CUMULATIVE DIGEST

MATTERS REFERRED TO IN DECISIONS OF INDUSTRIAL APPEAL COURT, INDUSTRIAL COMMISSION AND INDUSTRIAL MAGISTRATES CONTAINED IN VOL. 72 PART 2, SUB PARTS 1-6.

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

ACT—INTERPRETATION OF— Page

Conference referred *re* payment for lost time over safety issue—Applicant union claimed that payment should be made on the basis of a usual work week of 54 hours and 60 hours respectively—Respondent argued that it should be based on a 38 hour week—Commission reviewed the meaning of "usual", S.28 of the OHSW Act and found that the wider construction contended for by the Applicant should be implemented—Granted—M.E.W. *v.* Ical Limited and Another—No. CR221 of 1992—Salmon C.—24/6/92 1660

[2]Appeal against decision of the Commission (71 WAIG 2502) *re* registration of an agreement—Appellant argued the agreement was contrary to Section 41 of the I.R. Act as it was contrary to the State Wage Principles—Respondent argued a claim for a site allowance was not a claim for improvement in pay and conditions—Full Bench reviewed authorities, State Wage Principles and found insofar as the agreement permitted a new allowance not related to the existence or non existence of compensatable factors it was contrary to the Principles relating to allowances which required evolution on a case by case basis and the Commission had no power to register the agreement—Upheld—C.W.A.I. *v.* A.F.C.C. and Others—Appeal No. 1582 of 1991—Sharkey P., Coleman C.C., Gregor C.—19/6/92—Building 1500

[1]Appeal against decision of Full Bench (71 WAIG 3158) *re* that there was no jurisdiction to hear an appeal as it was lodged by an agent—Respondent conceded—IAC found Section 113 of I.R. Act gave power to make regulations, Full Bench had no power to declare Commission regulations invalid and the concession was proper—Upheld—Australian Glass Manufacturing Co. Pty Ltd and Others *v.* T.W.U.—IAC Appeal No. 27 of 30 of 1991—Rowland J., Walsh J., Wallwork J.—3/6/92—Transport 1499

Application to vary award *re* transfer and termination provisions for health and safety representatives—Applicant argued provisions should be the same as for job stewards—Respondent argued Applicant had not proven that the representatives would be prejudiced in employment and that the OHSW Act had provisions for dealing with discrimination—Commission reviewed I.R. Act, OHSW Act, the Laing Report, Building Trades (Construction) Award and found in favour of the Applicant—Granted—B.T.A. *v.* Adsigns Pty Ltd & Others—No. 872B of 1991—Beech C.—20/7/92—Building Construction 1789

[2]Appeal against decision of Commission (72 WAIG 372) *re* denied contractual entitlements—Appellant argued Commission failed to have proper regard to section 26 of the I.R. Act which ought to have led to the offsetting of the Respondent's indebtedness to the Appellant and disputed that it was the employer as named—Full Bench reviewed authorities and found it not within power to make any order for an offset—Commissioner in separate Reasons expressed view regarding whether offsetting was an industrial matter or not—Dismissed—Conti Sheffield Real Estate *v.* Brailey D.—Appeal No. 211 of 1992—Sharkey P., Salmon C., Negus C.—21/8/92—Real Estate 1965

[4]Application for orders for the observance of union rules concerning the conduct of union business, resolutions arising out of general meetings and declaring certain rules and actions void—President found in initial reasons a prima facie right for relief on an interim basis and no irreversible consequences of issuing interim orders—Applicant argued, *inter alia*, levies and collection of membership's subscriptions had been done other than in accordance with the rules, that the second respondent had failed to maintain proper membership records and returns to the Industrial Registrar and that a particular rule contravened the Equal Opportunity Act, 1984—Respondent argued Applicant did not have sufficient interest in the matter and was abusing the processes of the Commission as the application was brought for the benefit of another union rather than the Respondent union's membership—Respondent further argued application was brought in bad faith with the objective having the union declared bankrupt and its registration cancelled or suspended—President reviewed statutory provisions, union rules and found members could not provide consensual approval of *ultra vires* acts or validate acts which were *ultra vires* as they were required to observe the union rules—President found whether a breach of the rules was a matter which attracted his exercise of jurisdiction was another matter—President found although Applicant was motivated more by the interests of another union because of the importance of the Respondent union properly handling funds in accordance with the rules and breaches found, it was necessary to consider the matters further—President further found having regard for the Supreme Court and the Trustees Act that there was jurisdiction to deal with the matters conferred specifically on the President by section 66 of the IR Act and that as a matter of law and fact no resolution to raise funds during a ten year period constituted a valid levy nor a valid increase in the subscription prescribed by the rules—President further found payments out of provident fund were *ultra vires*, there was no power to loan monies out of the Union's provident fund and that various committees of management had acted contrary to their duties—President, having regard to the objectives of the Industrial Relations Act, the good conscience and substantial merits of the case found it would be unfair and inequitable to order some members of the committee of management to repay monies and not others even if there was power to do so—President outlined reasons for exercising his discretion or not relating to various matters and orders to be issued—Ordered Accordingly—In further Reasons for Decision President found application remained competent despite Applicant's loss of employment as he "has been a member of an organisation"—President dealt with further matters relating to an auditor's report not earlier submitted or presented to the Applicant—President found costs claimed would normally be legal costs—Ordered Accordingly—O'Brien W. *v.* WAPNA and Others—No. 532 of 1991—Sharkey P.—18/4/91, 24/10/91, 4/3/92, 17/7/92—Unions 2004

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that Commission did not have jurisdiction to deal with matter as employee was covered by Public Service Appeal Board jurisdiction—Commission reviewed the Industrial Relations Act, 1979, the Public Service Act 1978 and the Hospital Act No. 23 of 1927 and found that Applicant was a government officer as defined and the maxim generalia specialibus non-derogant applied—Dismissed for want of jurisdiction—Tremain P.C. *v.* King Edward Memorial Hospital for Women—No. 1932 of 1991—Gregor C.—21/8/92—Clerical 2078

Application for allegedly denied contractual entitlements *re* benefit deducted without authorisation—Respondent argued that the said amount was a debt paid by the Respondent on behalf of the Applicant in the form of an advance against wages—Commission found on evidence that the Respondent had failed to pay Applicant full benefits due under contract of employment defined as 'Wages' in the Truck Act—Granted—Hassen M.J. *v.* BHB Challenge Pty Ltd—No. 592 of 1992—Parks C—31/9/92 2232

[2]Question of law referred to Full Bench *re* whether demand for monies paid by employer in error was an industrial matter—Applicant argued overpayment was made in the capacity of the employer of the employee—Respondent argued it was a matter of litigation over a mistake and not a dispute over remuneration—Full Bench reviewed authorities and found that the matter was plainly consequential and indirectly related to the relationship of employer and employee—Answered No—A.D.S.T.E. *v.* B.M.A.—No. CA164 of 1992—Sharkey P., Salmon C., George C.—24/9/92—Building 2162

[4]Application for orders *re* breach of union rules—Applicant argued Union President had failed to carry out an order of the Commission constituted by the President and sought that the resolutions of a union's conference be nullified—Respondent argued, *inter alia*, it was entitled to change its meeting procedure, which it did by procedural motion—President reviewed I.R. Act and found union and members were subject to the jurisdiction of the Commission in particular the President and that a breach of rules was a contravention of section 61 under section 84(A)—President was not persuaded that the Executive or union had acted contrary to the orders—Dismissed—Sexton-Finck T.C and Others *v.* Harken E.J., President SSTU and Another—No. 749 of 1992—Sharkey P.—29/9/92—Unions 2178

[2]Appeal against decision of Commission (72 WAIG 599) *re* Interim Order *re* cessation of industrial action and transfer of employee—Full Bench found as the matter was a "finding", was not of such importance that an appeal should lie and dead, the appeal was incompetent—S.E.C.W.A. *v.* C.M.E.U.—Appeal No. 364 of 1992—Sharkey P., Halliwell S.C., George C.—3/11/92—Energy Supply 2512

CUMULATIVE DIGEST—*continued*

Page

ACT—INTERPRETATION OF—*continued*

[2]Application to amend union rules *re* Membership of Tool and Material Storepersons—Objections withdrawn following undertakings and amendments to application—Full Bench found it was not sufficient to paraphrase an alteration in the notice to members, however in this case the alteration was to all intents and purposes spelt out in full—Granted—A.E.E.F.E.U.—No. 427 of 1992—Sharkey P., Halliwell S.C., George C.—27/8/92—Unions 2639

[2]Appeal against decision of Commission (71 WAIG 2801) *re* registration of an Agreement—Preliminary Matter—Respondent argued the Appellant was not competent to appeal as it was not a party to the application at first instance—Full Bench reviewed I.R. Act, in particular S.49(3), and found Appellant was, in the circumstances, an intervener and the appeal competent—Declared Accordingly—F.M.W.U. *v.* S.D.A. and Others—Appeal No. 1760 of 1991—Sharkey P., Negus C., Beech C.—10/7/92 & 9/9/92—Retail 2514

Application for leave to object to application to register a new organisation by the amalgamation of two registered organisations—Objecting employers argued decision of Full Bench in *re* Forest Products and Allied Industries Union had been wrongly decided—Full Bench reviewed Section 72 of the I.R. Act, Interpretation Act, Hansard and found word "may" did not indicate a discretion to be used at large and that the objections were incompetent—Dismissed—M.E.W.U.—No. 954 of 1992—Sharkey P., George C., Beech C.—21/10/92—Unions 2526

[2]Appeal against decision of Commission (72 WAIG 872) *re* establishment of safety committee to resolve dispute over asbestos removal and cessation of industrial action—Appellant argued Order was not in accordance with Section 44(6)(b)(a) of the I.R. Act and that the OHSW Act prevailed over the powers of the Commission under the I.R. Act—Respondent argued matter was dead and the order mute therefore the appeal should be dismissed—Majority of Full Bench reviewed authorities and found the matter was not of such public interest that an appeal should lie and the issue was dead—Dissenting Full Bench member gave reasons in favour of Appellant—Dismissed—S.E.C.W.A. *v.* A.M.W.S.U. and Others—No. 463 of 1992—Sharkey P., Halliwell S.C., Beech C., 3/11/92—Energy Supply 2504

[1]Appeal against decision of Full Bench (72 WAIG 1295) *re* dismissal of application for declaration that union membership rules were the same as Federal Counterpart Body's Rule—IAC found Full Bench had misunderstood the operation of the I.R. Act in that it compared the rules of the State organisation with the rules of the Federal Body nationally rather than the West Australian Branch of the Federal Body as required by the definition of "Federal Counterpart Body"—Upheld and Returned—A.P.E.A.—IAC Appeal No. 8 of 1992—Rowland J., Nicholson J., Ipp J.—11/11/92—Unions 2741

[4]Application for Orders *re inter alia*, the observance of union rules, and the validity of office bearers of the Union—President reviewed history of Union business, section 71 of the I.R. Act and found that the Applicant was validly the President notwithstanding the deregistration of the Federal Counterpart Body, as were other office bearers, until the next State election—President further found that the Respondent had not fulfilled the evidentiary onus to prove the Applicant ineligible for membership—President found there had been a series of breaches by the Respondent relating to by-elections for office bearers, the conduct of Union business, keeping of records, failure to permit the Applicant to inspect the records of the Union and the registered office of the Union—President found appointments made according to State rules as purported by Respondent were null and void—President made various orders relating to the observance of Union rules and directing the Registrar to report as to the compliance with any matters requiring compliance—In Supplementary Reasons President found that the Reasons for Decision were reflected in the orders made and made particular comments to specific aspects of the orders—President found no serious matters of dispute between parties as to what the orders would contain—Ordered Accordingly—Jeffery J.R. *v.* W.A.T.A.E.A. and Another—No. 1903 of 1991—Sharkey P.—24/9/92, 26/10/92—Unions 2534

ALLOWANCES—

Application to vary award *re* averaged On-Call Allowance by consent—Parties sought to give effect to terms of an agreement reached after extensive negotiation—Commission found application did not go to the Principles and commented on effect of an existing allowance however was satisfied that variation sought should issue—Granted—U.F.U. *v.* W.A.F.B.B.—No. 783 of 1992—Kennedy C.—24/6/92—Emergency Services 1579

Application to vary award *re* Away From Home and Meal Allowance and On-Call Allowance by consent—Parties sought to bring allowances in line with changes to similar allowances for the Public Service—RCB was satisfied that claim fell within the scope of the Principles and that variations sought should issue—Granted—W.A.G.R.C. *v.* W.A.R.O.U.—Fielding C./Munyard/Bothwell—16/6/92—Railways 1709

[2]Appeal against decision of the Commission (71 WAIG 2502) *re* registration of an agreement—Appellant argued the agreement was contrary to Section 41 of the I.R. Act as it was contrary to the State Wage Principles—Respondent argued a claim for a site allowance was not a claim for improvement in pay and conditions—Full Bench reviewed authorities, State Wage Principles and found insofar as the agreement permitted a new allowance not related to the existence or non existence of compensatable factors it was contrary to the Principles relating to allowances which required evolution on a case by case basis and the Commission had no power to register the agreement—Upheld—C.W.A.I. *v.* A.F.C.C. and Others—Appeal No. 1582 of 1991—Sharkey P., Coleman C.C., Gregor C.—19/6/92—Building 1500

Application for an order *re* site allowance—Applicant union claimed a site allowance of $3.00 for each hour worked—Respondent argued that there was nothing special about the project or the conditions under which work was being performed which justified an allowance other than at the lower end of a scale as compared to other projects—Commission found on evidence and from inspections that it was appropriate that allowance be toward the higher end of the scale due to the remoteness and lack of recreational facilities commensurate with the number of employees—Ordered Accordingly—M.E.W.U. *v.* Pipeline Induction Heat Pty Ltd and Others—No. CR220(A) of 1992—George C.—16/6/92—Mining 1662

Application to vary award *re* 2.5% Structural Efficiency Wage Adjustment, supplementary payments and other provisions—Respondent argued Union's proposals did not satisfy State Wage Principles—Commission in absence of parties agreement, heard and determined claims and counterclaims relating to: Contract of Employment, Hours, Annual Leave, Overtime, Time and Wages Record, Special Rates and Provisions, Wages, Dispute Settlement Procedure, Trade Union Training Leave, Training Leave Structural Efficiency and Award Modernisation, Record Keeping, Essential Services, Stand-Down, Transfer to Another Workplace, and Employee Counselling of Operational Meetings clauses—Award varied—F.M.W.U. *v.* Canine Security and Others—No. 1415 of 1991—Parks C.—10/7/92—Security 1813

Conference referred *re* claim for site allowance of $3.00 per hour—Applicant Union argued disabilities were recognised in allowances already paid to other employees engaged in similar construction projects—Respondent employer claimed that majority of workforce employed on the project were federally covered and that there was not an established precedent for site allowances on road construction sites—Commission found on evidence that there was no basis upon which the payment of site allowance could be justified as outlined therefore Applicant had not discharged the onus of establishing the claim—Dismissed—M.E.W.U. *v.* Henry and Walker Contracting Pty Ltd—No. CR254 of 1992—George C.—16/7/92—Construction 1866

Application to vary award *re* Contract of Service, Rates of Pay, Additional Rates for Ordinary Hours, Special Rates and Provisions and Casual Employees—Applicant Employer sought to increase wage rates and allowances by 2.5% and to provide for an increase in loading to time and one half for casual work—Respondent union failed to appear—Commission reviewed previous application and was satisfied that claim had merit and there was no need for further additional consideration under the Principles—Granted—W.A.T.A.E.A. *v.* Burswood Resort (Management) Limited—No. 473 of 1992—Kennedy C.—4/6/92—Casino 1566

Application to vary awards *re* allowances and overtime by consent—Commission was satisfied that the variations sought fell within the Principles and should issue—Granted—W.A.P.U. *v.* Hon. Minister for Police—Nos. 660 & 661 of 1992—Kennedy C.—29/6/92—Police 1546

Application to vary award *re* 2.5% Structural Efficiency Adjustment wage rates and allowances—Applicant Union argued that increases sought were in line with wage fixing principles—GSTT found on evidence that whilst wage increases should be effected, the other variations sought should be dealt with after further discussions and consultation between the parties—Ordered Accordingly—S.S.T.U. *v.* Hon Minister for Education—No. T2 of 1992 Kennedy C., Reeves/McKinnon—15/7/92—Education 1931

CUMULATIVE DIGEST—*continued*

Page

ALLOWANCES—*continued*

Application to vary award *re* Away From Home and Meal Allowances—Applicant Employer sought to establish standards of accommodation for employees and to modernise various allowances providing or relating to being away from home—Commission was satisfied that variations fell within the provisions of the Wage Fixing Principles—Granted—W.A.G.R.C. *v.* A.R.U.—No. 229 of 1992—Fielding C.—17/7/92—Railways 1811

Application to vary award *re* Second Stage Structural Efficiency Wage Adjustment and first Minimum Rates Adjustment by consent—Parties sought changes to allowances, hours, overtime and annual leave which would introduce greater flexibility—Commission was satisfied that the variations sought should issue—Granted—W.A.C.A.T.U. *v.* Valiant Dry Cleaners and Others—No. 809 of 1991 (R2)—Kennedy C.—29/6/92—Dry Cleaning 1576

Conferences referred *re* claim for site allowance—Applicant Unions argued there had been problems with wind, dust and flies on the worksite and these had previously been site awarded allowances for the area—Respondent argued that there were not any disabilities present which were not catered for by existing award and sapri provisions—Commission found site allowance was applicable pursuant on evidence that the disabilities were only slight and the allowance be towards the lower end of the scale—Ordered Accordingly—B.T.A. and Another *v.* Geraldton Building Company—Nos. CR193 and CR 207 of 1992—Beech C.—13/5/92—Construction 2088

Application to vary award *re* Fares and Travelling, Liberty to Apply—Commission was satisfied that allowances would not set precedents or flow-ons to other employers as it was already well-established and that it was industrially reasonable that variations sought should issue—Granted—O.P.D.U. *v.* Blastcoaters Pty Ltd and Others—No. 53 of 1992—Halliwell S.C.—23/7/92—Spraypainting and Sandblasting 2051

[3]Application to vary award *re* Shift Allowance and Annual Leave Entitlements for shift workers—Applicant argued claims were justified under Work Value Principle (1989) and Inequities Principle (1989) or as a special case under the 1992 State Wage Principles—Respondent argued claim ignored terms and conditions established in the award reflecting the uniqueness of the Argyle operation—CICS restricted intervention to the matter of flow-on and refused legal representation—CICS reviewed transcript of award application, establishment of the commute cycle, history of award variations and found the award was not a "pre-start" agreement—CICS found no merit in claims and commented in relation to the Enterprise Bargaining Principle—Dismissed—M.E.W.U. *v.* Argyle Diamond Mines Pty Limited—No. 873A of 1991—Coleman C.C., Gregor C., Kennedy C.—17/9/92—Diamond Mines 2167

Application to vary award *re* asbestos allowance—Parties sought to bring allowance in line with Midland Workshops allowance for similar work—Commission was satisfied that claim complied with State Wage Fixing Principles and variations sought should issue—Granted—A.R.U. *v.* W.A.G.R.C.—No. 395 of 1992—Fielding C.—23/10/92—Railways 2582

Application for variation of General Order for location allowances in private sector awards to be increased in line with CPI figures—Respondent raised problem of operative date in one award in which the allowance was included for "all purposes"—CICS was satisfied that the basis for the increase sought was established and that the General Order should issue with a provision for the operative date of the single award—Granted—T.L.C. *v.* Chamber of Commerce and Industry and A.M.M.A.—No. 851 of 1992—Kennedy C., George C., Beech C.—30.10.92—Private Industry 2498

[2]Appeal against decision of Commission (71 WAIG 2801) *re* registration of an Agreement—Preliminary Matter—Respondent argued the Appellant was not competent to appeal as it was not a party to the application at first instance—Full Bench reviewed I.R. Act, in particular S.49(3), and found Appellant was, in the circumstances, an intervener and the appeal competent—Declared Accordingly—F.M.W.U. *v.* S.D.A. and Others—Appeal No. 1760 of 1991—Sharkey P., Negus C., Beech C.—10/7/92 & 9/9/92—Retail 2514

[2]Appeal against decision of Commission (72 WAIG 599) *re* Interim Order *re* cessation of industrial action and transfer of employee—Full Bench found as the matter was a "finding", was not of such importance that an appeal should lie and dead, the appeal was incompetent—S.E.C.W.A. *v.* C.M.E.U.—Appeal No. 364 of 1992—Sharkey P., Halliwell S.C., George C.—3/11/92—Energy Supply 2512

Application to vary award *re* call-out allowance and special rates and provisions by consent—Parties sought to bring allowances in line with Consumer Price Index movement and relied on a nexus—Commission was prepared to accede to request as proposed although a dearth of information was supplied by the parties—Granted—W.A.R.O.U. *v.* W.A.G.R.C.—No. 1082 of 1992—Fielding C.—19/11/92—Railways 2807

Conference referred *re* claim for an administrative allowance—Applicant unions argued changed work practices had increased productivity—Respondent argued that changes were in forms and formats and a piecemeal allowance would hinder future goals—Commission found net change in the nature of work constituted a significant net addition work requirements but amount claim was excessive—Granted in Part—P.G.E.U. and Others *v.* Hon. Minister for Construction—No. CR299 of 1992—Halliwell S.C.—21/9/92—Construction 2883

Application to amend award *re* 4.5% increase in wages and allowances by consent—Applicant employer claimed that Enterprise Bargaining Principle in Special Case imposed a no limit level on wages and allowances increases and that Principles should be used as policy guidelines—Respondent unions were concerned that future claims under Enterprise Bargaining Principle might be restricted—Commission found on evidence that the circumstances surrounding claim warranted a special case claim for purpose of the Principles—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No. 1115 of 1992—Fielding C.—27/11/92—Mining 2788

ANNUAL LEAVE—

Application to vary award *re* finalisation of June 1991 Structural Efficiency Agreement—Parties sought to effect an enterprise agreement which mirrored the outcome of proceedings before the Federal Commission and had only three points of disagreement—Commission found parental leave provisions did not conflict with Conditions of Employment Principle and determined matters of Standing Down of Employees, Annual Leave, Absence Before and After Holidays—Commission found no ambiguities or unfairness and accepted the package provided the parties examined the minimum rates configuration—Granted—A.E.E.F.E.U. *v.* John Lysaght (Australia) Limited—No. 1337(B) of 1991—George C.—19/3/92—Electrical and Manufacturing Work 1594

[3]Application to vary award *re* Shift Allowance and Annual Leave Entitlements for shift workers—Applicant argued claims were justified under Work Value Principle (1989) and Inequities Principle (1989) or as a special case under the 1992 State Wage Principles—Respondent argued claim ignored terms and conditions established in the award reflecting the uniqueness of the Argyle operation—CICS restricted intervention to the matter of flow-on and refused legal representation—CICS reviewed transcript of award application, establishment of the commute cycle, history of award variations and found the award was not a "pre-start" agreement—CICS found no merit in claims and commented in relation to the Enterprise Bargaining Principle—Dismissed—M.E.W.U. *v.* Argyle Diamond Mines Pty Limited—No. 873A of 1991—Coleman C.C., Gregor C., Kennedy C.—17/9/92—Diamond Mines 2167

Application for allegedly denied contractual entitlements *re* pro-rata payment of Bonus—Applicant claimed pro-rata payment was due for seven months work and was a term of contract in lieu of Annual Leave Loading and Superannuation payments—Commission found that Applicant had misconstrued said agreement with Respondent—Dismissed—Baugh N.J. *v.* Ribbon Distributors and Trading Pty Ltd—No. 719 of 1992—Kennedy C.—30/10/92—Retail 2604

APPEAL—

Appeal against the constructive dismissal of an employee—Appellant felt he had been unfairly forced to resign and sought reinstatement without loss of entitlements—Respondent argued that it had lost confidence and faith in the ability and credibility of the employee to the point where the question of reinstatement could not be a serious option—Commission reviewed the matter de novo and found that the way employee was summarily dismissed was unfair, however there was a reasonable and lawful instruction which employee had disobeyed, that coupled with other charges of peculation and misconduct was sufficient grounds to terminate contract of employment and ordered one months pay in lieu of notice as well as pro-rata long service leave—Ordered Accordingly—Greenaway T.G. *v.* Country High School Hostels Authority—No. PSAB11 of 1991—Negus C./Gornik/Kaub—15/5/92—Education 1700

CUMULATIVE DIGEST—*continued*

Page

APPEAL—*continued*

[2]Appeal against decision of the Commission (71 WAIG 2502) *re* registration of an agreement—Appellant argued the agreement was contrary to Section 41 of the I.R. Act as it was contrary to the State Wage Principles—Respondent argued a claim for a site allowance was not a claim for improvement in pay and conditions—Full Bench reviewed authorities, State Wage Principles and found insofar as the agreement permitted a new allowance not related to the existence or non existence of compensatable factors it was contrary to the Principles relating to allowances which required evolution on a case by case basis and the Commission had no power to register the agreement—Upheld—C.W.A.I. *v.* A.F.C.C. and Others—Appeal No. 1582 of 1991—Sharkey P., Coleman C.C., Gregor C.—19/6/92—Building 1500

[2]Appeal against decision of Commission (71 WAIG 2620) *re* dismissed application for reinstatement on the grounds of unfair dismissal—Appellant argued Commission failed to apply correct principles of Full Bench and Industrial Appeal Court and that the weight of evidence showed that the Appellant was under the control and direction of the Respondent—Full Bench reviewed authorities and found it could not look to extrinsic evidence where a written document contained the whole of the contract, there was no ambiguity and that in the totality, there was not a right to control the Appellant in the restricted manner of an employer with an employee—Dismissed—Ince J.A. *v.* Hartfield Country Club Inc.—Appeal No. 1666 of 1991—Sharkey P., Halliwell S.C., Kennedy C.—19/6/92—Sport and Recreation 1510

Appeal against decision of Chairman of Apprenticeship Tribunal *re* refusal to cancel Apprenticeship Agreement—Appellant Employer argued Chairman had erred in finding that Respondent's conduct and failure to comply with agreement obligations had not amounted to misconduct—Commission reviewed matter de novo and found that other instances of misconduct were established by evidence therefore grounds had been made out—Upheld—Sarich P.M. and R.T. T/A Cape Bouvard Farm *v.* Cornock P.T.—No. APA 1 of 1992—Negus C.—3/6/92 1710

[1]Appeal against decision of Full Bench (71 WAIG 3158) *re* that there was no jurisdiction to hear an appeal as it was lodged by an agent—Respondent conceded—IAC found Section 113 of I.R. Act gave power to make regulations, Full Bench had no power to declare Commission regulations invalid and the concession was proper—Upheld—Australian Glass Manufacturing Co. Pty Ltd and Others *v.* T.W.U.—IAC Appeal No. 27 of 30 of 1991—Rowland J., Walsh J., Wallwork J.—3/6/92—Transport 1499

[1]Appeal against decision of Full Bench (71 WAIG 2480) *re* order for reinstatement and consequential matters—Appellant argued Full Bench erred in law in holding that the dismissal was for misconduct thus applying the wrong principles and in upholding that the evidentiary onus was not discharged—IAC reviewed matter's chequered history of case, authorities and found that to be a constructive dismissal the employer had to be guilty of conduct which was a significant breach going to the root of the contract which entitled the employee to accept the breach and leave—IAC further found that Full Bench had erroneously focussed attention away from the fairness or unfairness of the dismissal to whether the employee was guilty of misconduct sufficient to justify summary dismissal when there was an agreed resignation and a negotiated payment in lieu of notice—Upheld—Cargill Australia Limited, Leslie Salt Division *v.* F.C.U.—IAC Appeal No. 12 of 1991—Rowland J., Wallwork J., Owen J.—11/6/92—Salt Production and Mining 1495

[2]Appeal against decision of Commission (72 WAIG 168) *re* declaration that employee's performance was not at acceptable level and transfer of that employee—Appellant argued Commission had erred in making various findings of fact—Full Bench reviewed authorities and found on evidence that the Commission having the benefit of seeing the witnesses had not erred or miscarried in its discretion—Dismissed—F.M.W.U. *v.* C.A.L.M.—No. 6 of 1992—Sharkey P., Coleman C.C., Fielding C.—29/7/92—Parks and Wildlife 1737

Appeal against dismissal of an employee—Appellant claimed he had been unfairly dismissed and sought reinstatement and transfer to a more suitable position—Respondent argued that employee was unable to produce volume of work required and continually disobeyed specific instruction despite counselling—PSAB found on evidence that employee had failed to fulfil his duties adequately and that termination in this instance was not unfair—Dismissed—Arnold E. *v.* S.G.I.C.—No. PSAB 10 of 1991—Negus C., Middleton/Carr—3/7/92—Insurance 1698

[2]Appeal against decision of Commission (72 WAIG 151) *re* order for reinstatement and payments of entitlements for unfair dismissal—Full Bench reviewed authorities and found the Commission had erred in failing to find that there was a binding agreement to settle the matter which the Respondent had repudiated—Upheld—Polygon Holdings Pty Ltd T/A The Boulevard Alehouse *v.* Malone T.N.—Appeal No. 1965 of 1991—Sharkey P., Gregor C., Parks C.—10/7/92—Hotels 1744

[2]Appeal against decision of Commission (72 WAIG 423) *re* 19 day roster and return of signed agreement—Respondent argued Commission lacked jurisdiction as the matter was for an enforcement of an award or did not have the power to nullify agreements and order their return—Respondent argued declaration was available as relief if it resolved a dispute—Full Bench found claim was clearly for arbitral relief and the Commission was acting pursuant to a clause in the relevant award—Dismissed—Coles/Myer T/A K-Mart Discount Stores *v.* S.D.A.—Appeal No. 158 of 1992—Sharkey P., Gregor C., Beech C.—23/7/92—Retail 1747

[2]Appeal against decision of Commission (72 WAIG 131) *re* variation of an award—Appellant argued Commission had misconstrued evidence and erred in finding an extra difficulty in slaughtering ram lambs of 8 to 24% of ewe lambs—Full Bench reviewed authorities and having regard for the evidence found one could not find on the balance of probabilities that it had been established otherwise and the Commission had not erred in its discretion—Dismissed—W.A Meat Commission *v.* A.M.I.E.U.—Appeal No. 35 of 1992—Sharkey P., Gregor C., Parks C.—29/7/92—Meat 1732

[2]Appeal against decision (71 WAIG 3032) *re* failure to order re-employment having found an unfair dismissal—Appellant argued Commission erred in accounting for, *inter alia*, extraneous factors outside the employment relationship in determining whether re-employment should be ordered or not and sought an order for re-employment and loss benefits—Full Bench found Commission had erred by not informing parties of its intention and not allowing them to be heard on the question of industrial harmony outside the particular contract of employment—Upheld—Woodberry N.M *v.* Koolan Island Club Inc—Appeal No. 1720 of 1991—Sharkey P., Fielding C., Parks C.—16/6/92—Iron Ore/Recreation 1751

[4]Application for order *re* breach of union rules *re* officers and the management of a union (continued from 72 WAIG 1529)—Application for interim orders *re* validity of meetings and actions of Acting Union President—President reviewed background of Industrial Appeal, Court Decision, other authorities and found he was not persuaded on the evidence that equity, good conscience and the substantial merits as well as the balance of convenience would direct him to make any interim orders save one dealing with union mail—Granted in Part—President dealt with application remitted from Industrial Appeal Court *re* union election to fill vacancy of a Union President's office—President found and gave reasons therefore ordering the Registrar to update the Union's electoral role—President found and gave reasons therefore that it was not in equity, good conscious, the substantial merits of the case or public interest to truncate proceedings under section 27(1)(a) of the I.R. Act and gave further reasons regarding an order for an amended notice of answer and counter proposal—President was not persuaded to discharge interim orders—In Supplementary Reasons President found I.A.C. matters did not preclude an order that the Registrar examine mail of the union to determine the electoral role—Orders Issued Accordingly—Drake M.A. *v.* Carter L.B. and Others—Nos. 1053, 1478, 1479, 1529 of 1991 and 127 of 1992—Sharkey P.—17/6/92, 10/7/92 & 30/7/92—Unions 1776

[2]Appeal against decision of the Commission (72 WAIG 839) *re* dismissed application to vary award regarding Anzac day holiday—Appellant argued *inter alia*, Commission failed to give proper effect to existing award provisions, to decide the application on its merits contrary to section 26(1)(a) of the I.R. Act and erred in holding that it would not be fair to the Respondent Union to weaken its bargaining position—Full Bench reviewed authorities, the award, Retail Trading Hours Act, Public and Bank Holidays Act, the Enterprise Bargaining Principle and found the onus lay with the parties proposing the variation to show cause and that too literal an interpretation could not be placed on the term "special circumstances" such that the Commission could not be expected to couch its reasons in the terms expected of traditional courts—However, Full Bench found a fair reading of the transcripts, Reasons for Decision and Order did not show that the findings related to the enterprise bargaining process was a live issue in the proceedings, not notified to the parties concerned, such that they were not afforded the opportunity of being heard and hence the decision was either void or voidable—Upheld and Quashed—Stamco Pty Ltd and Others *v.* S.D.A.—Nos. 453, 454, 457,458 and 461 of 1992—Sharkey P., Fielding C., Parks C.—28/8/92—Retail and Wholesale Establishments 1980

CUMULATIVE DIGEST—*continued*

Page

APPEAL—*continued*

[2]Appeal against decision of Commission (72 WAIG 860) *re* denied contractual entitlements—Appellants argued the Commission erred in fact and law with regards to time and wages records were denied natural justice and erred in determining the terms and nature of the contracts of employment—Full Bench found Commission did not misuse the advantage of observing witnesses and there was no inference erroneously drawn or left out from the primary facts which required correction—Dismissed—Hazart Pty Ltd t/a Southern Cross Koala and Another *v.* Mullan L.—Appeal No. 448 of 1992—Sharkey P., Fielding C., Gregor C.—1/9/92—Horticulture 1971

[2]Appeal against decision of Commission (72 WAIG 173) *re* dismissed claim for reinstatement on the grounds of unfair dismissal—Appellant argued Commission erred in finding the Respondent entitled to summarily dismiss the employee as there was insufficient evidence of striking or intending to strike another employee—Respondent argued employee was dismissed for hostile behaviour and the likelihood that it might occur again—Full Bench reviewed authorities and found on evidence it was open for the Commission to make various findings as it did—However Full Bench found the Commission failed to take into account all of the relevant circumstances and all alternatives were not canvassed—The Appellant had therefore discharged the onus upon it—Upheld and Decision Varied—T.W.U. *v.* BHP Iron Ore Limited—Appeal No. 26 of 1992—Sharkey P., Coleman C.C., Parks C.—3/8/92—Iron Ore 1994

[2]Appeal against decision of Commission (72 WAIG 372) *re* denied contractual entitlements—Appellant argued Commission failed to have proper regard to section 26 of the I.R. Act which ought to have led to the offsetting of the Respondent's indebtedness to the Appellant and disputed that it was the employer as named—Full Bench reviewed authorities and found it not within power to make any order for an offset—Commissioner in separate Reasons expressed view regarding whether offsetting was an industrial matter or not—Dismissed—Conti Sheffield Real Estate *v.* Brailey D.—Appeal No. 211 of 1992—Sharkey P., Salmon C., Negus C.—21/8/92—Real Estate 1965

[2]Appeal against decision of Commission (70 WAIG 853) *re* reinstatement on the grounds of unfair dismissal—Appellant argued Commission had erred in making various findings of fact in relation to alleged assault and sexual harassment—Full Bench reviewed authorities and found on evidence Commission had not erred in its discretion—Dismissed—Royal Perth Hospital *v.* Lynn T.—Appeal No. 405 of 1992—Sharkey P., Salmon C., Kennedy C.—25/8/92—Health 1976

Appeal to Public Service Appeal Board against decision *re* termination—Board found on evidence that the Respondent was left with no alternative but to terminate employee's contract of employment—Board further found that due to the sensitivity of the issues involved no further reasons for decisions would be published—Dismissed—Cooke A. *v.* West Australian Alcohol and Drug Authority—No. PSAB 7 of 1992—Negus C., Horden/Wall—27/8/92 2110

Appeal against dismissal of an employee for allegedly striking a patient—Appellant argued on the basis of unfair dismissal and sought reinstatement without loss of entitlements—PSAB found on evidence that although the incident was serious, it was the employers responsibility to create a safe work environment and coupled with the Appellant's unblemished employment record termination in this instance was unfair—Ordered Accordingly—Rees M.R. *v.* The Authority for Intellectually Handicapped Persons—No. PSAB 1 of 1992—Negus C., Middleton/Purdie—28/5/92—Health 2114

[2]Appeal against decision of Commission (72 WAIG 594) *re* denied contractual entitlements—Appellant argued he had received notice of hearing late as it had gone to the wrong part of the premises and that led to a miscarriage of justice—Full Bench reviewed regulations and found Notices of Hearing were not required to be served under Regulation 89 of the IRC Regulation 1985 and the notice of proceedings had been duly served—Notice of Hearing was received at registered address albeit late—Dismissed—Friendly Helpers and F.H. Promotions *v.* Galbraith D.—Appeal No. 149 of 1992—Sharkey P., George C., Parks C.,—24/9/92 2161

Appeals against disciplinary action *re* failure to provide prisoner with adequate protection—Applicants argued that assault of prisoner was not due to wilful act of negligence but was due to the lack of prison procedure—PSAB found that both Applicants were equally culpable and so accepted decision of Public Service Commissioner to equalise fines—PSAB further found that the inadequate prison procedure was a factor leading to assault and ordered that recording of Applicants' transfer as disciplinary action be removed—Vyner A.B. and Another *v.* P.S.C.—PSAB Nos. 2 & 3 of 1991—Negus C., Floate/Chinnery—18/9/91—Corrective Services 2690

[2]Appeal against decision of Commission (71 WAIG 2801) *re* registration of an Agreement—Preliminary Matter—Respondent argued the Appellant was not competent to appeal as it was not a party to the application at first instance—Full Bench reviewed I.R. Act, in particular S.49(3), and found Appellant was, in the circumstances, an intervener and the appeal competent—Declared Accordingly—F.M.W.U. *v.* S.D.A. and Others—Appeal No. 1760 of 1991—Sharkey P., Negus C., Beech C.—10/7/92 & 9/9/92—Retail 2514

[2]Appeal against decision of Commission (72 WAIG 599) *re* Interim Order *re* cessation of industrial action and transfer of employee—Full Bench found as the matter was a "finding", was not of such importance that an appeal should lie and dead, the appeal was incompetent—S.E.C.W.A. *v.* C.M.E.U.—Appeal No. 364 of 1992—Sharkey P., Halliwell S.C., George C.—3/11/92—Energy Supply 2512

[3]Application to extend time prescribed for lodging an appeal against decision of Board of Reference (70 WAIG 2392) *re* Long Service Leave Entitlements—Applicant argued delay was due to excessive workload and his ignorance of procedures—CICS reviewed authorities and found several unsatisfactory features in the delay, for most no explanation for the delay in seeking legal advice—Dismissed—Ryan R.J. *v.* K.N. Hazelby and Jack Lester t/a Carnarvon Waste Disposal—No. 622 of 1992—Fielding C., George C., Parks C.—19/10/92—Waste Disposal 2529

[2]Appeals against decision of Commission (72 WAIG 888, 2843) *re* excusing witness and dismissal of unfair dismissal/contractual entitlement claims—Appellant argued, *inter alia*, he was denied the opportunity to fairly and fully present his case and that in the public interest an appeal should lie—Full Bench reviewed authorities and found from evidence it was not possible to say that the Appellant was an employee of either of the Respondent—Full Bench found nothing which could lead to the conclusion that cause was shown for the witnesses to appear—Dismissed—Mosson B.C. *v.* Haymarket Publishing and Another—Appeal No. 503 of 1992—Sharkey P., Fielding C., Beech C.—22/10/92—Publishing 2517

[2]Appeals against decision of Industrial Magistrate *re* breaches of award—Appellant argued failure to keep time and wages record was a serious matter and the Industrial Magistrate erred in substituting penalties—Respondent argued Industrial Magistrate erred in finding multiple breaches when there was only one complaint and argued the quantum of penalty was discretionary—Full Bench reviewed authorities and found the amount of underpayment was not material to the breach of duty to maintain time and wages record—Full Bench further found there was insufficient consideration to the deterrent factor and that $100 penalty for each breach was more appropriate—Upheld and Decision Varied—McCorry G. *v.* Bolivia Nominees Pty Ltd t/a Ballajura Tavern—Appeal Nos. 715 and 716 of 1992—Sharkey P., George C.,—Parks C.—2/10/92—Hospitality 2521

[1]Appeal against decision of Full Bench (72 WAIG 706) *re* interlocutory orders relating to the conduct of union officers concerning award variation negotiations—Appellant argued orders were made when there was no serious question to be tried and the balance of convenience favoured the Appellant—Appellant further argued there was no evidence that the rules of the union had been breached—IAC stated it should generally be slow to find a fault in the making of interlocutory orders and should not act unless the case was clearly made out—IAC reviewed history of the matter, union rules and was satisfied that the requisite foundation for making of the orders in issue was not before the President when he made them and in the circumstances it was appropriate for the Court to allow the appeal—Upheld and Quashed—Carter L.B. *v.* Drake M.A.—IAC Appeal No. 2 of 1992—Franklyn J., Nicholson J., Ipp J.—20/10/92—Unions 2742

[2]Appeal against decision of Commission (72 WAIG 872) *re* establishment of safety committee to resolve dispute over asbestos removal and cessation of industrial action—Appellant argued Order was not in accordance with Section 44(6)(b)(a) of the I.R. Act and that the OHSW Act prevailed over the powers of the Commission under the I.R. Act—Respondent argued matter was dead and the order mute therefore the appeal should be dismissed—Majority of Full Bench reviewed authorities and found the matter was not of such public interest that an appeal should lie and the issue was dead—Dissenting Full Bench member gave reasons in favour of Appellant—Dismissed—S.E.C.W.A. *v.* A.M.W.S.U. and Others—No. 463 of 1992—Sharkey P., Halliwell S.C., Beech C., 3/11/92—Energy Supply 2504

CUMULATIVE DIGEST—*continued*

Page

APPEAL—*continued*

[1]Appeal against decision of Full Bench (72 WAIG 1295) *re* dismissal of application for declaration that union membership rules were the same as Federal Counterpart Body's Rule—IAC found Full Bench had misunderstood the operation of the I.R. Act in that it compared the rules of the State organisation with the rules of the Federal Body nationally rather than the West Australian Branch of the Federal Body as required by the definition of "Federal Counterpart Body"—Upheld and Returned—A.P.E.A.—IAC Appeal No. 8 of 1992—Rowland J., Nicholson J., Ipp J.—11/11/92—Unions 2741

[2]Appeal against decision of Commission (72 WAIG 1398) *re* cancellation of an Order—Appellant argued Order was in excess of jurisdiction because it was contrary to Section 44(6) of the I.R. Act—Full Bench found failure to afford opportunity to make submissions was a denial of natural justice—Full Bench found no power to remit matter—Upheld and Quashed—Westralian Equipment Pty Ltd *v.* A.E.E.F.E.U.—Appeal No. 797 of 1992—Sharkey P., Fielding C., Gregor C.—19/11/92—Manufacturing 2750

[2]Appeal against decision of Commission (72 WAIG 1871) *re* dismissed application to refrain from hearing matter—Appellant argued Commission erred in determining the matter was different to those extent before the District Court and failed to give adequate reasons—Full Bench found proceeding to hear the application proper at first instance occasioned no injustice despite delay in issuing writ—Dismissed—Tri Star Group Pty Ltd *v.* Ball D.J.—Appeal No. 955 of 1992—Sharkey P., Halliwell S.C.,—Salmon C.—12/11/92 2752

APPRENTICES AND JUNIORS—

Appeal against decision of Chairman of Apprenticeship Tribunal *re* refusal to cancel Apprenticeship Agreement—Appellant Employer argued Chairman had erred in finding that Respondent's conduct and failure to comply with agreement obligations had not amounted to misconduct—Commission reviewed matter de novo and found that other instances of misconduct were established by evidence therefore grounds had been made out—Upheld—Sarich P.M. and R.T. T/A Cape Bouvard Farm *v.* Cornock P.T.—No. APA 1 of 1992—Negus C.—3/6/92 1710

AWARDS—

Application to vary award *re* averaged On-Call Allowance by consent—Parties sought to give effect to terms of an agreement reached after extensive negotiation—Commission found application did not go to the Principles and commented on effect of an existing allowance however was satisfied that variation sought should issue—Granted—U.F.U. *v.* W.A.F.B.B.—No. 783 of 1992—Kennedy C.—24/6/92—Emergency Services 1579

Application to vary award *re* Away From Home and Meal Allowance and On-Call Allowance by consent—Parties sought to bring allowances in line with changes to similar allowances for the Public Service—RCB was satisfied that claim fell within the scope of the Principles and that variations sought should issue—Granted—W.A.G.R.C. *v.* W.A.R.O.U.—Fielding C./Munyard/Bothwell—16/6/92—Railways 1709

Applications to vary award *re* 2.5% Structural Efficiency Wage Adjustments—Applications heard in conjunction with Federal applications—Applicant Union argued the industry was already lean, hungry and efficient through the efforts of its members who were amongst the lowest paid and most vulnerable of employees and saw little to gain unless employers were not firmly repelled in attempts at negative costs cutting—Respondents argued threatened industrial action was contrary to the dispute settlement procedures erected when negotiating the Second Tier Wage Increase—Commission outlined its attempts at conciliation and found the parties had not become imbued with the spirit of the Structural Efficiency Principle—Commission determined matters of union representation at enterprise level consultation committees, Accrued Days Off agreement to examine demarcation matters and further found that there were special circumstance to grant the agreed operative date—Ordered Accordingly—F.M.W.U. *v.* Anglican Homes (Inc) and Others—No. 1394, 1401, 1405, 1410, 1411, 1421, 1418, 1437, 1440, 1639 and 1641 of 1991—Negus C.—27/11/91—Health 1547

[3]Application to vary award *re* 2.5% Structural Efficiency Wage Adjustment—CICS divided application and dealt with salaries separately at request of Applicant—Applicant argued on the basis of a parent award and sought, *inter alia*, the insertion of a new classification—Respondent argued salary comparison with hospital pharmacists as quite inappropriate—CICS having regard for section 32 of the I.R. Act found the Shop and Warehouse (Wholesale and Retail Establishments) Award was more relevant for the day to day operations of the Respondent's businesses and established appropriate salary ranges—Ordered Accordingly—Salaried Pharmacists Association *v.* Pharmacy 777 and Others—No. 1050(1) of 1989—Salmon C., Negus C., Gregor C.—25/5/92—Retail Pharmacies 1756

Application to vary award *re* 2.5% Structural Efficiency Wage Adjustment, supplementary payments and other provisions—Respondent argued Union's proposals did not satisfy State Wage Principles—Commission in absence of parties agreement, heard and determined claims and counterclaims relating to: Contract of Employment, Hours, Annual Leave, Overtime, Time and Wages Record, Special Rates and Provisions, Wages, Dispute Settlement Procedure, Trade Union Training Leave, Training Leave Structural Efficiency and Award Modernisation, Record Keeping, Essential Services, Stand-Down, Transfer to Another Workplace, and Employee Counselling of Operational Meetings clauses—Award varied—F.M.W.U. *v.* Canine Security and Others—No. 1415 of 1991—Parks C.—10/7/92—Security 1813

Application to vary award *re* Shift Work by consent—Parties sought to include provision to provide a guarantee of work for slaughtermen so long as there is stock to be slaughtered—Commission was satisfied that variation sought should issue—Granted—W.A.M.C. *v.* M.I.E.U.—No. 445 of 1992—Fielding C.—5/8/92—Meat 1805

Application to vary award *re* Away From Home and Meal Allowances—Applicant Employer sought to establish standards of accommodation for employees and to modernise various allowances providing or relating to being away from home—Commission was satisfied that variations fell within the provisions of the Wage Fixing Principles—Granted—W.A.G.R.C. *v.* A.R.U.—No. 229 of 1992—Fielding C.—17/7/92—Railways 1811

Application to vary award *re* 2.5% Structural Efficiency Adjustment wage rates and allowances—Applicant Union argued that increases sought were in line with wage fixing principles—GSTT found on evidence that whilst wage increases should be effected, the other variations sought should be dealt with after further discussions and consultation between the parties—Ordered Accordingly—S.S.T.U. *v.* Hon Minister for Education—No. T2 of 1992 Kennedy C., Reeves/McKinnon—15/7/92—Education 1931

Application to vary award *re* Structural Efficiency Wage Adjustment—Contract of Service clause disputed only—Applicant Union argued clause should have a qualification to limit the magnitude of change while allowing flexibility—Respondent argued amended proposal was not as facilitative as initial application and did not comply with the Wage Fixing Principles—Commission found Applicant had not made out its case—Granted in Part—C.M.E.U. *v.* BHP Iron Ore Ltd—No. 159 of 1992—Gregor C.—29/5/92—Iron Ore 1587

Application to vary award *re* Structural Efficiency Wage Increase 1991—Applicant stated that in essence to previous proceedings the recent developments represented steps in the restructuring process and also the consolidation of the award—Commission regarded the Applicant's case and was satisfied that the application should be ratified—Ordered Accordingly—F.P.U. *v.* Walker Candy Co and Others—No. 588 of 1992—Kennedy C.—15/7/92—Confectionery 1797

Application for an order *re* site allowance—Applicant union claimed a site allowance of $3.00 for each hour worked—Respondent argued that there was nothing special about the project or the conditions under which work was being performed which justified an allowance other than at the lower end of a scale as compared to other projects—Commission found on evidence and from inspections that it was appropriate that allowance be toward the higher end of the scale due to the remoteness and lack of recreational facilities commensurate with the number of employees—Ordered Accordingly—M.E.W.U. *v.* Pipeline Induction Heat Pty Ltd and Others—No. CR220(A) of 1992—George C.—16/6/92—Mining 1662

Application to vary award *re* Contract of Service, Rates of Pay, Additional Rates for Ordinary Hours, Special Rates and Provisions and Casual Employees—Applicant Employer sought to increase wage rates and allowances by 2.5% and to provide for an increase in loading to time and one half for casual work—Respondent union failed to appear—Commission reviewed previous application and was satisfied that claim had merit and there was no need for further additional consideration under the Principles—Granted—W.A.T.A.E.A. *v.* Burswood Resort (Management) Limited—No. 473 of 1992—Kennedy C.—4/6/92—Casino 1566

CUMULATIVE DIGEST—*continued*

Page

AWARDS—*continued*

Application to vary award *re* Wages and new classifications by consent—Parties sought to implement a new structure which involved distinct career pathing for on-train suburban rail staff—Commission having regard to the Principles found that the variations sought should issue and the allowance should be dealt with administratively—Granted—A.R.U. *v.* W.A.G.R.C. and Others—Fielding C.—16/6/92—Railways 1616

Application to vary award *re* Second Stage Structural Efficiency Wage Adjustment and first Minimum Rates Adjustment by consent—Parties sought changes to allowances, hours, overtime and annual leave which would introduce greater flexibility—Commission was satisfied that the variations sought should issue—Granted—W.A.C.A.T.U. *v.* Valiant Dry Cleaners and Others—No. 809 of 1991 (R2)—Kennedy C.—29/6/92—Dry Cleaning 1576

Application to vary awards *re* allowances and overtime by consent—Commission was satisfied that the variations sought fell within the Principles and should issue—Granted—W.A.P.U. *v.* Hon. Minister for Police—Nos. 660 & 661 of 1992—Kennedy C.—29/6/92—Police 1546

Application to vary award *re* finalisation of June 1991 Structural Efficiency Agreement—Parties sought to effect an enterprise agreement which mirrored the outcome of proceedings before the Federal Commission and had only three points of disagreement—Commission found parental leave provisions did not conflict with Conditions of Employment Principle and determined matters of Standing Down of Employees, Annual Leave, Absence Before and After Holidays—Commission found no ambiguities or unfairness and accepted the package provided the parties examined the minimum rates configuration—Granted—A.E.E.F.E.U. *v.* John Lysaght (Australia) Limited—No. 1337(B) of 1991—George C.—19/3/92—Electrical and Manufacturing Work 1594

Application to vary award *re* provisions to replace payment for work on the basis of results—Applicant argued variations sought were parallel to federal award amendments and federal decision as to merit and conformity with wages principles and therefore should be endorsed—Commission found award should be varied and commented on allowing for changes in Respondents—Granted—W.A.C.T.U. *v.* Fullin Tailoring Company and Others—No. 1740 of 1991—Kennedy C.—26/6/92—Clothing 1570

[3]Application to vary award *re* redundancy—Applicant union sought that superannuation benefits paid under the award not be offset against severance pay on termination—Respondent argued an interpretation would have been a more appropriate approach that the need for the variation had not been established and CICS had to apply the Caris the Jewellers case—CICS reviewed authorities and found TCR test case had not created a standard for all other awards and that it was appropriate that the difference status of Occupational or Award Based Superannuation be recognised in award provisions—Granted—A.E.E.F.E.U. *v.* A.C. Electrical Engineering Pty Ltd and Others—No. 678 of 1991—George C., Beech C., Parks C.—1/7/92—Metal and Electrical Trades 1518

Application to vary award *re* Fares and Travelling, Liberty to Apply—Commission was satisfied that allowances would not set precedents or flow-ons to other employers as it was already well-established and that it was industrially reasonable that variations sought should issue—Granted—O.P.D.U. *v.* Blastcoaters Pty Ltd and Others—No. 53 of 1992—Halliwell S.C.—23/7/92—Spraypainting and Sandblasting 2051

Applications to vary award by consent *re* salary rates and the introductions of horizontal career structure—Parties sought to give effect the 2nd phase of a 3 phase agreed program of 26 productivity initiatives and award variations—Commission found that the variations sought should be issued and that the horizontal pay structure initiative should be examined more intensely when the final phase was pursued by the parties—Granted—W.A.P.U. *v.* Minister for Police—Nos. P10A of 1990 and 1294A of 1991—Kennedy C.—12/8/92—Police 2031

Application to vary award *re* exemption of Applicant from common rule provisions of the award—Applicant employer proposed an arrangement which ensured a more equitable payment to employees remuneration component based upon skill levels and a grading system which provided for a more efficient operation whilst providing a career path for employees—Respondent union argued that award should continue to regulate Applicants operations and that other small abattoirs who were bound by the award would be commercially disadvantaged—Commission was satisfied that Applicants claim was satisfactory on both sides and that it did not decrease basic award conditions—Granted—Stewart Butchering Co Pty Limited *v.* AMIEU—No. 889 of 1992—Halliwell S.C.—25/8/92—Meat 2054

Application for orders *re* cessation of industrial action over log of claims for 4.5% wage increases—Applicant Employer argued that real intent of dispute was pressure aimed at Company over writs issued by Supreme Court and to return to arrangements prior to "closed shop" dispute to which the writs related—Respondent Unions argued that industrial action arose over Company's alleged failure to reasonably discuss wage claims—Commission found on evidence that Respondent Unions were committed to a recommendation previously issued and that parties ought to be encouraged to return to further negotiation—Direction Issued—Hamersley Iron Pty Limited *v.* A.W.U. and Others—No. C549 of 1992—Kennedy C.—25/9/92—Iron Ore 2255

Application to vary award *re* Holiday Work and Holidays—Applicant sought to overcome discrepancies in the award relating to the annual Christmas Day shutdown in that special penalties for work on Christmas Day to be extended to Boxing Day shifts—Commission was satisfied that variations sought should issue—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No. 975 of 1992—Fielding C.—8/9/92—Iron Ore 2212

[3]Application to vary award *re* Shift Allowance and Annual Leave Entitlements for shift workers—Applicant argued claims were justified under Work Value Principle (1989) and Inequities Principle (1989) or as a special case under the 1992 State Wage Principles—Respondent argued claim ignored terms and conditions established in the award reflecting the uniqueness of the Argyle operation—CICS restricted intervention to the matter of flow-on and refused legal representation—CICS reviewed transcript of award application, establishment of the commute cycle, history of award variations and found the award was not a "pre-start" agreement—CICS found no merit in claims and commented in relation to the Enterprise Bargaining Principle—Dismissed—M.E.W.U. *v.* Argyle Diamond Mines Pty Limited—No. 873A of 1991—Coleman C.C., Gregor C., Kennedy C.—17/9/92—Diamond Mines 2167

Application to vary award by consent—Respondent union secretary treasurer sought leave to intervene to object to proposed variations in that amendment may be affected by an undertaking given in the Supreme Court and therefore proceedings should be adjourned until the hearing of the objection—Respondent union argued that objector did not have authority to represent the union in this matter therefore intervention should be disallowed—Commission found on evidence that Respondent union had not fully informed secretary treasurer of the application and that objector had sufficient interest to warrant intervention—Ordered Accordingly—W.A.H.H.A. and Others *v.* L.A.I.E.U.—No. 386 of 1992—Parks C.—29/9/92—Hospitality 2643

Application to vary award *re* 2.5%, leading hands, contract of service, rates of pay and award modernisation and enterprise consultation—Applicant proposed additional wording for the provisions of the contract of service clause—Respondent opposed the extended provisions and sought to limit the wording as set out in paragraph (v) of the Structural Efficiency Principle—Commission reviewed evidence and found that the term proposed by the Applicant union were superfluous and that other variations sought should issue—Granted in Part—Miscellaneous Workers' Union *v.* Dulux Australia Limited & Others—No. 1423 of 1991—Coleman C.C.—28/10/92—Paint & Varnish Makers 2580

Application for registration of agreement by consent—Commission noted that there were too many unions and awards to cover the Company's operations however with the subsequent amendments and restructuring, it was satisfied that it met the relevant Principles—Granted—Breweries and Bottleyards Employees' Union and Others *v.* The Swan Brewery Company Limited—No. AG19 of 1992—Kennedy C.—18/11/92—Brewing 2764

Application to vary award *re* call-out allowance and special rates and provisions by consent—Parties sought to bring allowances in line with Consumer Price Index movement and relied on a nexus—Commission was prepared to accede to request as proposed although a dearth of information was supplied by the parties—Granted—W.A.R.O.U. *v.* W.A.G.R.C.—No. 1082 of 1992—Fielding C.—19/11/92—Railways 2807

Application to vary Award *re* modernisation of Occupational Superannuation Fund by consent—Parties sought to streamline the administration of the scheme by enabling the enrolment procedure to be simplified and redefining the ordinary time earnings to provide for a commuted sum—Commission was satisfied that variations complied with Wage Fixing Principles and should issue—Granted—A.M.E.I.U. *v.* W.A.M.C.—No. 446 of 1992—Fielding C.—6/11/92—Meat 2808

CUMULATIVE DIGEST—*continued*

Page

BOARD OF REFERENCE—
Application for pro rata long service leave entitlements—Board of Reference found absence to travel overseas was authorised—However, BOR found on evidence employee had resigned to cause a second break-in service—Dismissed—Sawan S. *v.* Mondello's Joinery and Cabinet Works—File No. 23 of 1991—Pope (DR), Beech/Uphill—10/6/92—Furniture Trades . 1624
Application *re* long service leave entitlement—B.O.R. found that period where Applicant was absent was authorised by employer and did not constitute a break in continuous service—B.O.R. also found that the authorised absence would not count as part of the calculation period for Applicant's long service leave entitlement—Granted in Part—Stalk I. *v.* Mecaid (Australia) Pty Ltd—No. 11 of 1992—Carrigg Registrar/Latter/Jones—6/7/92—Clerical 1829
[3]Application to extend time prescribed for lodging an appeal against decision of Board of Reference (70 WAIG 2392) *re* Long Service Leave Entitlements—Applicant argued delay was due to excessive workload and his ignorance of procedures—CICS reviewed authorities and found several unsatisfactory features in the delay, for most no explanation for the delay in seeking legal advice—Dismissed—Ryan R.J. *v.* K.N. Hazelby and Jack Lester t/a Carnarvon Waste Disposal—No. 622 of 1992—Fielding C., George C., Parks C.—19/10/92—Waste Disposal 2529

BONUS—
Application for allegedly denied contractual entitlements *re* lump sum payments—Applicant argued he had completed three years satisfactory service therefore he was entitled to the bonus—Respondent argued that it was at the discretion of the employer and that the Applicant's job performance was unsatisfactory—Commission found on evidence that Applicant had not performed sufficiently to warrant lump sum payment—Dismissed—King R.E. *v.* GEC Althson Australia—No. 198 of 1992—Electrical 1841
Application for allegedly denied contractual entitlements *re* pro-rata payment of Bonus—Applicant claimed pro-rata payment was due for seven months work and was a term of contract in lieu of Annual Leave Loading and Superannuation payments—Commission found that Applicant had misconstrued said agreement with Respondent—Dismissed—Baugh N.J. *v.* Ribbon Distributors and Trading Pty Ltd—No. 719 of 1992—Kennedy C.—30/10/92—Retail 2604

BREACH OF AWARD—
[2]Appeals against decision of Industrial Magistrate *re* breaches of award—Appellant argued failure to keep time and wages record was a serious matter and the Industrial Magistrate erred in substituting penalties—Respondent argued Industrial Magistrate erred in finding multiple breaches when there was only one complaint and argued the quantum of penalty was discretionary—Full Bench reviewed authorities and found the amount of underpayment was not material to the breach of duty to maintain time and wages record—Full Bench further found there was insufficient consideration to the deterrent factor and that $100 penalty for each breach was more appropriate—Upheld and Decision Varied—McCorry G. *v.* Bolivia Nominees Pty Ltd t/a Ballajura Tavern—Appeal Nos. 715 and 716 of 1992—Sharkey P., George C.,—Parks C.—2/10/92—Hospitality 2521
Complaint *re* alleged breach of award—Complainant union argued Defendant had failed to provide on-site amenities—Industrial Magistrate found on evidence that most of the amenities had been provided for—Complaint No. 113 of 1991—Brown S.M.—16/4/92—Construction 2810
Alleged breach of award *re* underpayment of wages—Defendant Counsel argued that the delays between the making of the complaints and issuing of summons was such to amount to an abuse of process and complaints ought to be dismissed—Industrial Magistrate reviewed authorities and found on evidence that he not only had jurisdiction but was bound to follow the decision as per the Metaxas Case—Industrial Magistrate further found the delays were unconscionable and contrary to the intention of legislature—Dismissed—McCorry G. *v.* Como Investments Pty Ltd t/a Garden City Bistro—Complaint Nos. 154 and 155 of 1992—Cicchini S.M.—2/12/92—Hospitality 2817
Complaints *re* alleged failure to pay motor vehicle allowance in accordance with two awards—Complainant argued there had been an oral requirement to supply and maintain a motor vehicle as part of his employment—Industrial Magistrate found on evidence that the Complainant had failed to establish that the award had been breached—Dismissed—C.S.A. *v.* Commissioner, P.S.C.—No. 192 & 193 of 1991—Brown S.M.—1/5/92—Public Service 2813

CASUAL WORK—
Application to vary award *re* Contract of Service, Rates of Pay, Additional Rates for Ordinary Hours, Special Rates and Provisions and Casual Employees—Applicant Employer sought to increase wage rates and allowances by 2.5% and to provide for an increase in loading to time and one half for casual work—Respondent union failed to appear—Commission reviewed previous application and was satisfied that claim had merit and there was no need for further additional consideration under the Principles—Granted—W.A.T.A.E.A. *v.* Burswood Resort (Management) Limited—No. 473 of 1992—Kennedy C.—4/6/92—Casino 1566

CLASSIFICATION—
[3]Application to vary award *re* rates and conditions for construction work—Applicant argued proposal fit within Structural Efficiency Principle, established appropriate rates and conditions and would be in the public interest by reducing demarcation disputes—Respondents and Interveners argued *inter alia* Applicant had not fully comprehended the real financial impact and further emphasised the dangers of flow on—CICS found September 1989 Principles were the appropriate Principles to be applied, that the application did not satisfy the requirements of a special case and that the minimum rates adjustment process provided the vehicle for the industry to assess its needs—Dismissed—F.P.F.A.I.I.U. *v.* Allwood Furniture Industries and Others—No. 1226A of 1990—Coleman C.C., Halliwell S.C., Beech C.—16/6/92—Furniture/Construction 1524
[3]Application to vary award *re* 2.5% Structural Efficiency Wage Adjustment—CICS divided application and dealt with salaries separately at request of Applicant—Applicant argued on the basis of a parent award and sought, *inter alia*, the insertion of a new classification—Respondent argued salary comparison with hospital pharmacists as quite inappropriate—CICS having regard for section 32 of the I.R. Act found the Shop and Warehouse (Wholesale and Retail Establishments) Award was more relevant for the day to day operations of the Respondent's businesses and established appropriate salary ranges—Ordered Accordingly—Salaried Pharmacists Association *v.* Pharmacy 777 and Others—No. 1050(1) of 1989—Salmon C., Negus C., Gregor C.—25/5/92—Retail Pharmacies 1756
Application to vary award *re* Wages and new classifications by consent—Parties sought to implement a new structure which involved distinct career pathing for on-train suburban rail staff—Commission having regard to the Principles found that the variations sought should issue and the allowance should be dealt with administratively—Granted—A.R.U. *v.* W.A.G.R.C. and Others—Fielding C.—16/6/92—Railways 1616
Applications to vary award by consent *re* salary rates and the introductions of horizontal career structure—Parties sought to give effect the 2nd phase of a 3 phase agreed program of 26 productivity initiatives and award variations—Commission found that the variations sought should be issued and that the horizontal pay structure initiative should be examined more intensely when the final phase was pursued by the parties—Granted—W.A.P.U. *v.* Minister for Police—Nos. P10A of 1990 and 1294A of 1991—Kennedy C.—12/8/92—Police 2031
Conference referred *re* removal of drilling skill and reclassification of an employee—Applicant union argued that the "mishaps" mainly resulted from factors beyond employee's control and that the decision to regress him to a lower classification was harsh and unfair—Respondent argued that employee had a history of accidents and that they had acted to protect the employee's safety, the safety of others and equipment—Commission reviewed authorities and found on evidence that employer had sufficient grounds to believe that employee was not sufficiently competent to operate equipment and that Applicant had failed to discharge the onus of establishing its claim—Dismissed—A.W.U. *v.* Hamersley Iron Pty Ltd—Nos. CR244 and CR356 of 1992—Fielding C—3/11/92—Iron Ore 2626
[2]Application to amend union rules *re* Membership of Tool and Material Storepersons—Objections withdrawn following undertakings and amendments to application—Full Bench found it was not sufficient to paraphrase an alteration in the notice to members, however in this case the alteration was to all intents and purposes spelt out in full—Granted—A.E.E.F.E.U.—No. 427 of 1992—Sharkey P., Halliwell S.C., George C.—27/8/92—Unions 2639

CUMULATIVE DIGEST—*continued*

Page

COMMON RULE—
Application to vary award *re* exemption of Applicant from common rule provisions of the award—Applicant employer proposed an arrangement which ensured a more equitable payment to employees remuneration component based upon skill levels and a grading system which provided for a more efficient operation whilst providing a career path for employees—Respondent union argued that award should continue to regulate Applicants operations and that other small abattoirs who were bound by the award would be commercially disadvantaged—Commission was satisfied that Applicants claim was satisfactory on both sides and that it did not decrease basic award conditions—Granted—Stewart Butchering Co Pty Limited *v.* AMIEU—No. 889 of 1992—Halliwell S.C.—25/8/92—Meat 2054

COMPENSATION—
Application for reinstatement on the grounds of unfair dismissal—Respondent argued that the Applicant had breached the confidentiality of the company in photocopying a proposed letter and showing it to a fellow worker and that compensation ought not to be paid as the company was running on a budget deficit—Commission found on evidence that as no warnings being given to the Applicant the action taken by the employer was unwarranted—Granted—Yarran R.L. *v.* Manguri—No. 1220 of 1991—Parks C.—3/3/92—Gardening 2079

CONFERENCE—
Conference referred *re* dispute over non provision of amenities and payments—Applicant union argued that Respondent failed to follow an agreed procedure for the incident and that wages deducted on that day should be paid—Commission reviewed evidence, in particular the agreement and found that the problem was fixed by the next meal break therefore the union was not able to make out its claim—Dismissed—B.T.A. *v.* B.M.A.—No. CR 288(2) of 1992—Beech C.—7/10/92—Building Construction 2272

[2]Question of law referred to Full Bench *re* whether demand for monies paid by employer in error was an industrial matter—Applicant argued overpayment was made in the capacity of the employer of the employee—Respondent argued it was a matter of litigation over a mistake and not a dispute over remuneration—Full Bench reviewed authorities and found that the matter was plainly consequential and indirectly related to the relationship of employer and employee—Answered No—A.D.S.T.E. *v.* B.M.A.—No. CA164 of 1992—Sharkey P., Salmon C., George C.—24/9/92—Building 2162

Application for orders *re* cessation of industrial action over log of claims for 4.5% wage increases—Applicant Employer argued that real intent of dispute was pressure aimed at Company over writs issued by Supreme Court and to return to arrangements prior to "closed shop" dispute to which the writs related—Respondent Unions argued that industrial action arose over Company's alleged failure to reasonably discuss wage claims—Commission found on evidence that Respondent Unions were committed to a recommendation previously issued and that parties ought to be encouraged to return to further negotiation—Direction Issued—Hamersley Iron Pty Limited *v.* A.W.U. and Others—No. C549 of 1992—Kennedy C.—25/9/92—Iron Ore 2255

Conference referred *re* appeal against penalties and suspension of employees over derailment of an ore train—Applicant union argued that the inquiry procedure was misconceived and that the punishment was too severe—Respondent argued that there was considerable loss of revenue in this incident and as such penalties were reasonable—Commission found on evidence that Agreement authorised the Commission to amend the decision which broadened the powers under Section 44 and that a proper investigation into the event had been conducted which confirmed that drivers because of their special responsibility and skill carried an additional onus to ensure that signals were properly set—Dismissed—C.M.E.T.S.W.U. *v.* BHP Iron Ore Ltd—No. CR418 of 1992—Gregor C.—9/9/92—Iron Ore 2278

[2]Appeal against decision of Commission (72 WAIG 599) *re* Interim Order *re* cessation of industrial action and transfer of employee—Full Bench found as the matter was a "finding", was not of such importance that an appeal should lie and dead, the appeal was incompetent—S.E.C.W.A. *v.* C.M.E.U.—Appeal No. 364 of 1992—Sharkey P., Halliwell S.C., George C.—3/11/92—Energy Supply 2512

Conference referred *re* removal of drilling skill and reclassification of an employee—Applicant union argued that the "mishaps" mainly resulted from factors beyond employee's control and that the decision to regress him to a lower classification was harsh and unfair—Respondent argued that employee had a history of accidents and that they had acted to protect the employee's safety, the safety of others and equipment—Commission reviewed authorities and found on evidence that employer had sufficient grounds to believe that employee was not sufficiently competent to operate equipment and that Applicant had failed to discharge the onus of establishing its claim—Dismissed—A.W.U. *v.* Hamersley Iron Pty Ltd—Nos. CR244 and CR356 of 1992—Fielding C—3/11/92—Iron Ore 2626

Conference referred *re* claim of reinstatement to original classification on grounds of unfair treatment—Respondent argued that employee failed to comply with basic safety requirements after repeatedly being warned by supervisors—Commission found on evidence that action of the Respondent was not unfair—Dismissed—A.E.E.F.E.U. *v.* Robe River Iron Associates—No. CR212 of 1992—Gregor C.—16/10/92 2633

[2]Appeal against decision of Commission (72 WAIG 872) *re* establishment of safety committee to resolve dispute over asbestos removal and cessation of industrial action—Appellant argued Order was not in accordance with Section 44(6)(b)(a) of the I.R. Act and that the OHSW Act prevailed over the powers of the Commission under the I.R. Act—Respondent argued matter was dead and the order mute therefore the appeal should be dismissed—Majority of Full Bench reviewed authorities and found the matter was not of such public interest that an appeal should lie and the issue was dead—Dissenting Full Bench member gave reasons in favour of Appellant—Dismissed—S.E.C.W.A. *v.* A.M.W.S.U. and Others—No. 463 of 1992—Sharkey P., Halliwell S.C., Beech C., 3/11/92—Energy Supply 2504

Conference referred *re* claim for an administrative allowance—Applicant unions argued changed work practices had increased productivity—Respondent argued that changes were in forms and formats and a piecemeal allowance would hinder future goals—Commission found net change in the nature of work constituted a significant net addition work requirements but amount claim was excessive—Granted in Part—P.G.E.U. and Others *v.* Hon. Minister for Construction—No. CR299 of 1992—Halliwell S.C.—21/9/92—Construction 2883

Conference referred *re* dispute over reduction of pay of an employee—Applicant union sought reinstatement of pay and to expunge breach of contract by payment of all monies rightfully due—Respondent argued that as genuine overpayment had occurred no monies were due—Commission found that overpayment had occurred but did not act as variation to work contract and employee was entitled to payments under the varied contract—Declared Accordingly—A.W.U. *v.* BHP Steel—No. CR381 of 1992—Gregor C.—13/11/92—Steel Works 2863

[2]Appeal against decision of Commission (72 WAIG 1398) *re* cancellation of an Order—Appellant argued Order was in excess of jurisdiction because it was contrary to Section 44(6) of the I.R. Act—Full Bench found failure to afford opportunity to make submissions was a denial of natural justice—Full Bench found no power to remit matter—Upheld and Quashed—Westralian Equipment Pty Ltd *v.* A.E.E.F.E.U.—Appeal No. 797 of 1992—Sharkey P., Fielding C., Gregor C.—19/11/92—Manufacturing 2750

CONSUMER PRICE INDEX—
Application for variation of General Order for location allowances in private sector awards to be increased in line with CPI figures—Respondent raised problem of operative date in one award in which the allowance was included for "all purposes"—CICS was satisfied that the basis for the increase sought was established and that the General Order should issue with a provision for the operative date of the single award—Granted—T.L.C. *v.* Chamber of Commerce and Industry and A.M.M.A.—No. 851 of 1992—Kennedy C., George C., Beech C.—30.10.92—Private Industry 2498

CUMULATIVE DIGEST—*continued*

Page

CONTRACT OF SERVICE—

Application for allegedly denied contractual entitlements *re* payment in lieu of notice—Respondent argued that the award provided for only one days notice of termination therefore it had fulfilled its obligations—Commission found that award had not been adopted as a term of contract of employment and one months notice was appropriate—Granted—Vincent E.I. *v.* Davmil Furniture—No. 193 of 1992—Parks C.—16/6/92—Furniture 1647

[2]Appeal against decision of Commission (71 WAIG 2620) *re* dismissed application for reinstatement on the grounds of unfair dismissal—Appellant argued Commission failed to apply correct principles of Full Bench and Industrial Appeal Court and that the weight of evidence showed that the Appellant was under the control and direction of the Respondent—Full Bench reviewed authorities and found it could not look to extrinsic evidence where a written document contained the whole of the contract, there was no ambiguity and that in the totality, there was not a right to control the Appellant in the restricted manner of an employer with an employee—Dismissed—Ince J.A. *v.* Hartfield Country Club Inc.—Appeal No. 1666 of 1991—Sharkey P., Halliwell S.C., Kennedy C.—19/6/92—Sport and Recreation 1510

Application for allegedly denied contractual entitlements *re* outstanding salary—Applicant argued contract of employment was for a higher annual salary than used to calculate payment—Commission found although higher salary was implied in contract the methods of paying it were well established and annualisation of the amount did not give business efficacy to the contract of employment—Dismissed—Kakulas A.B. *v.* Kannis Holdings Pty Ltd T/A W.A. Opticians Associates (1963)—No. 480 of 1992—Salmon C.—30/6/92—Health 1637

Application for allegedly denied contractual entitlements *re* payment in lieu of notice and pro rata annual leave—Respondent argued question of estoppel in light of previous proceedings, that claim should be stayed in line with principle outlined in Port Melbourne case—Commission reviewed authorities and found that an issue closely connected with the subject matter of earlier litigation ought reasonably be expected to be raised in those proceedings, ought not be the subject matter of subsequent application between the same parties—Commission further found that pro-rata annual leave in the absence of expressed agreement was not able to be converted to cash and if General Order from the Commission was applicable it could not be dealt with before it—Dismissed—Smartt M. *v.* Portman Mining Limited—No. 92 of 1992—Fielding C.—16/6/92—Mining 1641

Application for allegedly denied contractual entitlements *re* wages and reimbursement of expenses—Respondent failed to appear—Commission owing to the failure of the Respondent to appear, the Commission was left with no option but to determine the application on the uncontested evidence of the Applicant—Ordered Accordingly—Cheong E.K. *v.* Peony Garden Chinese Restaurant—No. 177 of 1992—George C.—19/6/92—Restaurant 1629

Application for allegedly denied contractual entitlements—Applicant sought a letter from Respondent stating that her dismissal was unfair and claimed contractual entitlements, namely unpaid commissions—Respondent argued Commission ought to refrain from hearing unfair dismissal claim but admitted that benefits were due and consented to an order requiring the sum to be paid—Commission found that as it had no power to order relief sought the matter should not proceed further—Granted In Part—Scaffidi M. *v.* Tarragan Holdings Pty Ltd T/A Roy Weston Hillarys—No. 293 of 1992—Fielding C.—12/6/92—Real Estate 1640

Application for allegedly denied contractual entitlements *re* lump sum payments—Applicant argued he had completed three years satisfactory service therefore he was entitled to the bonus—Respondent argued that it was at the discretion of the employer and that the Applicant's job performance was unsatisfactory—Commission found on evidence that Applicant had not performed sufficiently to warrant lump sum payment—Dismissed—King R.E. *v.* GEC Althson Australia—No. 198 of 1992—Electrical 1841

Application to vary award *re* Structural Efficiency Wage Adjustment—Contract of Service clause disputed only—Applicant Union argued clause should have a qualification to limit the magnitude of change while allowing flexibility—Respondent argued amended proposal was not as facilitative as initial application and did not comply with the Wage Fixing Principles—Commission found Applicant had not made out its case—Granted in Part—C.M.E.U. *v.* BHP Iron Ore Ltd—No. 159 of 1992—Gregor C.—29/5/92—Iron Ore 1587

Application for allegedly denied contractual entitlements—Applicant sought outstanding commissions from property sales—Respondent argued that another employee had listed the properties in question—Commission found that Applicant was not an employee at the time in question therefore there was no jurisdiction to hear matter—Dismissed for Want of Jurisdiction—D'Alonzo G.R. *v.* Keystone Realty—No. 541 of 1992—Salmon C.—24/7/92—Real Estate 1841

Application that Commission denies or refrain from hearing an application *re* allegedly denied contractual entitlements—Commission found that whilst there were two separate proceedings before itself and another jurisdiction the Respondent was entitled to pursue his initial application—Dismissed—Tri Star Group Pty Ltd *v.* Ball D.J.—No. 853 of 1992—Parks C.—29/7/92 1871

Application for alleged non payment of contractual benefits—Applicant sought payment of wages to end of trial period on the basis that it was a fixed term contract—Commission found on evidence that the Applicant failed to come up to the reasonable standard of performance or behaviour which resulted in a breach in the implied terms of the contract, entitling the employer to terminate the contract—Dismissed—Buck D. *v.* Wizard Soft Computers—No. 160 of 1992—Halliwell S.C.—16/7/92—Computers 1837

[2]Appeal against decision of Commission (72 WAIG 372) *re* denied contractual entitlements—Appellant argued Commission failed to have proper regard to section 26 of the I.R. Act which ought to have led to the offsetting of the Respondent's indebtedness to the Appellant and disputed that it was the employer as named—Full Bench reviewed authorities and found it not within power to make any order for an offset—Commissioner in separate Reasons expressed view regarding whether offsetting was an industrial matter or not—Dismissed—Conti Sheffield Real Estate *v.* Brailey D.—Appeal No. 211 of 1992—Sharkey P., Salmon C., Negus C.—21/8/92—Real Estate 1965

[2]Appeal against decision of Commission (72 WAIG 860) *re* denied contractual entitlements—Appellants argued the Commission erred in fact and law with regards to time and wages records were denied natural justice and erred in determining the terms and nature of the contracts of employment—Full Bench found Commission did not misuse the advantage of observing witnesses and there was no inference erroneously drawn or left out from the primary facts which required correction—Dismissed—Hazart Pty Ltd t/a Southern Cross Koala and Another *v.* Mullan L.—Appeal No. 448 of 1992—Sharkey P., Fielding C., Gregor C.—1/9/92—Horticulture 1971

Application for allegedly denied contractual entitlements *re* outstanding commissions, one months pay in lieu of notice and unauthorised deductions from commission—Respondent argued that Applicant was dismissed before the sale was made for reasons of unsatisfactory service therefore no commission was due and also that she had overspent her advertising budget which had been deducted from final payment—Commission reviewed authorities and found on evidence that whilst Applicant had failed to make out her claim for pay in lieu of notice, she had discharged onus of establishing other claims—Granted in Part—Layer J.E. *v.* Thomas Gabriel Esze t/a Tom Esze Real Estate—No. 819 of 1992—Salmon C.—26/8/92—Real Estate . 2074

Application for allegedly denied contractual entitlements *re* superannuation payments—Applicant argued that he was induced to take up employment with Respondent due to offer of superannuation scheme—Respondent argued that no such proposal was approved by the Directors of the company—Commission found on evidence that whilst parties did not reduce their agreement to complete written form, the implication of a term providing for such benefits existed in employment contract therefore Applicant was entitled to claim—Granted—Escudier D.R. *v.* Advanced Electrical Equipment Pty Ltd—No. 462 of 1992—George C.—1/9/92—Electrical 2065

Application for allegedly denied contractual entitlements *re* monies and holiday pay—Applicant claimed that period of notice to terminate was unreasonable—Respondent argued that under common law where there is no notice given in the contract an entitlement to dismiss without notice occurs—Commission found on evidence that Applicant's claim for costs were fair and reasonable—Granted—Bigelman H. *v.* Mahdie Pty Limited—No. 953 of 1992—Salmon C.—25/9/92 2226

Application for allegedly denied contractual entitlements *re* wages—Respondent argued that there had never been a contract of employment on foot between itself and the Applicant—Commission found on evidence that the Applicant had failed to establish his employment with the Respondent—Dismissed for want of jurisdiction—Benjamin C. *v.* China National Geological Technology Development Import and Export Corporation T/A Mount Marven Mining Project—No. 236 of 1992—Negus C.—15/9/92—Accountant 2226

CUMULATIVE DIGEST—*continued*

Page

CONTRACT OF SERVICE—*continued*

[2]Appeal against decision of Commission (72 WAIG 594) *re* denied contractual entitlements—Appellant argued he had received notice of hearing late as it had gone to the wrong part of the premises and that led to a miscarriage of justice—Full Bench reviewed regulations and found Notices of Hearing were not required to be served under Regulation 89 of the IRC Regulation 1985 and the notice of proceedings had been duly served—Notice of Hearing was received at registered address albeit late—Dismissed—Friendly Helpers and F.H. Promotions *v.* Galbraith D.—Appeal No. 149 of 1992—Sharkey P., George C., Parks C.,—24/9/92 2161

Application for allegedly denied contractual entitlements *re* benefit deducted without authorisation—Respondent argued that the said amount was a debt paid by the Respondent on behalf of the Applicant in the form of an advance against wages—Commission found on evidence that the Respondent had failed to pay Applicant full benefits due under contract of employment defined as 'Wages' in the Truck Act—Granted—Hassen M.J. *v.* BHB Challenge Pty Ltd—No. 592 of 1992—Parks C—31/9/92 2232

Application for allegedly denied contractual benefits *re* payment in lieu of notice and unpaid hours—Commission found on evidence that as the Applicant had given no advance termination notice the Respondent's withholding of pay was acceptable—Commission further found that Applicant was entitled to ten hours pay for work performed—Granted in Part—Saunders G.T. *v.* Personalised Tuition Services Pty Ltd—No. 659 of 1992—Halliwell S.C.—16/9/92—Education 2245

Application for allegedly denied contractual entitlements—Applicant argued that commissions earned were outstanding—Respondent argued that Applicant was not an employee, therefore the Commission was without jurisdiction and that the Applicant did not have any entitlement to his claim because the conditions precedent to payment of these commissions were not met—Commission reviewed authorities and found on evidence that Applicant was an employee but had not been able to fulfil with the exception of one the conditions to grant claim—Granted in Part—Tobin G.W. *v.* Ashmy Pty Limited T/A Artisan Homes—No 463 of 1991—Fielding C.—2/10/92—Building 2247

Conference referred *re* unfair dismissal claim—Applicant union claimed that employee was dismissed due to being on Workers Compensation without warning of termination—Respondent argued that the absence of employee on Workers Compensation was not material to dismissal whereas a dissatisfaction with employee's performance was—Commission found on evidence that the dismissal claim did not meet the test set for the Commission intervention—Commission further found that Union's claim for 1 week's wages in lieu of notice had been paid—Dismissed—F.P.F.A.I.U. *v.* Lexcraft Pty Ltd T/A Kembla Furniture—No. CR471 of 1992—Beech C.—23/9/92—Furniture 2281

Application for allegedly denied contractual entitlements—Applicant argued that he had been summarily dismissed after he had given three months' notice and sought payment for outstanding wages, 3 months payment in lieu of notice, petrol allowance, pro-rata holiday pay and the balance of a bonus and payment for cutting of tiles—Respondent argued that Applicant was indebted to the employer by way of outstanding rent, petrol and motor vehicle repair expenses—Commission reviewed authorities and found on the whole that the Applicants evidence was most credible and therefore had discharged the onus of establishing his claim—Granted—Wardell W. *v.* Donnybrook Stone Company—No 516 of 1992—18/9/92—Stone Masonry 2250

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant further sought, as an alternative, a payment for an allegedly fixed term employment contract—Respondent argued Applicant was unfairly dismissed as there had been a failure to raise the performance level of night shift crew to required standard and opposed alternate remedy—Commission found on evidence Applicant had been warned of performance level by senior management and dismissal was neither harsh or oppressive—Dismissed—Himsworth A. *v.* Cape Modern Bains Joint Venture—No. 886 of 1992—George C.—13/10/92—Mining 2233

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Parties advised Commission that dismissal issue had been resolved—Applicant further claimed unpaid redundancy payments—Respondent argued that as the termination occurred before starting date of the redundancy package it was not obliged to make payment—Commission found on evidence that another date was selected and Applicant entitled to benefit of contract as varied by a letter—Granted—Foster D.A. *v.* Central Kalgoorlie Gold Mines N/L—No. 629 of 1992—Gregor C.—24/9/92—Mining 2230

Application for allegedly denied contractual entitlements *re* payment in lieu of notice—Applicant claimed that notice period was unreasonable—Respondent argued that Applicant was covered by specified award and notice period was given accordingly—Commission reviewed authorities and found that the Respondent was not covered by an award and that a reasonable notice period was two months—Granted in Part—Brett I. *v.* Atelier Furniture and Interiors Pty Ltd—No. 734 of 1992—Negus C.—20/10/92 2606

Application for allegedly denied contractual entitlements *re* annual leave, pro-rata annual leave, reimbursement of telephone costs, advertising and relocation expenses—Respondent argued that Applicants' terms and conditions of employment were subject to laws of another state therefore the Commission did not have jurisdiction—Commission reviewed authorities and found on evidence that although majority of costs were beyond the Commission's jurisdiction, Applicant was entitled to annual leave benefits, relocation expenses and that one weeks wages should be deducted from total claim—Ordered Accordingly—Halls M. *v.* Austware Pottery (Australia) Pty Ltd—No. 600 of 1992—Beech C.—16/10/92—Pottery Sales 2609

Application for an order directing reinstatement of undercover parking and compensation for out of pocket expenses—Applicant claimed that Respondent had unilaterally altered his contract therefore was in breach of contract—Respondent argued that the matter subject of the claim had not been approved by the Respondent and that the verbal arrangement ended when the Applicant was permanently appointed—Commission found on evidence that Applicant could not reasonably regard his previous package as more than a domestic administrative arrangement which was not binding on the Respondent therefore claim must fail—Dismissed—Civil Service Association *v.* Commissioner, Public Service Commission—No P4 of 1992—Fielding C.—14/8/92—Public Service 2595

Application for denied contractual entitlements—Applicant claimed that Respondent was withholding 2 days wages—Respondent submitted that payment was withheld due to Applicant's conduct—Commission found nothing to give Respondent contractual right to retain wages—Granted—Woodcock L.C. *v.* Kim Dorizzi t/a Ribtech—No. 1129 of 1992—Parks C.—20/10/92 2621

Application for allegedly denied contractual entitlements *re* pro-rata payment of Bonus—Applicant claimed pro-rata payment was due for seven months work and was a term of contract in lieu of Annual Leave Loading and Superannuation payments—Commission found that Applicant had misconstrued said agreement with Respondent—Dismissed—Baugh N.J. *v.* Ribbon Distributors and Trading Pty Ltd—No. 719 of 1992—Kennedy C.—30/10/92—Retail 2604

[2]Appeals against decision of Commission (72 WAIG 888, 2843) *re* excusing witness and dismissal of unfair dismissal/contractual entitlement claims—Appellant argued, *inter alia*, he was denied the opportunity to fairly and fully present his case and that in the public interest an appeal should lie—Full Bench reviewed authorities and found from evidence it was not possible to say that the Appellant was an employee of either of the Respondent—Full Bench found nothing which could lead to the conclusion that cause was shown for the witnesses to appear—Dismissed—Mosson B.C. *v.* Haymarket Publishing and Another—Appeal No. 503 of 1992—Sharkey P., Fielding C., Beech C.—22/10/92—Publishing 2517

Application for allegedly denied contractual entitlements *re* overtime payment and motor vehicle expenses—Respondent argued that employee did not qualify for the payments in that her position did not necessitate overtime or use of her motor vehicle other than the initial authorised period and that the claims made were estimates therefore no benefits have been substantiated—Commission found on evidence that Applicant had failed to establish the benefits claimed other than the increased motor vehicle allowance—Granted in Part—Lobb G. *v.* The Armadale Christian Education Association Inc.—No. 1372 of 1991—Parks C.—10/11/92—Education 2840

Conference referred *re* claim for reinstatement on the grounds of unfair dismissal—Applicant claimed termination was due to a previous worker's compensation injury claim—Respondent argued that employment was on a casual "on and as when required" basis—Commission found on evidence that Applicant's employment was casual—Dismissed—T.W.U. *v.* Merman Pty Limited t/a Atlas Haulage Services—No. CR576 of 1992—Halliwell S.C.—17/11/92—Transport 2886

Application for allegedly denied contractual entitlements *re* retail value of vehicle—Respondent argued that the rights of employee were forfeited when resignation occurred—Commission found on evidence that Applicant was entitled to monies amounting to retail value of vehicle in question—Granted in Part—Pozzi R. *v.* Gail Force Manpower Services Pty Ltd and Another—No. 547 of 1992—Negus C.—3/11/92—Marketing 2843

CUMULATIVE DIGEST—*continued*

Page

CONTRACT OF SERVICE—*continued*

Application for allegedly denied contractual entitlements *re* payment in lieu of notice—Applicant claimed entitlements were due as Respondent had failed to give notice of termination—Respondent argued that an agreement was reached in closing employment contract immediately—Commission found on evidence that at time of termination no residual benefit was present—Dismissed—Thambipillai T. *v.* J.H. Computer Services Pty Ltd—No. 1010 of 1992—Gregor C.—18/11/92—Computer Services 2849

Conference referred *re* dispute over reduction of pay of an employee—Applicant union sought reinstatement of pay and to expunge breach of contract by payment of all monies rightfully due—Respondent argued that as genuine overpayment had occurred no monies were due—Commission found that overpayment had occurred but did not act as variation to work contract and employee was entitled to payments under the varied contract—Declared Accordingly—A.W.U. *v.* BHP Steel—No. CR381 of 1992—Gregor C.—13/11/92—Steel Works 2863

Application for contractual entitlements *re* 12 months remuneration—Applicant claimed that constructive dismissal occurred and reasonable period of notice was denied—Respondent argued that Applicant was asked to resign and freely agreed to—Commission found in evidence that Applicant had agreed to resign and that there was no scope for reasonable notice period claim—Dismissed—Keating P.J. *v.* Biotech International Limited—No. 529 of 1992—Fielding C.—24/11/92—Chemical Manufacturing 2836

Application for allegedly denied contractual entitlements *re* payment of wages, motor vehicle expenses and pro rata annual leave entitlements—Respondent argued that as a result of misconduct by the Applicant, this loss and damage should be offset against any monies said to be due to the employee—Commission found on evidence that Applicant had established his claim and that monies held back by him were to be deducted from the net total due—Ordered Accordingly—Bates E.R. *v.* Victoria Park Holdings Pty Limited trading as Welch World Travel—No. 1464A of 1991—Kennedy C.—10/8/92—Real Estate 2820

Application for allegedly denied contractual entitlements—Respondent questioned jurisdiction of Commission as employment relationship with Applicant was not one of service but for service—Commission determined that Applicant was a Consultant and therefore the claim was outside of the jurisdiction of the Commission—Dismissed—Wiltshire D. *v.* Mainwood Holdings Pty Limited t/a WA Transport and Machinery—No. 1205 of 1992—Parks C.—26/11/92—Transport 2852

CUSTOM AND PRACTICE—

Application for reinstatement on the grounds of unfair dismissal—Applicant claimed that no criticism or discipline had been received about work performance—Respondent argued it was not acting unfairly in dismissing the last helpful employee despite the last on first off principle—Commission found in favour of Respondent—Dismissed—Williams C. *v.* W.A. Football League Members Club (Inc)—Salmon C.—15/9/92—Hospitality 2253

DANGEROUS WORK—

Conference referred *re* payment for lost time over safety issue—Applicant union claimed that payment should be made on the basis of a usual work week of 54 hours and 60 hours respectively—Respondent argued that it should be based on a 38 hour week—Commission reviewed the meaning of "usual", S.28 of the OHSW Act and found that the wider construction contended for by the Applicant should be implemented—Granted—M.E.W. *v.* Ical Limited and Another—No. CR221 of 1992—Salmon C.—24/6/92 1660

Conference referred *re* payment for lost time and other benefits over alleged safety issue—Applicant Union argued that employees had reasonable grounds that there may be imminent or serious injury on site due to hazardous chemicals and that Respondent showed a disregard for the health and welfare of their workforce—Commission found on evidence that there was alternative work at the time for the employees and that the tests carried out had indicated no risks to the workforce therefore no payment should be made—Dismissed—C.M.E.W.U. *v.* Kirfield Engineering Australia Pty Ltd and Another and Western Construction Company and Another *v.* A.M.W.S.U. and Others—Nos. CR253 and 257 of 1991—Parks C.—27/7/92—Construction 1861

DATE OF OPERATION—

Applications to vary award *re* 2.5% Structural Efficiency Wage Adjustments—Applications heard in conjunction with Federal applications—Applicant Union argued the industry was already lean, hungry and efficient through the efforts of its members who were amongst the lowest paid and most vulnerable of employees and saw little to gain unless employers were not firmly repelled in attempts at negative costs cutting—Respondents argued threatened industrial action was contrary to the dispute settlement procedures erected when negotiating the Second Tier Wage Increase—Commission outlined its attempts at conciliation and found the parties had not become imbued with the spirit of the Structural Efficiency Principle—Commission determined matters of union representation at enterprise level consultation committees, Accrued Days Off agreement to examine demarcation matters and further found that there were special circumstance to grant the agreed operative date—Ordered Accordingly—F.M.W.U. *v.* Anglican Homes (Inc) and Others—No. 1394, 1401, 1405, 1410, 1411, 1421, 1418, 1437, 1440, 1639 and 1641 of 1991—Negus C.—27/11/91—Health 1547

Application for variation of General Order for location allowances in private sector awards to be increased in line with CPI figures—Respondent raised problem of operative date in one award in which the allowance was included for "all purposes"—CICS was satisfied that the basis for the increase sought was established and that the General Order should issue with a provision for the operative date of the single award—Granted—T.L.C. *v.* Chamber of Commerce and Industry and A.M.M.A.—No. 851 of 1992—Kennedy C., George C., Beech C.—30.10.92—Private Industry 2498

DISABILITIES—

[2]Appeal against decision of the Commission (71 WAIG 2502) *re* registration of an agreement—Appellant argued the agreement was contrary to Section 41 of the I.R. Act as it was contrary to the State Wage Principles—Respondent argued a claim for a site allowance was not a claim for improvement in pay and conditions—Full Bench reviewed authorities, State Wage Principles and found insofar as the agreement permitted a new allowance not related to the existence or non existence of compensatable factors it was contrary to the Principles relating to allowances which required evolution on a case by case basis and the Commission had no power to register the agreement—Upheld—C.W.A.I. *v.* A.F.C.C. and Others—Appeal No. 1582 of 1991—Sharkey P., Coleman C.C., Gregor C.—19/6/92—Building 1500

[3]Application to vary award *re* rates and conditions for construction work—Applicant argued proposal fit within Structural Efficiency Principle, established appropriate rates and conditions and would be in the public interest by reducing demarcation disputes—Respondents and Interveners argued *inter alia* Applicant had not fully comprehended the real financial impact and further emphasised the dangers of flow on—CICS found September 1989 Principles were the appropriate Principles to be applied, that the application did not satisfy the requirements of a special case and that the minimum rates adjustment process provided the vehicle for the industry to assess its needs—Dismissed—F.P.F.A.I.I.U. *v.* Allwood Furniture Industries and Others—No. 1226A of 1990—Coleman C.C., Halliwell S.C., Beech C.—16/6/92—Furniture/Construction 1524

Conference referred *re* claim for site allowance of $3.00 per hour—Applicant Union argued disabilities were recognised in allowances already paid to other employees engaged in similar construction projects—Respondent employer claimed that majority of workforce employed on the project were federally covered and that there was not an established precedent for site allowances on road construction sites—Commission found on evidence that there was no basis upon which the payment of site allowance could be justified as outlined therefore Applicant had not discharged the onus of establishing the claim—Dismissed—M.E.W.U. *v.* Henry and Walker Contracting Pty Ltd—No. CR254 of 1992—George C.—16/7/92—Construction 1866

Application for an order *re* site allowance—Applicant union claimed a site allowance of $3.00 for each hour worked—Respondent argued that there was nothing special about the project or the conditions under which work was being performed which justified an allowance other than at the lower end of a scale as compared to other projects—Commission found on evidence and from inspections that it was appropriate that allowance be toward the higher end of the scale due to the remoteness and lack of recreational facilities commensurate with the number of employees—Ordered Accordingly—M.E.W.U. *v.* Pipeline Induction Heat Pty Ltd and Others—No. CR220(A) of 1992—George C.—16/6/92—Mining 1662

CUMULATIVE DIGEST—*continued*

Page

DISABILITIES—*continued*

Conferences referred *re* claim for site allowance—Applicant Unions argued there had been problems with wind, dust and flies on the worksite and these had previously been site awarded allowances for the area—Respondent argued that there were not any disabilities present which were not catered for by existing award and sapri provisions—Commission found site allowance was applicable pursuant on evidence that the disabilities were only slight and the allowance be towards the lower end of the scale—Ordered Accordingly—B.T.A. and Another *v.* Geraldton Building Company—Nos. CR193 and CR 207 of 1992—Beech C.—13/5/92—Construction 2088

Application to vary award *re* asbestos allowance—Parties sought to bring allowance in line with Midland Workshops allowance for similar work—Commission was satisfied that claim complied with State Wage Fixing Principles and variations sought should issue—Granted—A.R.U. *v.* W.A.G.R.C.—No. 395 of 1992—Fielding C.—23/10/92—Railways 2582

DISCRIMINATION—

Application to vary award *re* transfer and termination provisions for health and safety representatives—Applicant argued provisions should be the same as for job stewards—Respondent argued Applicant had not proven that the representatives would be prejudiced in employment and that the OHSW Act had provisions for dealing with discrimination—Commission reviewed I.R. Act, OHSW Act, the Laing Report, Building Trades (Construction) Award and found in favour of the Applicant—Granted—B.T.A. *v.* Adsigns Pty Ltd & Others—No. 872B of 1991—Beech C.—20/7/92—Building Construction 1789

EMPLOYEE—

[2]Appeal against decision of Commission (71 WAIG 2620) *re* dismissed application for reinstatement on the grounds of unfair dismissal—Appellant argued Commission failed to apply correct principles of Full Bench and Industrial Appeal Court and that the weight of evidence showed that the Appellant was under the control and direction of the Respondent—Full Bench reviewed authorities and found it could not look to extrinsic evidence where a written document contained the whole of the contract, there was no ambiguity and that in the totality, there was not a right to control the Appellant in the restricted manner of an employer with an employee—Dismissed—Ince J.A. *v.* Hartfield Country Club Inc.—Appeal No. 1666 of 1991—Sharkey P., Halliwell S.C., Kennedy C.—19/6/92—Sport and Recreation 1510

[4]Complaints *re* breach of union rules—Applicant argued Respondent had wrongly held himself out as occupying an office when he was ineligible to do so—President found there was no evidence that the Respondent was at any time an independent contractor—Dismissed—Mosson B.C. *v.* McLaughlan L.—No. 829 of 1992—Sharkey P.—10/8/92—Unions 1775

[2]Appeal against decision of Commission (72 WAIG 860) *re* denied contractual entitlements—Appellants argued the Commission erred in fact and law with regards to time and wages records were denied natural justice and erred in determining the terms and nature of the contracts of employment—Full Bench found Commission did not misuse the advantage of observing witnesses and there was no inference erroneously drawn or left out from the primary facts which required correction—Dismissed—Hazart Pty Ltd t/a Southern Cross Koala and Another *v.* Mullan L.—Appeal No. 448 of 1992—Sharkey P., Fielding C., Gregor C.—1/9/92—Horticulture 1971

Application for allegedly denied contractual entitlements—Applicant argued that commissions earned were outstanding—Respondent argued that Applicant was not an employee, therefore the Commission was without jurisdiction and that the Applicant did not have any entitlement to his claim because the conditions precedent to payment of these commissions were not met—Commission reviewed authorities and found on evidence that Applicant was an employee but had not been able to fulfil with the exception of one the conditions to grant claim—Granted in Part—Tobin G.W. *v.* Ashmy Pty Limited T/A Artisan Homes—No 463 of 1991—Fielding C.—2/10/92—Building 2247

Application for allegedly denied contractual entitlements *re* wages—Respondent argued that there had never been a contract of employment on foot between itself and the Applicant—Commission found on evidence that the Applicant had failed to establish his employment with the Respondent—Dismissed for want of jurisdiction—Benjamin C. *v.* China National Geological Technology Development Import and Export Corporation T/A Mount Marven Mining Project—No. 236 of 1992—Negus C.—15/9/92—Accountant 2226

[2]Appeals against decision of Commission (72 WAIG 888, 2843) *re* excusing witness and dismissal of unfair dismissal/contractual entitlement claims—Appellant argued, *inter alia*, he was denied the opportunity to fairly and fully present his case and that in the public interest an appeal should lie—Full Bench reviewed authorities and found from evidence it was not possible to say that the Appellant was an employee of either of the Respondent—Full Bench found nothing which could lead to the conclusion that cause was shown for the witnesses to appear—Dismissed—Mosson B.C. *v.* Haymarket Publishing and Another—Appeal No. 503 of 1992—Sharkey P., Fielding C., Beech C.—22/10/92—Publishing 2517

ENFORCEMENT OF AWARDS/ORDERS—

[2]Application for enforcement of Act *re* Interim Order of reinstatement—Preliminary Matter—Applicant applied for expedited hearing—Full Bench found question was of such urgency to the Applicant it ought be determined—Granted—F.M.W.U. *v.* Nappy Happy Hire Pty Ltd t/a Nappy Happy Service—No. 1151 of 1992—Sharkey P., George C., Parks C.—28/10/92—Laundry 2525

[2]Appeals against decision of Industrial Magistrate *re* breaches of award—Appellant argued failure to keep time and wages record was a serious matter and the Industrial Magistrate erred in substituting penalties—Respondent argued Industrial Magistrate erred in finding multiple breaches when there was only one complaint and argued the quantum of penalty was discretionary—Full Bench reviewed authorities and found the amount of underpayment was not material to the breach of duty to maintain time and wages record—Full Bench further found there was insufficient consideration to the deterrent factor and that $100 penalty for each breach was more appropriate—Upheld and Decision Varied—McCorry G. *v.* Bolivia Nominees Pty Ltd t/a Ballajura Tavern—Appeal Nos. 715 and 716 of 1992—Sharkey P., George C.,—Parks C.—2/10/92—Hospitality 2521

Complaint *re* alleged breach of award—Complainant union argued Defendant had failed to provide on-site amenities—Industrial Magistrate found on evidence that most of the amenities had been provided for—Complaint No. 113 of 1991—Brown S.M.—16/4/92—Construction 2810

Alleged breach of award *re* underpayment of wages—Defendant Counsel argued that the delays between the making of the complaints and issuing of summons was such to amount to an abuse of process and complaints ought to be dismissed—Industrial Magistrate reviewed authorities and found on evidence that he not only had jurisdiction but was bound to follow the decision as per the Metaxas Case—Industrial Magistrate further found the delays were unconscionable and contrary to the intention of legislature—Dismissed—McCorry G. *v.* Como Investments Pty Ltd t/a Garden City Bistro—Complaint Nos. 154 and 155 of 1992—Cicchini S.M.—2/12/92—Hospitality 2817

Complaints *re* alleged failure to pay motor vehicle allowance in accordance with two awards—Complainant argued there had been an oral requirement to supply and maintain a motor vehicle as part of his employment—Industrial Magistrate found on evidence that the Complainant had failed to establish that the award had been breached—Dismissed—C.S.A. *v.* Commissioner, P.S.C.—No. 192 & 193 of 1991—Brown S.M.—1/5/92—Public Service 2813

ENTRY: RIGHT OF—

Conference referred *re* dispute over refusal of right of entry of Applicant union officials—Applicant union argued that the Respondent employed persons on site covered by the Building Trades (Construction) Award which gave the union right of entry to inspect the sites—Respondent employer argued that Commission did not have jurisdiction to hear matter as it was under jurisdiction of the Industrial Magistrate—Commission preliminarily found that it did have jurisdiction to hear matter and refused request of two parties to be joined to application—Ordered Accordingly B.L.F. *v.* J-Corp Pty Ltd—No. CR458 of 1992—Halliwell S.C.—3/9/92—Building Construction 2086

CUMULATIVE DIGEST—*continued*

Page

HOURS OF WORK—

[2]Appeal against decision of Commission (72 WAIG 423) *re* 19 day roster and return of signed agreement—Respondent argued Commission lacked jurisdiction as the matter was for an enforcement of an award or did not have the power to nullify agreements and order their return—Respondent argued declaration was available as relief if it resolved a dispute—Full Bench found claim was clearly for arbitral relief and the Commission was acting pursuant to a clause in the relevant award—Dismissed—Coles/Myer T/A K-Mart Discount Stores *v.* S.D.A.—Appeal No. 158 of 1992—Sharkey P., Gregor C., Beech C.—23/7/92—Retail 1747

Application to vary award *re* Second Stage Structural Efficiency Wage Adjustment and first Minimum Rates Adjustment by consent—Parties sought changes to allowances, hours, overtime and annual leave which would introduce greater flexibility—Commission was satisfied that the variations sought should issue—Granted—W.A.C.A.T.U. *v.* Valiant Dry Cleaners and Others—No. 809 of 1991 (R2)—Kennedy C.—29/6/92—Dry Cleaning 1576

[4]Application for stay of order *re* reduced hours and earnings pending appeal to Full Bench—Applicant argued its business would suffer severe damage without a stay—Respondent argued workforce had already been heavily reduced—President found balance of convenience did not favour the Applicant—Dismissed—Westralian Equipment Pty Ltd *v.* A.E.E.F.E.U.—No. 798 of 1992—Sharkey P.—10/7/92—Electrical Equipment Manufacturer 1765

INDUSTRY ALLOWANCE—

[3]Application to vary award *re* rates and conditions for construction work—Applicant argued proposal fit within Structural Efficiency Principle, established appropriate rates and conditions and would be in the public interest by reducing demarcation disputes—Respondents and Interveners argued *inter alia* Applicant had not fully comprehended the real financial impact and further emphasised the dangers of flow on—CICS found September 1989 Principles were the appropriate Principles to be applied, that the application did not satisfy the requirements of a special case and that the minimum rates adjustment process provided the vehicle for the industry to assess its needs—Dismissed—F.P.F.A.I.I.U. *v.* Allwood Furniture Industries and Others—No. 1226A of 1990—Coleman C.C., Halliwell S.C., Beech C.—16/6/92—Furniture/Construction 1524

Application for variation of General Order for location allowances in private sector awards to be increased in line with CPI figures—Respondent raised problem of operative date in one award in which the allowance was included for "all purposes"—CICS was satisfied that the basis for the increase sought was established and that the General Order should issue with a provision for the operative date of the single award—Granted—T.L.C. *v.* Chamber of Commerce and Industry and A.M.M.A.—No. 851 of 1992—Kennedy C., George C., Beech C.—30.10.92—Private Industry 2498

INDUSTRIAL ACTION—

Applications to vary award *re* 2.5% Structural Efficiency Wage Adjustments—Applications heard in conjunction with Federal applications—Applicant Union argued the industry was already lean, hungry and efficient through the efforts of its members who were amongst the lowest paid and most vulnerable of employees and saw little to gain unless employers were not firmly repelled in attempts at negative costs cutting—Respondents argued threatened industrial action was contrary to the dispute settlement procedures erected when negotiating the Second Tier Wage Increase—Commission outlined its attempts at conciliation and found the parties had not become imbued with the spirit of the Structural Efficiency Principle—Commission determined matters of union representation at enterprise level consultation committees, Accrued Days Off agreement to examine demarcation matters and further found that there were special circumstance to grant the agreed operative date—Ordered Accordingly—F.M.W.U. *v.* Anglican Homes (Inc) and Others—No. 1394, 1401, 1405, 1410, 1411, 1421, 1418, 1437, 1440, 1639 and 1641 of 1991—Negus C.—27/11/91—Health 1547

Conference referred *re* dispute over refusal of right of entry of Applicant union officials—Applicant union argued that the Respondent employed persons on site covered by the Building Trades (Construction) Award which gave the union right of entry to inspect the sites—Respondent employer argued that Commission did not have jurisdiction to hear matter as it was under jurisdiction of the Industrial Magistrate—Commission preliminarily found that it did have jurisdiction to hear matter and refused request of two parties to be joined to application—Ordered Accordingly B.L.F. *v.* J-Corp Pty Ltd—No. CR458 of 1992—Halliwell S.C.—3/9/92—Building Construction 2086

Conference referred *re* claim that unions and their members be restrained from engaging in work stoppages, bans, limitation or any industrial action on Multiplex Swan Brewery site—Respondent unions argued on the basis that the Commission had no jurisdiction to deal with claim—Commission reviewed authorities and found on evidence that there was an industrial dispute which existed which prevented workers from starting work and ordered *inter alia* the lifting of bans and limitations—Granted—Multiplex Constructions Pty Ltd and Others and C.M.E.T.W.U. and Another—No. CR383 of 1992—Halliwell S.C.—19/8/92 2090

[4]Application for stay of order *re* cessation of industrial action pending appeal to Full Bench—Applicant argued question of private rights of union officials were serious matters to be tried and the balance of convenience favoured the democratic right to dissent—President found possible unlawful conduct of officials was not a relevant consideration for the Commission and there was not a serious issue to be tried—President further found he was not required to consider the wider community controversy and inconvenience to unions was outweighed by the Respondent's inability to go about their affairs and employees whose employment would be postponed—Dismissed—C.M.E.T.S.W.U. *v.* Multiplex Constructions Pty Ltd and Others—No. 1089 and 1090 of 1992—Sharkey P.—31/8/92—Construction 2000

Application for orders *re* cessation of industrial action over log of claims for 4.5% wage increases—Applicant Employer argued that real intent of dispute was pressure aimed at Company over writs issued by Supreme Court and to return to arrangements prior to "closed shop" dispute to which the writs related—Respondent Unions argued that industrial action arose over Company's alleged failure to reasonably discuss wage claims—Commission found on evidence that Respondent Unions were committed to a recommendation previously issued and that parties ought to be encouraged to return to further negotiation—Direction Issued—Hamersley Iron Pty Limited *v.* A.W.U. and Others—No. C549 of 1992—Kennedy C.—25/9/92—Iron Ore 2255

Conference referred *re* claim that consent order ought to be cancelled—Applicant union argued that order was no longer necessary and that it enabled the Respondent to engineer disputes to prove that the union was in breach of the order—Respondent argued that unions track record in respect of precipitating industrial action in defiance of consultation was such as to warrant the continuation of the order—Commission found on evidence that Applicant had not made out its claim however a redrafted order was found to be more amenable to reflect concerns at issue—Ordered Accordingly—M.I.E.U. *v.* W.A.M.C—No. CR452 of 1992—Halliwell S.C.—10/9/92—Meat 2282

Conference referred *re* dispute over non provision of amenities and payments—Applicant union argued that Respondent failed to follow an agreed procedure for the incident and that wages deducted on that day should be paid—Commission reviewed evidence, in particular the agreement and found that the problem was fixed by the next meal break therefore the union was not able to make out its claim—Dismissed—B.T.A. *v.* B.M.A.—No. CR 288(2) of 1992—Beech C.—7/10/92—Building Construction 2272

Claim *re* dispute over limited partnership agreements and subsequent withdrawal of labour—Applicant Union sought a declaration that Respondent's action in imposing the limited partnership documents on the employees involved in the dispute was in breach of the I.R. Act, that the employees were unfairly dismissed and sought reinstatement and payment of wages from the termination to date of reinstatement—Respondent argued that the business had undergone a significant change and that reinstatement of the workers would be impracticable—Commission found on evidence that employees had abandoned their work, that the agreement was not imposed on the workers and that it was not possible to determine the true working relationship of the employees in this instance—Dismissed—M.I.E.U. *v.* The Preston River Abattoir—No. 536 of 1992—Fielding C.—16/10/92—Meat 2602

CUMULATIVE DIGEST—*continued*

Page

INDUSTRIAL MATTER—

[2]Appeal against decision of Commission (71 WAIG 2620) *re* dismissed application for reinstatement on the grounds of unfair dismissal—Appellant argued Commission failed to apply correct principles of Full Bench and Industrial Appeal Court and that the weight of evidence showed that the Appellant was under the control and direction of the Respondent—Full Bench reviewed authorities and found it could not look to extrinsic evidence where a written document contained the whole of the contract, there was no ambiguity and that in the totality, there was not a right to control the Appellant in the restricted manner of an employer with an employee—Dismissed—Ince J.A. *v.* Hartfield Country Club Inc.—Appeal No. 1666 of 1991—Sharkey P., Halliwell S.C., Kennedy C.—19/6/92—Sport and Recreation 1510

[1]Appeal against decision of Full Bench (71 WAIG 2480) *re* order for reinstatement and consequential matters—Appellant argued Full Bench erred in law in holding that the dismissal was for misconduct thus applying the wrong principles and in upholding that the evidentiary onus was not discharged—IAC reviewed matter's chequered history of case, authorities and found that to be a constructive dismissal the employer had to be guilty of conduct which was a significant breach going to the root of the contract which entitled the employee to accept the breach and leave—IAC further found that Full Bench had erroneously focussed attention away from the fairness or unfairness of the dismissal to whether the employee was guilty of misconduct sufficient to justify summary dismissal when there was an agreed resignation and a negotiated payment in lieu of notice—Upheld—Cargill Australia Limited, Leslie Salt Division *v.* F.C.U.—IAC Appeal No. 12 of 1991—Rowland J., Wallwork J., Owen J.—11/6/92—Salt Production and Mining 1495

Application for an order *re* redundancy package—Applicant Union sought order so that if redundancy agreement was not observed they had the ability to take action for its enforcement—Respondent argued having sought the matter be re-allocated that Commission as constituted was biased on the basis of comments made at a conference and that the matter was not an industrial matter—Commission in Preliminary Reasons for Decision reviewed authorities including the Stamers Supermarket case and found that the comments made would not lead an objective observer to perceive that the Commission's ultimate decision might be biased—Commission later found, in line with a Decision of the Full Bench, that there was jurisdiction to make the order sought and that the matter was not a dead issue—Commission further found the appropriate provisions of the Act should not be put aside in favour of leaving the result of the parties' negotiations in industrial limbo—Granted—M.E.W.U. and Others *v.* Arnotts Mills and Ware—No. 264 of 1992—Halliwell S.C.—9/4/92 & 5/8/92—Food Manufacture 1830

[2]Appeal against decision of Commission (72 WAIG 372) *re* denied contractual entitlements—Appellant argued Commission failed to have proper regard to section 26 of the I.R. Act which ought to have led to the offsetting of the Respondent's indebtedness to the Appellant and disputed that it was the employer as named—Full Bench reviewed authorities and found it not within power to make any order for an offset—Commissioner in separate Reasons expressed view regarding whether offsetting was an industrial matter or not—Dismissed—Conti Sheffield Real Estate *v.* Brailey D.—Appeal No. 211 of 1992—Sharkey P., Salmon C., Negus C.—21/8/92—Real Estate 1965

[2]Question of law referred to Full Bench *re* whether demand for monies paid by employer in error was an industrial matter—Applicant argued overpayment was made in the capacity of the employer of the employee—Respondent argued it was a matter of litigation over a mistake and not a dispute over remuneration—Full Bench reviewed authorities and found that the matter was plainly consequential and indirectly related to the relationship of employer and employee—Answered No—A.D.S.T.E. *v.* B.M.A.—No. CA164 of 1992—Sharkey P., Salmon C., George C.—24/9/92—Building 2162

INTERPRETATION—WORDS AND PHRASES—

Conference referred *re* payment for lost time over safety issue—Applicant union claimed that payment should be made on the basis of a usual work week of 54 hours and 60 hours respectively—Respondent argued that it should be based on a 38 hour week—Commission reviewed the meaning of "usual", S.28 of the OHSW Act and found that the wider construction contended for by the Applicant should be implemented—Granted—M.E.W. *v.* Ical Limited and Another—No. CR221 of 1992—Salmon C.—24/6/92 1660

[4]Application for order that a motion passed by union executive to pay General Secretary's legal fees be declared null and void—Applicant argued motion was not put and passed in accordance with democratic control of the union and the payments were *ultra vires* the union rules—Respondent argued that motion was passed in accordance with standing orders—President found on evidence that it had not been intended to give proper notice to the motion so that it could be introduced at the most advantage moment—President reviewed authorities and found without proper notice the resolution was not binding and the equity, good conscience and substantial merits of the case required the executive to resolve the matter properly—Ordered Accordingly—O'Neill C. *v.* S.S.T.U.—No. 1885 of 1991—Sharkey P.—18/6/92—Unions 1533

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that Commission did not have jurisdiction to deal with matter as employee was covered by Public Service Appeal Board jurisdiction—Commission reviewed the Industrial Relations Act, 1979, the Public Service Act 1978 and the Hospital Act No. 23 of 1927 and found that Applicant was a government officer as defined and the maxim generalia specialibus non-derogant applied—Dismissed for want of jurisdiction—Tremain P.C. *v.* King Edward Memorial Hospital for Women—No. 1932 of 1991—Gregor C.—21/8/92—Clerical 2078

[4]Application for orders for the observance of union rules concerning the conduct of union business, resolutions arising out of general meetings and declaring certain rules and actions void—President found in initial reasons a prima facie right for relief on an interim basis and no irreversible consequences of issuing interim orders—Applicant argued, *inter alia*, levies and collection of membership's subscriptions had been done other than in accordance with the rules, that the second respondent had failed to maintain proper membership records and returns to the Industrial Registrar and that a particular rule contravened the Equal Opportunity Act, 1984—Respondent argued Applicant did not have sufficient interest in the matter and was abusing the processes of the Commission as the application was brought for the benefit of another union rather than the Respondent union's membership—Respondent further argued application was brought in bad faith with the objective having the union declared bankrupt and its registration cancelled or suspended—President reviewed statutory provisions, union rules and found members could not provide consensual approval of *ultra vires* acts or validate acts which were *ultra vires* as they were required to observe the union rules—President found whether a breach of the rules was a matter which attracted his exercise of jurisdiction was another matter—President found although Applicant was motivated more by the interests of another union because of the importance of the Respondent union properly handling funds in accordance with the rules and breaches found, it was necessary to consider the matters further—President further found having regard for the Supreme Court and the Trustees Act that there was jurisdiction to deal with the matters conferred specifically on the President by section 66 of the IR Act and that as a matter of law and fact no resolution to raise funds during a ten year period constituted a valid levy nor a valid increase in the subscription prescribed by the rules—President further found payments out of provident fund were *ultra vires*, there was no power to loan monies out of the Union's provident fund and that various committees of management had acted contrary to their duties—President, having regard to the objectives of the Industrial Relations Act, the good conscience and substantial merits of the case found it would be unfair and inequitable to order some members of the committee of management to repay monies and not others even if there was power to do so—President outlined reasons for exercising his discretion or not relating to various matters and orders to be issued—Ordered Accordingly—In further Reasons for Decision President found application remained competent despite Applicant's loss of employment as he "has been a member of an organisation"—President dealt with further matters relating to an auditor's report not earlier submitted or presented to the Applicant—President found costs claimed would normally be legal costs—Ordered Accordingly—O'Brien W. *v.* WAPNA and Others—No. 532 of 1991—Sharkey P.—18/4/91, 24/10/91, 4/3/92, 17/7/92—Unions 2004

CUMULATIVE DIGEST—*continued*

Page

INTERPRETATION—WORDS AND PHRASES—*continued*

[2]Appeal against decision of the Commission (72 WAIG 839) *re* dismissed application to vary award regarding Anzac day holiday—Appellant argued *inter alia*, Commission failed to give proper effect to existing award provisions, to decide the application on its merits contrary to section 26(1)(a) of the I.R. Act and erred in holding that it would not be fair to the Respondent Union to weaken its bargaining position—Full Bench reviewed authorities, the award, Retail Trading Hours Act, Public and Bank Holidays Act, the Enterprise Bargaining Principle and found the onus lay with the parties proposing the variation to show cause and that too literal an interpretation could not be placed on the term "special circumstances" such that the Commission could not be expected to couch its reasons in the terms expected of traditional courts—However, Full Bench found a fair reading of the transcripts, Reasons for Decision and Order did not show that the findings related to the enterprise bargaining process was a live issue in the proceedings, not notified to the parties concerned, such that they were not afforded the opportunity of being heard and hence the decision was either void or voidable—Upheld and Quashed—Stamco Pty Ltd and Others *v.* S.D.A.—Nos. 453, 454, 457,458 and 461 of 1992—Sharkey P., Fielding C., Parks C.—28/8/92—Retail and Wholesale Establishments 1980

Conference referred *re* appeal against penalties and suspension of employees over derailment of an ore train—Applicant union argued that the inquiry procedure was misconceived and that the punishment was too severe—Respondent argued that there was considerable loss of revenue in this incident and as such penalties were reasonable—Commission found on evidence that Agreement authorised the Commission to amend the decision which broadened the powers under Section 44 and that a proper investigation into the event had been conducted which confirmed that drivers because of their special responsibility and skill carried an additional onus to ensure that signals were properly set—Dismissed—C.M.E.T.S.W.U. *v.* BHP Iron Ore Ltd—No. CR418 of 1992—Gregor C.—9/9/92—Iron Ore 2278

[4]Application for true interpretation of Union Rules *re* Membership Status—President reviewed rules and found that an appointed member did not have full membership status regardless of membership prior to employment by the union—President consequentially found returning officer acted correctly in denying a seconded employee the right to attend a conference as a delegate—Declared Accordingly—Lloyd T.K., Returning Officer, S.S.T.U. *v.* S.S.T.U.—No. 1055 of 1992—Sharkey P.—11/9/92—Unions 2175

Conference referred *re* introduction of staggered shift changes—Applicant Employer argued that implementation of this proposal would enable the plant to be run and be manned continuously—Respondent union argued that there should be a running shift change and that Applicants plan when introduced into the Award was on the understanding that it would have a limited operation—Commission reviewed evidence and found that Applicant had indicated that there would be increased efficiency in particular work groups and that they had discharged the onus of establishing claim and issued a Declaration to the effect of the claim—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No CR461 of 1992—Fielding C.—10/9/92—Iron Ore 2273

[2]Appeal against decision of Commission (72 WAIG 594) *re* denied contractual entitlements—Appellant argued he had received notice of hearing late as it had gone to the wrong part of the premises and that led to a miscarriage of justice—Full Bench reviewed regulations and found Notices of Hearing were not required to be served under Regulation 89 of the IRC Regulation 1985 and the notice of proceedings had been duly served—Notice of Hearing was received at registered address albeit late—Dismissed—Friendly Helpers and F.H. Promotions *v.* Galbraith D.—Appeal No. 149 of 1992—Sharkey P., George C., Parks C.,—24/9/92 2161

[2]Appeal against decision of Commission (71 WAIG 2801) *re* registration of an Agreement—Preliminary Matter—Respondent argued the Appellant was not competent to appeal as it was not a party to the application at first instance—Full Bench reviewed I.R. Act, in particular S.49(3), and found Appellant was, in the circumstances, an intervener and the appeal competent—Declared Accordingly—F.M.W.U. *v.* S.D.A. and Others—Appeal No. 1760 of 1991—Sharkey P., Negus C., Beech C.—10/7/92 & 9/9/92—Retail 2514

[4]Application for an Order *re* deletion and substitution of a union rule and interpretation of union rules—Respondent argued President had no jurisdiction to make order sought—Respondent sought direction as to when an electoral role should close to comply with the rules—President reviewed authorities, union rules and found the interpretation of the rule was clear as to what constituted the "quarter night"—President found nothing which required the rule to be disallowed as oppressive or undemocratic—Declared Accordingly—Hassan D. *v.* O'Sullivan F. and Another—No. 1287 of 1992—Sharkey P.—3/11/92—Unions 2759

INTERVENTION—

[2]Appeal against decision of Commission (71 WAIG 2801) *re* registration of an Agreement—Preliminary Matter—Respondent argued the Appellant was not competent to appeal as it was not a party to the application at first instance—Full Bench reviewed I.R. Act, in particular S.49(3), and found Appellant was, in the circumstances, an intervener and the appeal competent—Declared Accordingly—F.M.W.U. *v.* S.D.A. and Others—Appeal No. 1760 of 1991—Sharkey P., Negus C., Beech C.—10/7/92 & 9/9/92—Retail 2514

Application to vary award by consent—Respondent union secretary treasurer sought leave to intervene to object to proposed variations in that amendment may be affected by an undertaking given in the Supreme Court and therefore proceedings should be adjourned until the hearing of the objection—Respondent union argued that objector did not have authority to represent the union in this matter therefore intervention should be disallowed—Commission found on evidence that Respondent union had not fully informed secretary treasurer of the application and that objector had sufficient interest to warrant intervention—Ordered Accordingly—W.A.H.H.A. and Others *v.* L.A.I.E.U.—No. 386 of 1992—Parks C.—29/9/92—Hospitality 2643

JURISDICTION—

[2]Appeal against decision of the Commission (71 WAIG 2502) *re* registration of an agreement—Appellant argued the agreement was contrary to Section 41 of the I.R. Act as it was contrary to the State Wage Principles—Respondent argued a claim for a site allowance was not a claim for improvement in pay and conditions—Full Bench reviewed authorities, State Wage Principles and found insofar as the agreement permitted a new allowance not related to the existence or non existence of compensatable factors it was contrary to the Principles relating to allowances which required evolution on a case by case basis and the Commission had no power to register the agreement—Upheld—C.W.A.I. *v.* A.F.C.C. and Others—Appeal No. 1582 of 1991—Sharkey P., Coleman C.C., Gregor C.—19/6/92—Building 1500

[2]Appeal against decision of Commission (71 WAIG 2620) *re* dismissed application for reinstatement on the grounds of unfair dismissal—Appellant argued Commission failed to apply correct principles of Full Bench and Industrial Appeal Court and that the weight of evidence showed that the Appellant was under the control and direction of the Respondent—Full Bench reviewed authorities and found it could not look to extrinsic evidence where a written document contained the whole of the contract, there was no ambiguity and that in the totality, there was not a right to control the Appellant in the restricted manner of an employer with an employee—Dismissed—Ince J.A. *v.* Hartfield Country Club Inc.—Appeal No. 1666 of 1991—Sharkey P., Halliwell S.C., Kennedy C.—19/6/92—Sport and Recreation 1510

Application for allegedly denied contractual entitlements *re* payment in lieu of notice and pro rata annual leave—Respondent argued question of estoppel in light of previous proceedings, that claim should be stayed in line with principle outlined in Port Melbourne case—Commission reviewed authorities and found that an issue closely connected with the subject matter of earlier litigation ought reasonably be expected to be raised in those proceedings, ought not be the subject matter of subsequent application between the same parties—Commission further found that pro-rata annual leave in the absence of expressed agreement was not able to be converted to cash and if General Order from the Commission was applicable it could not be dealt with before it—Dismissed—Smartt M. *v.* Portman Mining Limited—No. 92 of 1992—Fielding C.—16/6/92—Mining 1641

CUMULATIVE DIGEST—*continued*

Page

JURISDICTION—*continued*

[1]Appeal against decision of Full Bench (71 WAIG 2480) *re* order for reinstatement and consequential matters—Appellant argued Full Bench erred in law in holding that the dismissal was for misconduct thus applying the wrong principles and in upholding that the evidentiary onus was not discharged—IAC reviewed matter's chequered history of case, authorities and found that to be a constructive dismissal the employer had to be guilty of conduct which was a significant breach going to the root of the contract which entitled the employee to accept the breach and leave—IAC further found that Full Bench had erroneously focussed attention away from the fairness or unfairness of the dismissal to whether the employee was guilty of misconduct sufficient to justify summary dismissal when there was an agreed resignation and a negotiated payment in lieu of notice—Upheld—Cargill Australia Limited, Leslie Salt Division *v.* F.C.U.—IAC Appeal No. 12 of 1991—Rowland J., Wallwork J., Owen J.—11/6/92—Salt Production and Mining 1495

[1]Appeal against decision of Full Bench (71 WAIG 3158) *re* that there was no jurisdiction to hear an appeal as it was lodged by an agent—Respondent conceded—IAC found Section 113 of I.R. Act gave power to make regulations, Full Bench had no power to declare Commission regulations invalid and the concession was proper—Upheld—Australian Glass Manufacturing Co. Pty Ltd and Others *v.* T.W.U.—IAC Appeal No. 27 of 30 of 1991—Rowland J., Walsh J., Wallwork J.—3/6/92—Transport 1499

Application for allegedly denied contractual entitlements—Applicant sought a letter from Respondent stating that her dismissal was unfair and claimed contractual entitlements, namely unpaid commissions—Respondent argued Commission ought to refrain from hearing unfair dismissal claim but admitted that benefits were due and consented to an order requiring the sum to be paid—Commission found that as it had no power to order relief sought the matter should not proceed further—Granted In Part—Scaffidi M. *v.* Tarragan Holdings Pty Ltd T/A Roy Weston Hillarys—No. 293 of 1992—Fielding C.—12/6/92—Real Estate 1640

Application that Commission denies or refrain from hearing an application *re* allegedly denied contractual entitlements—Commission found that whilst there were two separate proceedings before itself and another jurisdiction the Respondent was entitled to pursue his initial application—Dismissed—Tri Star Group Pty Ltd *v.* Ball D.J.—No. 853 of 1992—Parks C.—29/7/92 1871

[2]Appeal against decision of Commission (72 WAIG 423) *re* 19 day roster and return of signed agreement—Respondent argued Commission lacked jurisdiction as the matter was for an enforcement of an award or did not have the power to nullify agreements and order their return—Respondent argued declaration was available as relief if it resolved a dispute—Full Bench found claim was clearly for arbitral relief and the Commission was acting pursuant to a clause in the relevant award—Dismissed—Coles/Myer T/A K-Mart Discount Stores *v.* S.D.A.—Appeal No. 158 of 1992—Sharkey P., Gregor C., Beech C.—23/7/92—Retail 1747

Application for allegedly denied contractual entitlements—Applicant sought outstanding commissions from property sales—Respondent argued that another employee had listed the properties in question—Commission found that Applicant was not an employee at the time in question therefore there was no jurisdiction to hear matter—Dismissed for Want of Jurisdiction—D'Alonzo G.R. *v.* Keystone Realty—No. 541 of 1992—Salmon C.—24/7/92—Real Estate 1841

Application for an order *re* redundancy package—Applicant Union sought order so that if redundancy agreement was not observed they had the ability to take action for its enforcement—Respondent argued having sought the matter be re-allocated that Commission as constituted was biased on the basis of comments made at a conference and that the matter was not an industrial matter—Commission in Preliminary Reasons for Decision reviewed authorities including the Stamers Supermarket case and found that the comments made would not lead an objective observer to perceive that the Commission's ultimate decision might be biased—Commission later found, in line with a Decision of the Full Bench, that there was jurisdiction to make the order sought and that the matter was not a dead issue—Commission further found the appropriate provisions of the Act should not be put aside in favour of leaving the result of the parties' negotiations in industrial limbo—Granted—M.E.W.U. and Others *v.* Arnotts Mills and Ware—No. 264 of 1992—Halliwell S.C.—9/4/92 & 5/8/92—Food Manufacture 1830

Conference referred *re* claim that unions and their members be restrained from engaging in work stoppages, bans, limitation or any industrial action on Multiplex Swan Brewery site—Respondent unions argued on the basis that the Commission had no jurisdiction to deal with claim—Commission reviewed authorities and found on evidence that there was an industrial dispute which existed which prevented workers from starting work and ordered *inter alia* the lifting of bans and limitations—Granted—Multiplex Constructions Pty Ltd and Others and C.M.E.T.W.U. and Another—No. CR383 of 1992—Halliwell S.C.—19/8/92 2090

[2]Appeal against decision of Commission (72 WAIG 372) *re* denied contractual entitlements—Appellant argued Commission failed to have proper regard to section 26 of the I.R. Act which ought to have led to the offsetting of the Respondent's indebtedness to the Appellant and disputed that it was the employer as named—Full Bench reviewed authorities and found it not within power to make any order for an offset—Commissioner in separate Reasons expressed view regarding whether offsetting was an industrial matter or not—Dismissed—Conti Sheffield Real Estate *v.* Brailey D.—Appeal No. 211 of 1992—Sharkey P., Salmon C., Negus C.—21/8/92—Real Estate 1965

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that Commission did not have jurisdiction to deal with matter as employee was covered by Public Service Appeal Board jurisdiction—Commission reviewed the Industrial Relations Act, 1979, the Public Service Act 1978 and the Hospital Act No. 23 of 1927 and found that Applicant was a government officer as defined and the maxim generalia specialibus non-derogant applied—Dismissed for want of jurisdiction—Tremain P.C. *v.* King Edward Memorial Hospital for Women—No. 1932 of 1991—Gregor C.—21/8/92—Clerical 2078

Conference referred *re* dispute over refusal of right of entry of Applicant union officials—Applicant union argued that the Respondent employed persons on site covered by the Building Trades (Construction) Award which gave the union right of entry to inspect the sites—Respondent employer argued that Commission did not have jurisdiction to hear matter as it was under jurisdiction of the Industrial Magistrate—Commission preliminarily found that it did have jurisdiction to hear matter and refused request of two parties to be joined to application—Ordered Accordingly B.L.F. *v.* J-Corp Pty Ltd—No. CR458 of 1992—Halliwell S.C.—3/9/92—Building Construction 2086

[4]Application for orders for the observance of union rules concerning the conduct of union business, resolutions arising out of general meetings and declaring certain rules and actions void—President found in initial reasons a prima facie right for relief on an interim basis and no irreversible consequences of issuing interim orders—Applicant argued, *inter alia*, levies and collection of membership's subscriptions had been done other than in accordance with the rules, that the second respondent had failed to maintain proper membership records and returns to the Industrial Registrar and that a particular rule contravened the Equal Opportunity Act, 1984—Respondent argued Applicant did not have sufficient interest in the matter and was abusing the processes of the Commission as the application was brought for the benefit of another union rather than the Respondent union's membership—Respondent further argued application was brought in bad faith with the objective having the union declared bankrupt and its registration cancelled or suspended—President reviewed statutory provisions, union rules and found members could not provide consensual approval of *ultra vires* acts or validate acts which were *ultra vires* as they were required to observe the union rules—President found whether a breach of the rules was a matter which attracted his exercise of jurisdiction was another matter—President found although Applicant was motivated more by the interests of another union because of the importance of the Respondent union properly handling funds in accordance with the rules and breaches found, it was necessary to consider the matters further—President further found having regard for the Supreme Court and the Trustees Act that there was jurisdiction to deal with the matters conferred specifically on the President by section 66 of the IR Act and that as a matter of law and fact no resolution to raise funds during a ten year period constituted a valid levy nor a valid increase in the subscription prescribed by the rules—President further found payments out of provident fund were *ultra vires*, there was no power to loan monies out of the Union's provident fund and that various committees of management had acted contrary to their duties—President, having regard to the objectives of the Industrial Relations Act, the good conscience and substantial merits of the case found it would be unfair and inequitable to order some members of the committee of management to repay monies and not others even if there was power to do so—President outlined reasons for exercising his discretion or not relating to various matters and orders to be issued—Ordered Accordingly—In further Reasons for Decision President found application remained competent despite Applicant's loss of employment as he "has been a member of an organisation"—President dealt with further matters relating to an auditor's report not earlier submitted or presented to the Applicant—President found costs claimed would normally be legal costs—Ordered Accordingly—O'Brien W. *v.* WAPNA and Others—No. 532 of 1991—Sharkey P.—18/4/91, 24/10/91, 4/3/92, 17/7/92—Unions 2004

CUMULATIVE DIGEST—*continued*

Page

JURISDICTION—*continued*

Application for allegedly denied contractual entitlements *re* wages—Respondent argued that there had never been a contract of employment on foot between itself and the Applicant—Commission found on evidence that the Applicant had failed to establish his employment with the Respondent—Dismissed for want of jurisdiction—Benjamin C. *v.* China National Geological Technology Development Import and Export Corporation T/A Mount Marven Mining Project—No. 236 of 1992—Negus C.—15/9/92—Accountant 2226

[2]Question of law referred to Full Bench *re* whether demand for monies paid by employer in error was an industrial matter—Applicant argued overpayment was made in the capacity of the employer of the employee—Respondent argued it was a matter of litigation over a mistake and not a dispute over remuneration—Full Bench reviewed authorities and found that the matter was plainly consequential and indirectly related to the relationship of employer and employee—Answered No—A.D.S.T.E. *v.* B.M.A.—No. CA164 of 1992—Sharkey P., Salmon C., George C.—24/9/92—Building 2162

Application for reinstatement on the grounds of unfair dismissal—Applicant after several communications to the Commission requesting extension of time for a later hearing date failed to appear—Commission found on evidence that there was an obligation on Applicants to act with expedition and due to the inordinate delays in prosecuting claim and the necessity of the Applicant to respond by making himself available in person the claim must fail—Dismissed For Want Of Prosecution—Real M.A. *v.* Worsley Alumina Pty Ltd (Boddington Gold Mine)—No. 1755 of 1991—Gregor C.—14/9/92—Mining 2242

[4]Application for orders *re* breach of union rules—Applicant argued Union President had failed to carry out an order of the Commission constituted by the President and sought that the resolutions of a union's conference be nullified—Respondent argued, *inter alia*, it was entitled to change its meeting procedure, which it did by procedural motion—President reviewed I.R. Act and found union and members were subject to the jurisdiction of the Commission in particular the President and that a breach of rules was a contravention of section 61 under section 84(A)—President was not persuaded that the Executive or union had acted contrary to the orders—Dismissed—Sexton-Finck T.C and Others *v.* Harken E.J., President SSTU and Another—No. 749 of 1992—Sharkey P.—29/9/92—Unions 2178

Application for allegedly denied contractual entitlements *re* annual leave, pro-rata annual leave, reimbursement of telephone costs, advertising and relocation expenses—Respondent argued that Applicants' terms and conditions of employment were subject to laws of another state therefore the Commission did not have jurisdiction—Commission reviewed authorities and found on evidence that although majority of costs were beyond the Commission's jurisdiction, Applicant was entitled to annual leave benefits, relocation expenses and that one weeks wages should be deducted from total claim—Ordered Accordingly—Halls M. *v.* Austware Pottery (Australia) Pty Ltd—No. 600 of 1992—Beech C.—16/10/92—Pottery Sales 2609

[2]Appeal against decision of Commission (71 WAIG 2801) *re* registration of an Agreement—Preliminary Matter—Respondent argued the Appellant was not competent to appeal as it was not a party to the application at first instance—Full Bench reviewed I.R. Act, in particular S.49(3), and found Appellant was, in the circumstances, an intervener and the appeal competent—Declared Accordingly—F.M.W.U. *v.* S.D.A. and Others—Appeal No. 1760 of 1991—Sharkey P., Negus C., Beech C.—10/7/92 & 9/9/92—Retail 2514

[2]Appeal against decision of Commission (72 WAIG 599) *re* Interim Order *re* cessation of industrial action and transfer of employee—Full Bench found as the matter was a "finding", was not of such importance that an appeal should lie and dead, the appeal was incompetent—S.E.C.W.A. *v.* C.M.E.U.—Appeal No. 364 of 1992—Sharkey P., Halliwell S.C., George C.—3/11/92—Energy Supply 2512

[4]Application for stay of Order *re* production of documents pending appeal to Full Bench—President found there was a serious issue to be tried as to jurisdiction and the balance of convenience favoured the Applicant—Granted—J—Corp Pty Ltd *v.* A.B.L.F.—No. 1216 of 1992—Sharkey P.—20/10/92—Building 2531

[1]Appeal against decision of Full Bench (72 WAIG 706) *re* interlocutory orders relating to the conduct of union officers concerning award variation negotiations—Appellant argued orders were made when there was no serious question to be tried and the balance of convenience favoured the Appellant—Appellant further argued there was no evidence that the rules of the union had been breached—IAC stated it should generally be slow to find a fault in the making of interlocutory orders and should not act unless the case was clearly made out—IAC reviewed history of the matter, union rules and was satisfied that the requisite foundation for making of the orders in issue was not before the President when he made them and in the circumstances it was appropriate for the Court to allow the appeal—Upheld and Quashed—Carter L.B. *v.* Drake M.A.—IAC Appeal No. 2 of 1992—Franklyn J., Nicholson J., Ipp J.—20/10/92—Unions 2742

Alleged breach of award *re* underpayment of wages—Defendant Counsel argued that the delays between the making of the complaints and issuing of summons was such to amount to an abuse of process and complaints ought to be dismissed—Industrial Magistrate reviewed authorities and found on evidence that he not only had jurisdiction but was bound to follow the decision as per the Metaxas Case—Industrial Magistrate further found the delays were unconscionable and contrary to the intention of legislature—Dismissed—McCorry G. *v.* Como Investments Pty Ltd t/a Garden City Bistro—Complaint Nos. 154 and 155 of 1992—Cicchini S.M.—2/12/92—Hospitality 2817

[2]Appeal against decision of Commission (72 WAIG 872) *re* establishment of safety committee to resolve dispute over asbestos removal and cessation of industrial action—Appellant argued Order was not in accordance with Section 44(6)(b)(a) of the I.R. Act and that the OHSW Act prevailed over the powers of the Commission under the I.R. Act—Respondent argued matter was dead and the order mute therefore the appeal should be dismissed—Majority of Full Bench reviewed authorities and found the matter was not of such public interest that an appeal should lie and the issue was dead—Dissenting Full Bench member gave reasons in favour of Appellant—Dismissed—S.E.C.W.A. *v.* A.M.W.S.U. and Others—No. 463 of 1992—Sharkey P., Halliwell S.C., Beech C., 3/11/92—Energy Supply 2504

Conference referred *re* claim for reinstatement without loss of entitlements on the grounds of unfair dismissal—Respondent argued that the employee's services were terminated due to poor work performance and that the company was going out of business—Commission reviewed authorities and found on evidence that dismissals were unfair however was not able to order reinstatement as the Respondents no longer engaged in the business—In Supplementary Reasons, the Commission addressed the issue of compensation found it did have jurisdiction, and adopted figures from the Bureau of Statistics to determine the amounts due—Granted in Part—Miscellaneous Workers' Union *v.* Nappy Happy Service—No. CR 517 of 1992—Halliwell S.C.—20/10/92—Laundry 2872

Application for reinstatement on the grounds of unfair dismissal—Respondent questioned Commission's jurisdiction due to 6 1/2 month time lapse since dismissal—Commission reviewed Pepler's Case and found that recentness was not a qualification for jurisdiction and the hearing of case ought to continue—Adjourned—Jackson G. *v.* Alco Pty Ltd—No. 1103 of 1992—Salmon C.—16/11/92—Retail 2835

Application for allegedly denied contractual entitlements—Respondent questioned jurisdiction of Commission as employment relationship with Applicant was not one of service but for service—Commission determined that Applicant was a Consultant and therefore the claim was outside of the jurisdiction of the Commission—Dismissed—Wiltshire D. *v.* Mainwood Holdings Pty Limited t/a WA Transport and Machinery—No. 1205 of 1992—Parks C.—26/11/92—Transport 2852

[2]Appeal against decision of Commission (72 WAIG 1398) *re* cancellation of an Order—Appellant argued Order was in excess of jurisdiction because it was contrary to Section 44(6) of the I.R. Act—Full Bench found failure to afford opportunity to make submissions was a denial of natural justice—Full Bench found no power to remit matter—Upheld and Quashed—Westralian Equipment Pty Ltd *v.* A.E.E.F.E.U.—Appeal No. 797 of 1992—Sharkey P., Fielding C., Gregor C.—19/11/92—Manufacturing 2750

[4]Application for stay of proceedings *re* production of documents relating to determination of jurisdiction—President found there was no decision to be stayed—Dismissed—J-Corp Pty Ltd *v.* A.B.L.F.—No. 1331 of 1992—Sharkey P.—16/11/92—Building .. 2756

CUMULATIVE DIGEST—*continued*

Page

JURISDICTION—*continued*

[4]Application for Orders *re inter alia*, the observance of union rules, and the validity of office bearers of the Union—President reviewed history of Union business, section 71 of the I.R. Act and found that the Applicant was validly the President notwithstanding the deregistration of the Federal Counterpart Body, as were other office bearers, until the next State election—President further found that the Respondent had not fulfilled the evidentiary onus to prove the Applicant ineligible for membership—President found there had been a series of breaches by the Respondent relating to by-elections for office bearers, the conduct of Union business, keeping of records, failure to permit the Applicant to inspect the records of the Union and the registered office of the Union—President found appointments made according to State rules as purported by Respondent were null and void—President made various orders relating to the observance of Union rules and directing the Registrar to report as to the compliance with any matters requiring compliance—In Supplementary Reasons President found that the Reasons for Decision were reflected in the orders made and made particular comments to specific aspects of the orders—President found no serious matters of dispute between parties as to what the orders would contain—Ordered Accordingly—Jeffery J.R. *v.* W.A.T.A.E.A. and Another—No. 1903 of 1991—Sharkey P.—24/9/92, 26/10/92—Unions 2534

LIVING AWAY FROM HOME ALLOWANCE—

Application to vary award *re* Away From Home and Meal Allowances—Applicant Employer sought to establish standards of accommodation for employees and to modernise various allowances providing or relating to being away from home—Commission was satisfied that variations fell within the provisions of the Wage Fixing Principles—Granted—W.A.G.R.C. *v.* A.R.U.—No. 229 of 1992—Fielding C.—17/7/92—Railways 1811

[3]Application to vary award *re* Shift Allowance and Annual Leave Entitlements for shift workers—Applicant argued claims were justified under Work Value Principle (1989) and Inequities Principle (1989) or as a special case under the 1992 State Wage Principles—Respondent argued claim ignored terms and conditions established in the award reflecting the uniqueness of the Argyle operation—CICS restricted intervention to the matter of flow-on and refused legal representation—CICS reviewed transcript of award application, establishment of the commute cycle, history of award variations and found the award was not a "pre-start" agreement—CICS found no merit in claims and commented in relation to the Enterprise Bargaining Principle—Dismissed—M.E.W.U. *v.* Argyle Diamond Mines Pty Limited—No. 873A of 1991—Coleman C.C., Gregor C., Kennedy C.—17/9/92—Diamond Mines 2167

LONG SERVICE LEAVE—

Application for pro rata long service leave entitlements—Board of Reference found absence to travel overseas was authorised—However, BOR found on evidence employee had resigned to cause a second break-in service—Dismissed—Sawan S. *v.* Mondello's Joinery and Cabinet Works—File No. 23 of 1991—Pope (DR), Beech/Uphill—10/6/92—Furniture Trades . 1624

Application *re* long service leave entitlement—B.O.R. found that period where Applicant was absent was authorised by employer and did not constitute a break in continuous service—B.O.R. also found that the authorised absence would not count as part of the calculation period for Applicant's long service leave entitlement—Granted in Part—Stalk I. *v.* Mecaid (Australia) Pty Ltd—No. 11 of 1992—Carrigg Registrar/Latter/Jones—6/7/92—Clerical 1829

MANAGERIAL PREROGATIVE—

Conference referred *re* introduction of staggered shift changes—Applicant Employer argued that implementation of this proposal would enable the plant to be run and be manned continuously—Respondent union argued that there should be a running shift change and that Applicants plan when introduced into the Award was on the understanding that it would have a limited operation—Commission reviewed evidence and found that Applicant had indicated that there would be increased efficiency in particular work groups and that they had discharged the onus of establishing claim and issued a Declaration to the effect of the claim—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No CR461 of 1992—Fielding C.—10/9/92—Iron Ore 2273

MANNING—

Conference referred *re* introduction of staggered shift changes—Applicant Employer argued that implementation of this proposal would enable the plant to be run and be manned continuously—Respondent union argued that there should be a running shift change and that Applicants plan when introduced into the Award was on the understanding that it would have a limited operation—Commission reviewed evidence and found that Applicant had indicated that there would be increased efficiency in particular work groups and that they had discharged the onus of establishing claim and issued a Declaration to the effect of the claim—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No CR461 of 1992—Fielding C.—10/9/92—Iron Ore 2273

MATERNITY LEAVE—

Application to vary award *re* finalisation of June 1991 Structural Efficiency Agreement—Parties sought to effect an enterprise agreement which mirrored the outcome of proceedings before the Federal Commission and had only three points of disagreement—Commission found parental leave provisions did not conflict with Conditions of Employment Principle and determined matters of Standing Down of Employees, Annual Leave, Absence Before and After Holidays—Commission found no ambiguities or unfairness and accepted the package provided the parties examined the minimum rates configuration—Granted—A.E.E.F.E.U. *v.* John Lysaght (Australia) Limited—No. 1337(B) of 1991—George C.—19/3/92—Electrical and Manufacturing Work 1594

MEAL BREAKS—

Claim *re* failure to follow agreed procedure over lack of amenities and payment of wages—Applicant union argued that power had not been restored to the site by the next "meal break" and that as alternative arrangements were not made employees were entitled to payment for that period not worked—Respondent argued that as some power was restored then it was unreasonable for the workforce to have left the site—Commission declined to exclude Respondent's witnesses from the court when the other was giving evidence and found that Applicant had established claim but was advised that agreement had been reached between the parties—Discontinued—Building Trades Association *v.* Building Management Authority—No. CR 288(1) of 1992—Beech C.—22/6/92—Construction 2629

MEAL MONEY—

Application to vary award *re* Away From Home and Meal Allowances—Applicant Employer sought to establish standards of accommodation for employees and to modernise various allowances providing or relating to being away from home—Commission was satisfied that variations fell within the provisions of the Wage Fixing Principles—Granted—W.A.G.R.C. *v.* A.R.U.—No. 229 of 1992—Fielding C.—17/7/92—Railways 1811

MISCONDUCT—

Appeal against the constructive dismissal of an employee—Appellant felt he had been unfairly forced to resign and sought reinstatement without loss of entitlements—Respondent argued that it had lost confidence and faith in the ability and credibility of the employee to the point where the question of reinstatement could not be a serious option—Commission reviewed the matter de novo and found that the way employee was summarily dismissed was unfair, however there was a reasonable and lawful instruction which employee had disobeyed, that coupled with other charges of peculation and misconduct was sufficient grounds to terminate contract of employment and ordered one months pay in lieu of notice as well as pro-rata long service leave—Ordered Accordingly—Greenaway T.G. *v.* Country High School Hostels Authority—No. PSAB11 of 1991—Negus C./Gornik/Kaub—15/5/92—Education 1700

CUMULATIVE DIGEST—*continued*

Page

MISCONDUCT—*continued*

Appeal against decision of Chairman of Apprenticeship Tribunal *re* refusal to cancel Apprenticeship Agreement—Appellant Employer argued Chairman had erred in finding that Respondent's conduct and failure to comply with agreement obligations had not amounted to misconduct—Commission reviewed matter de novo and found that other instances of misconduct were established by evidence therefore grounds had been made out—Upheld—Sarich P.M. and R.T. T/A Cape Bouvard Farm *v.* Cornock P.T.—No. APA 1 of 1992—Negus C.—3/6/92 1710

[1]Appeal against decision of Full Bench (71 WAIG 2480) *re* order for reinstatement and consequential matters—Appellant argued Full Bench erred in law in holding that the dismissal was for misconduct thus applying the wrong principles and in upholding that the evidentiary onus was not discharged—IAC reviewed matter's chequered history of case, authorities and found that to be a constructive dismissal the employer had to be guilty of conduct which was a significant breach going to the root of the contract which entitled the employee to accept the breach and leave—IAC further found that Full Bench had erroneously focussed attention away from the fairness or unfairness of the dismissal to whether the employee was guilty of misconduct sufficient to justify summary dismissal when there was an agreed resignation and a negotiated payment in lieu of notice—Upheld—Cargill Australia Limited, Leslie Salt Division *v.* F.C.U.—IAC Appeal No. 12 of 1991—Rowland J., Wallwork J., Owen J.—11/6/92—Salt Production and Mining 1495

Conference referred *re* summary dismissal of employee for alleged misconduct—Applicant Union claimed dismissal was unfair and sought reinstatement without loss of entitlements—Respondent argued that employee had behaved in a threatening intimidatory manner and violent way towards a fellow worker and that a review procedure had been undertaken—Commission found on evidence that review process had been compromised, the employee's behaviour had arisen out of genuine concern as Union Convenor for fellow employee, that the punishment was disproportionate to the offence and therefore unfair—Granted in Part—A.W.U. *v.* BHP Iron Ore Ltd—No. CR322 of 1992—Gregor C.—11/6/92—Mining 1656

Application for reinstatement on the grounds of unfair dismissal—Applicant union argued employer should not have taken an earlier incident into account and should have applied the best case scenario because of the workers good record—Respondent argued the key element in the authorities was that a participant in a fight as opposed to a victim may be treated the same as a person who has inflicted harm on another—Commission reviewed authorities and found on evidence that the investigation into the incident was flawed and that the dismissal was tainted—Granted—C.M.E.U. *v.* R.R.I.A.—No. 1557 of 1991—Gregor C.—5/6/92—Iron Ore 1630

Application for reinstatement on the grounds of unfair dismissal—Applicant argued that she had not at any stage any intention of acting dishonestly about a "tip" and did nothing more than follow her understanding of the usual practice—Respondent argued that there was a difference between a tip and unclaimed money and the actions of the Applicant were regarded as being a breach of duty sufficient to warrant termination—Commission found on evidence that retaining large amounts of money was not an usual or acceptable practice therefore Applicant had not discharged onus of establishing claim—Dismissed—"C" *v.* Quality Pacific Management Pty Ltd—No. 628 of 1992—Beech C.—Hospitality 1838

Application for alleged non payment of contractual benefits—Applicant sought payment of wages to end of trial period on the basis that it was a fixed term contract—Commission found on evidence that the Applicant failed to come up to the reasonable standard of performance or behaviour which resulted in a breach in the implied terms of the contract, entitling the employer to terminate the contract—Dismissed—Buck D. *v.* Wizard Soft Computers—No. 160 of 1992—Halliwell S.C.—16/7/92—Computers 1837

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant argued on the basis of sexual harassment by fellow worker and failure of management to handle this situation—Respondent argued employee was rude, insubordinate, uncooperative, deceitful and failed to obey lawful instruction—Commission found on evidence that there was no attempt to rectify unacceptable behaviour by fellow employee nor a proper investigation therefore summary termination was flawed and ordered reinstatement and appropriate compensation—Granted—Taylor R.J. *v.* Dominion Mining Limited—No. 906 of 1991—Gregor C.—16/6/92—Mining 1642

Application for reinstatement on the grounds of alleged unfair summary dismissal—Applicant sought outstanding salary and one weeks pay in lieu of notice—Respondent argued that Applicant was terminated for alleged gross misconduct and had withheld wages said to be owing to offset missing money from the till—Commission found on evidence that whilst notice payment in this instance was not applicable, payment up till the time of dismissal was due—Granted in Part—Kerridge T.M. *v.* B.P. Victoria Park—No. 555 of 1992—Beech C.—28/8/92 2072

[2]Appeal against decision of Commission (72 WAIG 173) *re* dismissed claim for reinstatement on the grounds of unfair dismissal—Appellant argued Commission erred in finding the Respondent entitled to summarily dismiss the employee as there was insufficient evidence of striking or intending to strike another employee—Respondent argued employee was dismissed for hostile behaviour and the likelihood that it might occur again—Full Bench reviewed authorities and found on evidence it was open for the Commission to make various findings as it did—However Full Bench found the Commission failed to take into account all of the relevant circumstances and all alternatives were not canvassed—The Appellant had therefore discharged the onus upon it—Upheld and Decision Varied—T.W.U. *v.* BHP Iron Ore Limited—Appeal No. 26 of 1992—Sharkey P., Coleman C.C., Parks C.—3/8/92—Iron Ore 1994

[2]Appeal against decision of Commission (70 WAIG 853) *re* reinstatement on the grounds of unfair dismissal—Appellant argued Commission had erred in making various findings of fact in relation to alleged assault and sexual harassment—Full Bench reviewed authorities and found on evidence Commission had not erred in its discretion—Dismissed—Royal Perth Hospital *v.* Lynn T.—Appeal No. 405 of 1992—Sharkey P., Salmon C., Kennedy C.—25/8/92—Health 1976

Conference referred *re* appeal against penalties and suspension of employees over derailment of an ore train—Applicant union argued that the inquiry procedure was misconceived and that the punishment was too severe—Respondent argued that there was considerable loss of revenue in this incident and as such penalties were reasonable—Commission found on evidence that Agreement authorised the Commission to amend the decision which broadened the powers under Section 44 and that a proper investigation into the event had been conducted which confirmed that drivers because of their special responsibility and skill carried an additional onus to ensure that signals were properly set—Dismissed—C.M.E.T.S.W.U. *v.* BHP Iron Ore Ltd—No. CR418 of 1992—Gregor C.—9/9/92—Iron Ore 2278

Conference referred *re* dismissal of an employee for alleged misconduct—Applicant union argued that employee had been unfairly dismissed and sought reinstatement without loss of entitlements—Respondent argued that employee should be held responsible for losses incurred through the disappearance of money and a customers property and through damages caused to a customer's vehicle which had warranted termination—Commission found on evidence that a suspicion existed which caused a breakdown in the relationship and trust between employer and employee therefore dismissal in this instance was not unfair—Dismissed—A.W.U. *v.* Sage Holdings Pty Ltd—No CR342 of 1992—George C.—14/9/92—Petrol Station 2275

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that employee had resigned and was not able to bring the matter before the Commission—Commission found on evidence that Applicant was constructively dismissed—Commission however further found that the Applicant had refused to obey a reasonable and lawful command by Respondent warranting dismissal—Dismissed—Clarke D.A. *v.* Capricorn Society Ltd—No. 980 of 1992—Beech C.—9/10/92—Clerical 2228

Appeals against disciplinary action *re* failure to provide prisoner with adequate protection—Applicants argued that assault of prisoner was not due to wilful act of negligence but was due to the lack of prison procedure—PSAB found that both Applicants were equally culpable and so accepted decision of Public Service Commissioner to equalise fines—PSAB further found that the inadequate prison procedure was a factor leading to assault and ordered that recording of Applicants' transfer as disciplinary action be removed—Vyner A.B. and Another *v.* P.S.C.—PSAB Nos. 2 & 3 of 1991—Negus C., Floate/Chinnery—18/9/91—Corrective Services 2690

Application for reinstatement on the grounds of unfair dismissal—Applicant argued effect of alcohol consumed was minimal—Respondent argued that Applicant was aware of work rules as employee handbook had been issued and that clear breach of rule occurred—Commission found summary termination justified—Dismissed—Ovens P.M. *v.* Hills Industries Limited, Communication Division—No. 923 of 1992—Parks C.—26/10/92 2617

CUMULATIVE DIGEST—*continued*

Page

MISCONDUCT—*continued*

Application for reinstatement on the grounds of unfair summary dismissal for alleged misconduct—Applicant sought payment for wages and accommodation allowance—Respondent argued that the employee had engaged in improper conduct and behaviour with another employee which had warranted termination—Commission found on evidence that Applicant's role in the incident was somewhat different to the other employee and that summary dismissal was not a fair exercise of the employer's rights and ordered reinstatement to prior position and compensation for wages and loss of allowances—Granted—Sverns U. *v.* Advanced Food Systems International Limited—No. 970 of 1992—George C.—3/11/92—Restaurant 2846

Conference referred *re* dispute over summary dismissals for alleged misconduct—Applicant union argued that the terminations were disproportionate to the importance of the disagreement between the employees therefore unfair—Commission reviewed authorities and found on evidence that the two members had breached their contracts of employment in trying to cover up the incident and that decision to terminate was neither harsh nor unfair—Dismissed—A.W.U. *v.* Argyle Diamond Mines Pty Ltd—No. CR561 of 1992—Gregor C.—13/11/92—Mining 2859

NATURAL JUSTICE—

Application for an order *re* redundancy package—Applicant Union sought order so that if redundancy agreement was not observed they had the ability to take action for its enforcement—Respondent argued having sought the matter be re-allocated that Commission as constituted was biased on the basis of comments made at a conference and that the matter was not an industrial matter—Commission in Preliminary Reasons for Decision reviewed authorities including the Stamers Supermarket case and found that the comments made would not lead an objective observer to perceive that the Commission's ultimate decision might be biased—Commission later found, in line with a Decision of the Full Bench, that there was jurisdiction to make the order sought and that the matter was not a dead issue—Commission further found the appropriate provisions of the Act should not be put aside in favour of leaving the result of the parties' negotiations in industrial limbo—Granted—M.E.W.U. and Others *v.* Arnotts Mills and Ware—No. 264 of 1992—Halliwell S.C.—9/4/92 & 5/8/92—Food Manufacture 1830

Application for reinstatement on the grounds of unfair dismissal—Applicant union argued employer should not have taken an earlier incident into account and should have applied the best case scenario because of the workers good record—Respondent argued the key element in the authorities was that a participant in a fight as opposed to a victim may be treated the same as a person who has inflicted harm on another—Commission reviewed authorities and found on evidence that the investigation into the incident was flawed and that the dismissal was tainted—Granted—C.M.E.U. *v.* R.R.I.A.—No. 1557 of 1991—Gregor C.—5/6/92—Iron Ore 1630

[2]Appeal against decision of the Commission (72 WAIG 839) *re* dismissed application to vary award regarding Anzac day holiday—Appellant argued *inter alia*, Commission failed to give proper effect to existing award provisions, to decide the application on its merits contrary to section 26(1)(a) of the I.R. Act and erred in holding that it would not be fair to the Respondent Union to weaken its bargaining position—Full Bench reviewed authorities, the award, Retail Trading Hours Act, Public and Bank Holidays Act, the Enterprise Bargaining Principle and found the onus lay with the parties proposing the variation to show cause and that too literal an interpretation could not be placed on the term "special circumstances" such that the Commission could not be expected to couch its reasons in the terms expected of traditional courts—However, Full Bench found a fair reading of the transcripts, Reasons for Decision and Order did not show that the findings related to the enterprise bargaining process was a live issue in the proceedings, not notified to the parties concerned, such that they were not afforded the opportunity of being heard and hence the decision was either void or voidable—Upheld and Quashed—Stamco Pty Ltd and Others *v.* S.D.A.—Nos. 453, 454, 457,458 and 461 of 1992—Sharkey P., Fielding C., Parks C.—28/8/92—Retail and Wholesale Establishments 1980

[2]Appeal against decision of Commission (72 WAIG 594) *re* denied contractual entitlements—Appellant argued he had received notice of hearing late as it had gone to the wrong part of the premises and that led to a miscarriage of justice—Full Bench reviewed regulations and found Notices of Hearing were not required to be served under Regulation 89 of the IRC Regulation 1985 and the notice of proceedings had been duly served—Notice of Hearing was received at registered address albeit late—Dismissed—Friendly Helpers and F.H. Promotions *v.* Galbraith D.—Appeal No. 149 of 1992—Sharkey P., George C., Parks C.,—24/9/92 2161

Appeals against disciplinary action *re* failure to provide prisoner with adequate protection—Applicants argued that assault of prisoner was not due to wilful act of negligence but was due to the lack of prison procedure—PSAB found that both Applicants were equally culpable and so accepted decision of Public Service Commissioner to equalise fines—PSAB further found that the inadequate prison procedure was a factor leading to assault and ordered that recording of Applicants' transfer as disciplinary action be removed—Vyner A.B. and Another *v.* P.S.C.—PSAB Nos. 2 & 3 of 1991—Negus C., Floate/Chinnery—18/9/91—Corrective Services 2690

[2]Appeals against decision of Commission (72 WAIG 888, 2843) *re* excusing witness and dismissal of unfair dismissal/contractual entitlement claims—Appellant argued, *inter alia*, he was denied the opportunity to fairly and fully present his case and that in the public interest an appeal should lie—Full Bench reviewed authorities and found from evidence it was not possible to say that the Appellant was an employee of either of the Respondent—Full Bench found nothing which could lead to the conclusion that cause was shown for the witnesses to appear—Dismissed—Mosson B.C. *v.* Haymarket Publishing and Another—Appeal No. 503 of 1992—Sharkey P., Fielding C., Beech C.—22/10/92—Publishing 2517

[2]Appeal against decision of Commission (72 WAIG 1398) *re* cancellation of an Order—Appellant argued Order was in excess of jurisdiction because it was contrary to Section 44(6) of the I.R. Act—Full Bench found failure to afford opportunity to make submissions was a denial of natural justice—Full Bench found no power to remit matter—Upheld and Quashed—Westralian Equipment Pty Ltd *v.* A.E.E.F.E.U.—Appeal No. 797 of 1992—Sharkey P., Fielding C., Gregor C.—19/11/92—Manufacturing 2750

[2]Appeal against decision of Commission (72 WAIG 1871) *re* dismissed application to refrain from hearing matter—Appellant argued Commission erred in determining the matter was different to those extent before the District Court and failed to give adequate reasons—Full Bench found proceeding to hear the application proper at first instance occasioned no injustice despite delay in issuing writ—Dismissed—Tri Star Group Pty Ltd *v.* Ball D.J.—Appeal No. 955 of 1992—Sharkey P., Halliwell S.C.,—Salmon C.—12/11/92 2752

NEXUS—

Application to vary award *re* 3rd and final minimum rates adjustment—Commission found good reason to maintain approach of earlier decisions, thus maintain parity and establish coherence with the counterpart federal award—Granted—W.A.C.A.T.U. *v.* Fullin Tailoring Company and Others—No. 482 of 1992—Kennedy C.—29/6/92—Clothing 1572

Application to vary award *re* provisions to replace payment for work on the basis of results—Applicant argued variations sought were parallel to federal award amendments and federal decision as to merit and conformity with wages principles and therefore should be endorsed—Commission found award should be varied and commented on allowing for changes in Respondents—Granted—W.A.C.T.U. *v.* Fullin Tailoring Company and Others—No. 1740 of 1991—Kennedy C.—26/6/92—Clothing 1570

Application to vary award *re* call-out allowance and special rates and provisions by consent—Parties sought to bring allowances in line with Consumer Price Index movement and relied on a nexus—Commission was prepared to accede to request as proposed although a dearth of information was supplied by the parties—Granted—W.A.R.O.U. *v.* W.A.G.R.C.—No. 1082 of 1992—Fielding C.—19/11/92—Railways 2807

ORDER—

Conference referred *re* claim that consent order ought to be cancelled—Applicant union argued that order was no longer necessary and that it enabled the Respondent to engineer disputes to prove that the union was in breach of the order—Respondent argued that unions track record in respect of precipitating industrial action in defiance of consultation was such as to warrant the continuation of the order—Commission found on evidence that Applicant had not made out its claim however a redrafted order was found to be more amenable to reflect concerns at issue—Ordered Accordingly—M.I.E.U. *v.* W.A.M.C—No. CR452 of 1992—Halliwell S.C.—10/9/92—Meat 2282

CUMULATIVE DIGEST—*continued*

Page

OVERTIME—

Application to vary awards *re* allowances and overtime by consent—Commission was satisfied that the variations sought fell within the Principles and should issue—Granted—W.A.P.U. *v.* Hon. Minister for Police—Nos. 660 & 661 of 1992—Kennedy C.—29/6/92—Police 1546

[2]Appeal against decision of Commission (72 WAIG 860) *re* denied contractual entitlements—Appellants argued the Commission erred in fact and law with regards to time and wages records were denied natural justice and erred in determining the terms and nature of the contracts of employment—Full Bench found Commission did not misuse the advantage of observing witnesses and there was no inference erroneously drawn or left out from the primary facts which required correction—Dismissed—Hazart Pty Ltd t/a Southern Cross Koala and Another *v.* Mullan L.—Appeal No. 448 of 1992—Sharkey P., Fielding C., Gregor C.—1/9/92—Horticulture 1971

PENALTY RATES—

Application to vary award *re* Holiday Work and Holidays—Applicant sought to overcome discrepancies in the award relating to the annual Christmas Day shutdown in that special penalties for work on Christmas Day to be extended to Boxing Day shifts—Commission was satisfied that variations sought should issue—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No. 975 of 1992—Fielding C.—8/9/92—Iron Ore 2212

PIECE WORK—

Application to vary award *re* provisions to replace payment for work on the basis of results—Applicant argued variations sought were parallel to federal award amendments and federal decision as to merit and conformity with wages principles and therefore should be endorsed—Commission found award should be varied and commented on allowing for changes in Respondents—Granted—W.A.C.T.U. *v.* Fullin Tailoring Company and Others—No. 1740 of 1991—Kennedy C.—26/6/92—Clothing 1570

PRINCIPLES—

[2]Appeal against decision of the Commission (71 WAIG 2502) *re* registration of an agreement—Appellant argued the agreement was contrary to Section 41 of the I.R. Act as it was contrary to the State Wage Principles—Respondent argued a claim for a site allowance was not a claim for improvement in pay and conditions—Full Bench reviewed authorities, State Wage Principles and found insofar as the agreement permitted a new allowance not related to the existence or non existence of compensatable factors it was contrary to the Principles relating to allowances which required evolution on a case by case basis and the Commission had no power to register the agreement—Upheld—C.W.A.I. *v.* A.F.C.C. and Others—Appeal No. 1582 of 1991—Sharkey P., Coleman C.C., Gregor C.—19/6/92—Building 1500

[3]Application to vary award *re* rates and conditions for construction work—Applicant argued proposal fit within Structural Efficiency Principle, established appropriate rates and conditions and would be in the public interest by reducing demarcation disputes—Respondents and Interveners argued *inter alia* Applicant had not fully comprehended the real financial impact and further emphasised the dangers of flow on—CICS found September 1989 Principles were the appropriate Principles to be applied, that the application did not satisfy the requirements of a special case and that the minimum rates adjustment process provided the vehicle for the industry to assess its needs—Dismissed—F.P.F.A.I.I.U. *v.* Allwood Furniture Industries and Others—No. 1226A of 1990—Coleman C.C., Halliwell S.C., Beech C.—16/6/92—Furniture/Construction 1524

Applications to vary award *re* 2.5% Structural Efficiency Wage Adjustments—Applications heard in conjunction with Federal applications—Applicant Union argued the industry was already lean, hungry and efficient through the efforts of its members who were amongst the lowest paid and most vulnerable of employees and saw little to gain unless employers were not firmly repelled in attempts at negative costs cutting—Respondents argued threatened industrial action was contrary to the dispute settlement procedures erected when negotiating the Second Tier Wage Increase—Commission outlined its attempts at conciliation and found the parties had not become imbued with the spirit of the Structural Efficiency Principle—Commission determined matters of union representation at enterprise level consultation committees, Accrued Days Off agreement to examine demarcation matters and further found that there were special circumstance to grant the agreed operative date—Ordered Accordingly—F.M.W.U. *v.* Anglican Homes (Inc) and Others—No. 1394, 1401, 1405, 1410, 1411, 1421, 1418, 1437, 1440, 1639 and 1641 of 1991—Negus C.—27/11/91—Health 1547

Application to vary award *re* 2.5% Structural Efficiency Wage Adjustment, supplementary payments and other provisions—Respondent argued Union's proposals did not satisfy State Wage Principles—Commission in absence of parties agreement, heard and determined claims and counterclaims relating to: Contract of Employment, Hours, Annual Leave, Overtime, Time and Wages Record, Special Rates and Provisions, Wages, Dispute Settlement Procedure, Trade Union Training Leave, Training Leave Structural Efficiency and Award Modernisation, Record Keeping, Essential Services, Stand-Down, Transfer to Another Workplace, and Employee Counselling of Operational Meetings clauses—Award varied—F.M.W.U. *v.* Canine Security and Others—No. 1415 of 1991—Parks C.—10/7/92—Security 1813

Application to vary award *re* 2.5% Structural Efficiency Adjustment wage rates and allowances—Applicant Union argued that increases sought were in line with wage fixing principles—GSTT found on evidence that whilst wage increases should be effected, the other variations sought should be dealt with after further discussions and consultation between the parties—Ordered Accordingly—S.S.T.U. *v.* Hon Minister for Education—No. T2 of 1992 Kennedy C., Reeves/McKinnon—15/7/92—Education 1931

Application to vary award *re* Structural Efficiency Wage Adjustment—Contract of Service clause disputed only—Applicant Union argued clause should have a qualification to limit the magnitude of change while allowing flexibility—Respondent argued amended proposal was not as facilitative as initial application and did not comply with the Wage Fixing Principles—Commission found Applicant had not made out its case—Granted in Part—C.M.E.U. *v.* BHP Iron Ore Ltd—No. 159 of 1992—Gregor C.—29/5/92—Iron Ore 1587

[3]Application to vary award *re* redundancy—Applicant union sought that superannuation benefits paid under the award not be offset against severance pay on termination—Respondent argued an interpretation would have been a more appropriate approach that the need for the variation had not been established and CICS had to apply the Caris the Jewellers case—CICS reviewed authorities and found TCR test case had not created a standard for all other awards and that it was appropriate that the difference status of Occupational or Award Based Superannuation be recognised in award provisions—Granted—A.E.E.F.E.U. *v.* A.C. Electrical Engineering Pty Ltd and Others—No. 678 of 1991—George C., Beech C., Parks C.—1/7/92—Metal and Electrical Trades 1518

Application to amend award *re* 4.5% increase in wages and allowances by consent—Applicant employer claimed that Enterprise Bargaining Principle in Special Case imposed a no limit level on wages and allowances increases and that Principles should be used as policy guidelines—Respondent unions were concerned that future claims under Enterprise Bargaining Principle might be restricted—Commission found on evidence that the circumstances surrounding claim warranted a special case claim for purpose of the Principles—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No. 1115 of 1992—Fielding C.—27/11/92—Mining 2788

PROCEDURAL MATTERS—

[4]Application for stay of an order *re* denied contractual entitlements—President found that the Appellant had not been properly served with the initial application, was a serious issue to be tried, that the balance of convenience favoured the Applicant and ordered a stay with a limited period—Granted—Thomas Fletcher T/A Friendly Helpers and F.H. Promotions *v.* Galbraith D.W.J.—No. 315 of 1992—Sharkey P.—7/7/92—Promotions 1527

CUMULATIVE DIGEST—*continued*

Page

PROCEDURAL MATTERS—*continued*

Appeal against decision of Chairman of Apprenticeship Tribunal *re* refusal to cancel Apprenticeship Agreement—Appellant Employer argued Chairman had erred in finding that Respondent's conduct and failure to comply with agreement obligations had not amounted to misconduct—Commission reviewed matter de novo and found that other instances of misconduct were established by evidence therefore grounds had been made out—Upheld—Sarich P.M. and R.T. T/A Cape Bouvard Farm *v.* Cornock P.T.—No. APA 1 of 1992—Negus C.—3/6/92 1710

[1]Appeal against decision of Full Bench (71 WAIG 3158) *re* that there was no jurisdiction to hear an appeal as it was lodged by an agent—Respondent conceded—IAC found Section 113 of I.R. Act gave power to make regulations, Full Bench had no power to declare Commission regulations invalid and the concession was proper—Upheld—Australian Glass Manufacturing Co. Pty Ltd and Others *v.* T.W.U.—IAC Appeal No. 27 of 30 of 1991—Rowland J., Walsh J., Wallwork J.—3/6/92—Transport 1499

Application that Commission denies or refrain from hearing an application *re* allegedly denied contractual entitlements—Commission found that whilst there were two separate proceedings before itself and another jurisdiction the Respondent was entitled to pursue his initial application—Dismissed—Tri Star Group Pty Ltd *v.* Ball D.J.—No. 853 of 1992—Parks C.—29/7/92 1871

[4]Application for order *re* breach of union rules *re* officers and the management of a union (continued from 72 WAIG 1529)—Application for interim orders *re* validity of meetings and actions of Acting Union President—President reviewed background of Industrial Appeal, Court Decision, other authorities and found he was not persuaded on the evidence that equity, good conscience and the substantial merits as well as the balance of convenience would direct him to make any interim orders save one dealing with union mail—Granted in Part—President dealt with application remitted from Industrial Appeal Court *re* union election to fill vacancy of a Union President's office—President found and gave reasons therefore ordering the Registrar to update the Union's electoral role—President found and gave reasons therefore that it was not in equity, good conscious, the substantial merits of the case or public interest to truncate proceedings under section 27(1)(a) of the I.R. Act and gave further reasons regarding an order for an amended notice of answer and counter proposal—President was not persuaded to discharge interim orders—In Supplementary Reasons President found I.A.C. matters did not preclude an order that the Registrar examine mail of the union to determine the electoral role—Orders Issued Accordingly—Drake M.A. *v.* Carter L.B. and Others—Nos. 1053, 1478, 1479, 1529 of 1991 and 127 of 1992—Sharkey P.—17/6/92, 10/7/92 & 30/7/92—Unions 1776

[2]Appeal against decision of Commission (72 WAIG 131) *re* variation of an award—Appellant argued Commission had misconstrued evidence and erred in finding an extra difficulty in slaughtering ram lambs of 8 to 24% of ewe lambs—Full Bench reviewed authorities and having regard for the evidence found one could not find on the balance of probabilities that it had been established otherwise and the Commission had not erred in its discretion—Dismissed—W.A Meat Commission *v.* A.M.I.E.U.—Appeal No. 35 of 1992—Sharkey P., Gregor C., Parks C.—29/7/92—Meat 1732

Application for an order *re* redundancy package—Applicant Union sought order so that if redundancy agreement was not observed they had the ability to take action for its enforcement—Respondent argued having sought the matter be re-allocated that Commission as constituted was biased on the basis of comments made at a conference and that the matter was not an industrial matter—Commission in Preliminary Reasons for Decision reviewed authorities including the Stamers Supermarket case and found that the comments made would not lead an objective observer to perceive that the Commission's ultimate decision might be biased—Commission later found, in line with a Decision of the Full Bench, that there was jurisdiction to make the order sought and that the matter was not a dead issue—Commission further found the appropriate provisions of the Act should not be put aside in favour of leaving the result of the parties' negotiations in industrial limbo—Granted—M.E.W.U. and Others *v.* Arnotts Mills and Ware—No. 264 of 1992—Halliwell S.C.—9/4/92 & 5/8/92—Food Manufacture 1830

[2]Appeal against decision of Commission (72 WAIG 860) *re* denied contractual entitlements—Appellants argued the Commission erred in fact and law with regards to time and wages records were denied natural justice and erred in determining the terms and nature of the contracts of employment—Full Bench found Commission did not misuse the advantage of observing witnesses and there was no inference erroneously drawn or left out from the primary facts which required correction—Dismissed—Hazart Pty Ltd t/a Southern Cross Koala and Another *v.* Mullan L.—Appeal No. 448 of 1992—Sharkey P., Fielding C., Gregor C.—1/9/92—Horticulture 1971

[4]Application for orders for the observance of union rules concerning the conduct of union business, resolutions arising out of general meetings and declaring certain rules and actions void—President found in initial reasons a prima facie right for relief on an interim basis and no irreversible consequences of issuing interim orders—Applicant argued, *inter alia*, levies and collection of membership's subscriptions had been done other than in accordance with the rules, that the second respondent had failed to maintain proper membership records and returns to the Industrial Registrar and that a particular rule contravened the Equal Opportunity Act, 1984—Respondent argued Applicant did not have sufficient interest in the matter and was abusing the processes of the Commission as the application was brought for the benefit of another union rather than the Respondent union's membership—Respondent further argued application was brought in bad faith with the objective having the union declared bankrupt and its registration cancelled or suspended—President reviewed statutory provisions, union rules and found members could not provide consensual approval of *ultra vires* acts or validate acts which were *ultra vires* as they were required to observe the union rules—President found whether a breach of the rules was a matter which attracted his exercise of jurisdiction was another matter—President found although Applicant was motivated more by the interests of another union because of the importance of the Respondent union properly handling funds in accordance with the rules and breaches found, it was necessary to consider the matters further—President further found having regard for the Supreme Court and the Trustees Act that there was jurisdiction to deal with the matters conferred specifically on the President by section 66 of the IR Act and that as a matter of law and fact no resolution to raise funds during a ten year period constituted a valid levy nor a valid increase in the subscription prescribed by the rules—President further found payments out of provident fund were *ultra vires*, there was no power to loan monies out of the Union's provident fund and that various committees of management had acted contrary to their duties—President, having regard to the objectives of the Industrial Relations Act, the good conscience and substantial merits of the case found it would be unfair and inequitable to order some members of the committee of management to repay monies and not others even if there was power to do so—President outlined reasons for exercising his discretion or not relating to various matters and orders to be issued—Ordered Accordingly—In further Reasons for Decision President found application remained competent despite Applicant's loss of employment as he "has been a member of an organisation"—President dealt with further matters relating to an auditor's report not earlier submitted or presented to the Applicant—President found costs claimed would normally be legal costs—Ordered Accordingly—O'Brien W. *v.* WAPNA and Others—No. 532 of 1991—Sharkey P.—18/4/91, 24/10/91, 4/3/92, 17/7/92—Unions 2004

[2]Appeal against decision of Commission (72 WAIG 173) *re* dismissed claim for reinstatement on the grounds of unfair dismissal—Appellant argued Commission erred in finding the Respondent entitled to summarily dismiss the employee as there was insufficient evidence of striking or intending to strike another employee—Respondent argued employee was dismissed for hostile behaviour and the likelihood that it might occur again—Full Bench reviewed authorities and found on evidence it was open for the Commission to make various findings as it did—However Full Bench found the Commission failed to take into account all of the relevant circumstances and all alternatives were not canvassed—The Appellant had therefore discharged the onus upon it—Upheld and Decision Varied—T.W.U. *v.* BHP Iron Ore Limited—Appeal No. 26 of 1992—Sharkey P., Coleman C.C., Parks C.—3/8/92—Iron Ore 1994

[2]Appeal against decision of Commission (70 WAIG 853) *re* reinstatement on the grounds of unfair dismissal—Appellant argued Commission had erred in making various findings of fact in relation to alleged assault and sexual harassment—Full Bench reviewed authorities and found on evidence Commission had not erred in its discretion—Dismissed—Royal Perth Hospital *v.* Lynn T.—Appeal No. 405 of 1992—Sharkey P., Salmon C., Kennedy C.—25/8/92—Health 1976

Appeal to Public Service Appeal Board against decision *re* termination—Board found on evidence that the Respondent was left with no alternative but to terminate employee's contract of employment—Board further found that due to the sensitivity of the issues involved no further reasons for decisions would be published—Dismissed—Cooke A. *v.* West Australian Alcohol and Drug Authority—No. PSAB 7 of 1992—Negus C., Horden/Wall—27/8/92 2110

CUMULATIVE DIGEST—*continued*

Page

PROCEDURAL MATTERS—*continued*

[2]Appeal against decision of the Commission (72 WAIG 839) *re* dismissed application to vary award regarding Anzac day holiday—Appellant argued *inter alia*, Commission failed to give proper effect to existing award provisions, to decide the application on its merits contrary to section 26(1)(a) of the I.R. Act and erred in holding that it would not be fair to the Respondent Union to weaken its bargaining position—Full Bench reviewed authorities, the award, Retail Trading Hours Act, Public and Bank Holidays Act, the Enterprise Bargaining Principle and found the onus lay with the parties proposing the variation to show cause and that too literal an interpretation could not be placed on the term "special circumstances" such that the Commission could not be expected to couch its reasons in the terms expected of traditional courts—However, Full Bench found a fair reading of the transcripts, Reasons for Decision and Order did not show that the findings related to the enterprise bargaining process was a live issue in the proceedings, not notified to the parties concerned, such that they were not afforded the opportunity of being heard and hence the decision was either void or voidable—Upheld and Quashed—Stamco Pty Ltd and Others *v.* S.D.A.—Nos. 453, 454, 457,458 and 461 of 1992—Sharkey P., Fielding C., Parks C.—28/8/92—Retail and Wholesale Establishments 1980

Conference referred *re* appeal against penalties and suspension of employees over derailment of an ore train—Applicant union argued that the inquiry procedure was misconceived and that the punishment was too severe—Respondent argued that there was considerable loss of revenue in this incident and as such penalties were reasonable—Commission found on evidence that Agreement authorised the Commission to amend the decision which broadened the powers under Section 44 and that a proper investigation into the event had been conducted which confirmed that drivers because of their special responsibility and skill carried an additional onus to ensure that signals were properly set—Dismissed—C.M.E.T.S.W.U. *v.* BHP Iron Ore Ltd—No. CR418 of 1992—Gregor C.—9/9/92—Iron Ore 2278

[2]Appeal against decision of Commission (72 WAIG 594) *re* denied contractual entitlements—Appellant argued he had received notice of hearing late as it had gone to the wrong part of the premises and that led to a miscarriage of justice—Full Bench reviewed regulations and found Notices of Hearing were not required to be served under Regulation 89 of the IRC Regulation 1985 and the notice of proceedings had been duly served—Notice of Hearing was received at registered address albeit late—Dismissed—Friendly Helpers and F.H. Promotions *v.* Galbraith D.—Appeal No. 149 of 1992—Sharkey P., George C., Parks C.,—24/9/92 2161

[2]Application for enforcement of Act *re* Interim Order of reinstatement—Preliminary Matter—Applicant applied for expedited hearing—Full Bench found question was of such urgency to the Applicant it ought be determined—Granted—F.M.W.U. *v.* Nappy Happy Hire Pty Ltd t/a Nappy Happy Service—No. 1151 of 1992—Sharkey P., George C., Parks C.—28/10/92—Laundry 2525

[4]Application for stay of Order *re* production of documents pending appeal to Full Bench—President found there was a serious issue to be tried as to jurisdiction and the balance of convenience favoured the Applicant—Granted—J—Corp Pty Ltd *v.* A.B.L.F.—No. 1216 of 1992—Sharkey P.—20/10/92—Building 2531

[3]Application to extend time prescribed for lodging an appeal against decision of Board of Reference (70 WAIG 2392) *re* Long Service Leave Entitlements—Applicant argued delay was due to excessive workload and his ignorance of procedures—CICS reviewed authorities and found several unsatisfactory features in the delay, for most no explanation for the delay in seeking legal advice—Dismissed—Ryan R.J. *v.* K.N. Hazelby and Jack Lester t/a Carnarvon Waste Disposal—No. 622 of 1992—Fielding C., George C., Parks C.—19/10/92—Waste Disposal 2529

[2]Appeals against decision of Commission (72 WAIG 888, 2843) *re* excusing witness and dismissal of unfair dismissal/contractual entitlement claims—Appellant argued, *inter alia*, he was denied the opportunity to fairly and fully present his case and that in the public interest an appeal should lie—Full Bench reviewed authorities and found from evidence it was not possible to say that the Appellant was an employee of either of the Respondent—Full Bench found nothing which could lead to the conclusion that cause was shown for the witnesses to appear—Dismissed—Mosson B.C. *v.* Haymarket Publishing and Another—Appeal No. 503 of 1992—Sharkey P., Fielding C., Beech C.—22/10/92—Publishing 2517

[2]Appeal against decision of Commission (72 WAIG 1398) *re* cancellation of an Order—Appellant argued Order was in excess of jurisdiction because it was contrary to Section 44(6) of the I.R. Act—Full Bench found failure to afford opportunity to make submissions was a denial of natural justice—Full Bench found no power to remit matter—Upheld and Quashed—Westralian Equipment Pty Ltd *v.* A.E.E.F.E.U.—Appeal No. 797 of 1992—Sharkey P., Fielding C., Gregor C.—19/11/92—Manufacturing 2750

[2]Appeal against decision of Commission (72 WAIG 1871) *re* dismissed application to refrain from hearing matter—Appellant argued Commission erred in determining the matter was different to those extent before the District Court and failed to give adequate reasons—Full Bench found proceeding to hear the application proper at first instance occasioned no injustice despite delay in issuing writ—Dismissed—Tri Star Group Pty Ltd *v.* Ball D.J.—Appeal No. 955 of 1992—Sharkey P., Halliwell S.C.,—Salmon C.—12/11/92 2752

PROMOTION APPEALS—

Social Trainer Supervisor, Level 4, Accommodation Services, Authority for the Intellectually Handicapped—Appellant argued he had greater supervisory experience and that he had not received fair treatment in the selection process—Majority PAB found that the selection panel had approached its task with complete objectivity and fairness and Recommended Applicant had better managerial ability—Dismissed—Williamson L. *v.* Grazier N.—PAB No. 27 of 1992—Negus C./Patterson/Floate—9/6/92—Social Work 1708

Depot Support Officers, Level 3—Metropolitan (Perth) Passenger Transport Trust—Promotion Appeal Board found that in relation to the Recommended Applicants competencies in the duties of the positions and also the efficiency of the interview process, the Appellant had failed to establish a better claim to the positions—Dismissed—Bandy B. and Others *v.* Jones A.D.—PAB Nos. 42, 43, 44 and 45 of 1992—Negus C./Hey/Normandale—30/6/92 1707

Depot Manager, Level 5 & 6—Metropolitan (Perth) Passenger Transport Trust—Transperth—Majority PAB found that workplace reform could not proceed if the employer held back due to some valued employees becoming upset in the process therefore Appellants had failed to discharge the onus of establishing a better claim to the positions—Dismissed—Burgin W.A. and Others *v.* Baldry D.R. and Others—PAB Nos. 36, 37, 38, 39, 40, 41 and 53 of 1992—Negus C./Hey/MacDonald—1/7/92—Transperth 1708

Conference referred *re* dispute over transfer of temporary officers to permanent positions—Applicant Union argued Respondent had breached merit and equity agreements and sought that the positions be advertised so country officers had an opportunity to apply—Respondent argued the Applicant, having acquiesced and cooperated in the application of policies, was estopped from pursuing the instant claim—PSA reviewed promotion positions and redundancy policies and provisions, and found the requirements of section 26 leant further weight to the view that the claim must fail—Dismissed—C.S.A. *v.* Hon. Minister for Agriculture—No. PSA CR90 of 1991—Negus C.—5/8/92—Agricultural Protection 1859

Promotion Appeal—Social Trainer Co-ordinator, Level 5—Authority for Intellectually Handicapped Persons—PAB found the Recommended Applicant's previous experience acting in a supervisory role gave her the advantage over the Appellant and that she had the ability to perform duties required—Dismissed—Johnson M. *v.* Gerlach M.—No. PAB 63 of 1991—Negus C./Hounsome/Floate—6/7/92—Authority for Intellectually Handicapped Persons 1930

Promotion Appeal—Senior Staff Educator, Level 5—Authority for Intellectually Handicapped Persons—Promotion Appeal board found that Applicant lacked understanding of the overall role and function of the newly classified item and the Appellant had established a better claim to the promotion than the Recommended Applicant—Appeal Upheld—Hardie—Neil C. *v.* Gerlach M.—No. PAB 54 of 1991—Negus C./Curry/Kaub—6/7/92—Authority for Intellectually Handicapped Persons 1929

Depot Support Officer, Level 3, Metropolitan (Perth) Passenger Transport Trust—Promotion Appeal Board found that the Appellant did not have the breath and depth of Transperth experience to challenge Applicants—Dismissed—Abrey B. and Others *v.* Moffet R.L.—PAB Nos. 94, 95, 96, 97 and 98 of 1992—Negus C., Black/Hey—11/11/92—Transport 2920

CUMULATIVE DIGEST—*continued*

Page

PUBLIC HOLIDAYS—

Application to vary award *re* finalisation of June 1991 Structural Efficiency Agreement—Parties sought to effect an enterprise agreement which mirrored the outcome of proceedings before the Federal Commission and had only three points of disagreement—Commission found parental leave provisions did not conflict with Conditions of Employment Principle and determined matters of Standing Down of Employees, Annual Leave, Absence Before and After Holidays—Commission found no ambiguities or unfairness and accepted the package provided the parties examined the minimum rates configuration—Granted—A.E.E.F.E.U. *v.* John Lysaght (Australia) Limited—No. 1337(B) of 1991—George C.—19/3/92—Electrical and Manufacturing Work 1594

[2]Appeal against decision of the Commission (72 WAIG 839) *re* dismissed application to vary award regarding Anzac day holiday—Appellant argued *inter alia*, Commission failed to give proper effect to existing award provisions, to decide the application on its merits contrary to section 26(1)(a) of the I.R. Act and erred in holding that it would not be fair to the Respondent Union to weaken its bargaining position—Full Bench reviewed authorities, the award, Retail Trading Hours Act, Public and Bank Holidays Act, the Enterprise Bargaining Principle and found the onus lay with the parties proposing the variation to show cause and that too literal an interpretation could not be placed on the term "special circumstances" such that the Commission could not be expected to couch its reasons in the terms expected of traditional courts—However, Full Bench found a fair reading of the transcripts, Reasons for Decision and Order did not show that the findings related to the enterprise bargaining process was a live issue in the proceedings, not notified to the parties concerned, such that they were not afforded the opportunity of being heard and hence the decision was either void or voidable—Upheld and Quashed—Stamco Pty Ltd and Others *v.* S.D.A.—Nos. 453, 454, 457,458 and 461 of 1992—Sharkey P., Fielding C., Parks C.—28/8/92—Retail and Wholesale Establishments 1980

Application to vary award *re* Holiday Work and Holidays—Applicant sought to overcome discrepancies in the award relating to the annual Christmas Day shutdown in that special penalties for work on Christmas Day to be extended to Boxing Day shifts—Commission was satisfied that variations sought should issue—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No. 975 of 1992—Fielding C.—8/9/92—Iron Ore 2212

PUBLIC INTEREST—

[2]Appeals against decision of Commission (72 WAIG 888, 2843) *re* excusing witness and dismissal of unfair dismissal/contractual entitlement claims—Appellant argued, *inter alia*, he was denied the opportunity to fairly and fully present his case and that in the public interest an appeal should lie—Full Bench reviewed authorities and found from evidence it was not possible to say that the Appellant was an employee of either of the Respondent—Full Bench found nothing which could lead to the conclusion that cause was shown for the witnesses to appear—Dismissed—Mosson B.C. *v.* Haymarket Publishing and Another—Appeal No. 503 of 1992—Sharkey P., Fielding C., Beech C.—22/10/92—Publishing 2517

REDUNDANCY/RETRENCHMENT—

Application for an order *re* redundancy package—Applicant Union sought order so that if redundancy agreement was not observed they had the ability to take action for its enforcement—Respondent argued having sought the matter be re-allocated that Commission as constituted was biased on the basis of comments made at a conference and that the matter was not an industrial matter—Commission in Preliminary Reasons for Decision reviewed authorities including the Stamers Supermarket case and found that the comments made would not lead an objective observer to perceive that the Commission's ultimate decision might be biased—Commission later found, in line with a Decision of the Full Bench, that there was jurisdiction to make the order sought and that the matter was not a dead issue—Commission further found the appropriate provisions of the Act should not be put aside in favour of leaving the result of the parties' negotiations in industrial limbo—Granted—M.E.W.U. and Others *v.* Arnotts Mills and Ware—No. 264 of 1992—Halliwell S.C.—9/4/92 & 5/8/92—Food Manufacture 1830

[3]Application to vary award *re* redundancy—Applicant union sought that superannuation benefits paid under the award not be offset against severance pay on termination—Respondent argued an interpretation would have been a more appropriate approach that the need for the variation had not been established and CICS had to apply the Caris the Jewellers case—CICS reviewed authorities and found TCR test case had not created a standard for all other awards and that it was appropriate that the difference status of Occupational or Award Based Superannuation be recognised in award provisions—Granted—A.E.E.F.E.U. *v.* A.C. Electrical Engineering Pty Ltd and Others—No. 678 of 1991—George C., Beech C., Parks C.—1/7/92—Metal and Electrical Trades 1518

Conference referred *re* dispute over transfer of temporary officers to permanent positions—Applicant Union argued Respondent had breached merit and equity agreements and sought that the positions be advertised so country officers had an opportunity to apply—Respondent argued the Applicant, having acquiesced and cooperated in the application of policies, was estopped from pursuing the instant claim—PSA reviewed promotion positions and redundancy policies and provisions, and found the requirements of section 26 leant further weight to the view that the claim must fail—Dismissed—C.S.A. *v.* Hon. Minister for Agriculture—No. PSA CR90 of 1991—Negus C.—5/8/92—Agricultural Protection 1859

[4]Application for stay of order *re* reinstatement of employee pending appeal to Full Bench—Applicant argued that employees were redundant due to business downturn and could not be re-employed—Respondent argued balance of convenience favoured the payment of the wages—President found serious issue to be tried and was reluctant to readily interfere with s.44(6)(b)(a) orders—However President found that while the question of whether a business to employ the people existed remained an issue the order might cause inconvenience to both sides and ordered wages to be paid into a trust account—Ordered Accordingly—Nappy Happy Hire Pty Ltd *v.* F.M.W.U.—No. 1171 of 1992—Sharkey P.—23/9/92—Laundry 2173

Application for reinstatement on the grounds of unfair dismissal—Applicant claimed that no criticism or discipline had been received about work performance—Respondent argued it was not acting unfairly in dismissing the last helpful employee despite the last on first off principle—Commission found in favour of Respondent—Dismissed—Williams C. *v.* W.A. Football League Members Club (Inc)—Salmon C.—15/9/92—Hospitality 2253

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Parties advised Commission that dismissal issue had been resolved—Applicant further claimed unpaid redundancy payments—Respondent argued that as the termination occurred before starting date of the redundancy package it was not obliged to make payment—Commission found on evidence that another date was selected and Applicant entitled to benefit of contract as varied by a letter—Granted—Foster D.A. *v.* Central Kalgoorlie Gold Mines N/L—No. 629 of 1992—Gregor C.—24/9/92—Mining 2230

REINSTATEMENT—

Appeal against the constructive dismissal of an employee—Appellant felt he had been unfairly forced to resign and sought reinstatement without loss of entitlements—Respondent argued that it had lost confidence and faith in the ability and credibility of the employee to the point where the question of reinstatement could not be a serious option—Commission reviewed the matter de novo and found that the way employee was summarily dismissed was unfair, however there was a reasonable and lawful instruction which employee had disobeyed, that coupled with other charges of peculation and misconduct was sufficient grounds to terminate contract of employment and ordered one months pay in lieu of notice as well as pro-rata long service leave—Ordered Accordingly—Greenaway T.G. *v.* Country High School Hostels Authority—No. PSAB11 of 1991—Negus C./Gornik/Kaub—15/5/92—Education 1700

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that employee as a customer after working hours had moved goods past but not across the scanning beam which had not registered, that Applicant was a casual employee therefore there was no dismissal and that Respondent had lost confidence in employee's ability to perform the work—Commission found that there had been a dismissal, that although the Applicant's conduct had raised doubts about her future reliability this could be corrected by admonition therefore the termination was unfair—Granted—Anderson N.P. *v.* Supa Value Supermarket, Beechboro—No. 683 of 1992—Salmon C.—17/6/92—Retail Food 1624

CUMULATIVE DIGEST—*continued*

Page

REINSTATEMENT—*continued*

Application for reinstatement on the grounds of unfair constructive dismissal—Applicant claimed she felt she had been forced to leave her job therefore had submitted a letter of resignation—Respondent argued that as claim had been tried in another jurisdiction which had not been successful and the inordinate delay in the prosecution of the claim, Commission should apply doctrine of Laches against the Applicant—Commission reviewed authorities (Fosbury's Case) and found that there was a requirement for persons to act with expedition in pursuing a claim and that reinstatement could not reasonably be effected where a long period of time had elapsed following dismissal—Dismissed—Morgan K. *v.* BHP Iron Ore (Goldsworthy) Ltd—No. 102 of 1992—Gregor C.—15/6/92—Iron Ore 1638

Conference referred *re* summary dismissal of employee for alleged misconduct—Applicant Union claimed dismissal was unfair and sought reinstatement without loss of entitlements—Respondent argued that employee had behaved in a threatening intimidatory manner and violent way towards a fellow worker and that a review procedure had been undertaken—Commission found on evidence that review process had been compromised, the employee's behaviour had arisen out of genuine concern as Union Convenor for fellow employee, that the punishment was disproportionate to the offence and therefore unfair—Granted in Part—A.W.U. *v.* BHP Iron Ore Ltd—No. CR322 of 1992—Gregor C.—11/6/92—Mining 1656

Application for allegedly denied contractual entitlements—Applicant sought a letter from Respondent stating that her dismissal was unfair and claimed contractual entitlements, namely unpaid commissions—Respondent argued Commission ought to refrain from hearing unfair dismissal claim but admitted that benefits were due and consented to an order requiring the sum to be paid—Commission found that as it had no power to order relief sought the matter should not proceed further—Granted In Part—Scaffidi M. *v.* Tarragan Holdings Pty Ltd T/A Roy Weston Hillarys—No. 293 of 1992—Fielding C.—12/6/92—Real Estate 1640

Conference referred *re* unfair dismissal claim—Applicant sought reinstatement and payment of appropriate compensation—Respondent argued that termination was brought about by frustration of contract due to ill health of employee—Commission reviewed authorities and found from evidence that the operation of law had led to the frustration of the contract of employment, that despite subsequent prognosis of employees condition which had been favourable, at the time of the dismissal the Respondent was entitled to the view that the legal right to terminate had been fairly exercised—Dismissed—F.M.W.U. *v.* R.D. Miles and Company Pty Ltd T/A Undercliffe Hospital Complex—No. CR723 of 1991—Gregor C.—5/6/92—Health 1663

[2]Appeal against decision (71 WAIG 3032) *re* failure to order re-employment having found an unfair dismissal—Appellant argued Commission erred in accounting for, *inter alia*, extraneous factors outside the employment relationship in determining whether re-employment should be ordered or not and sought an order for re-employment and loss benefits—Full Bench found Commission had erred by not informing parties of its intention and not allowing them to be heard on the question of industrial harmony outside the particular contract of employment—Upheld—Woodberry N.M *v.* Koolan Island Club Inc—Appeal No. 1720 of 1991—Sharkey P., Fielding C., Parks C.—16/6/92—Iron Ore/Recreation 1751

[2]Appeal against decision of Commission (72 WAIG 151) *re* order for reinstatement and payments of entitlements for unfair dismissal—Full Bench reviewed authorities and found the Commission had erred in failing to find that there was a binding agreement to settle the matter which the Respondent had repudiated—Upheld—Polygon Holdings Pty Ltd T/A The Boulevard Alehouse *v.* Malone T.N.—Appeal No. 1965 of 1991—Sharkey P., Gregor C., Parks C.—10/7/92—Hotels 1744

Application for reinstatement on the grounds of unfair dismissal—Applicant argued he was not given the opportunity to respond to misdeeds alleged against him and was denied natural justice—Respondent argued that Applicant had been warned about his interference with an employee's personal affairs but had persisted in the "harassment"—Commission found on evidence that whilst the manner of the dismissal was unfair, the Applicant's conduct had fallen well below that expected of a person in his position therefore termination was not unfair—Dismissed—Van Witsen E.W. *v.* World Services and Construction Pty Ltd Ltd—No. 223 of 1992—Fielding C.—23/7/92—Engineering 1849

Application for reinstatement on the grounds of unfair dismissal—Applicant argued that she had not at any stage any intention of acting dishonestly about a "tip" and did nothing more than follow her understanding of the usual practice—Respondent argued that there was a difference between a tip and unclaimed money and the actions of the Applicant were regarded as being a breach of duty sufficient to warrant termination—Commission found on evidence that retaining large amounts of money was not an usual or acceptable practice therefore Applicant had not discharged onus of establishing claim—Dismissed—"C" *v.* Quality Pacific Management Pty Ltd—No. 628 of 1992—Beech C.—Hospitality 1838

Appeal against dismissal of an employee—Appellant claimed he had been unfairly dismissed and sought reinstatement and transfer to a more suitable position—Respondent argued that employee was unable to produce volume of work required and continually disobeyed specific instruction despite counselling—PSAB found on evidence that employee had failed to fulfil his duties adequately and that termination in this instance was not unfair—Dismissed—Arnold E. *v.* S.G.I.C.—No. PSAB 10 of 1991—Negus C., Middleton/Carr—3/7/92—Insurance 1698

Application for reinstatement on the grounds of unfair dismissal—Applicant union argued employer should not have taken an earlier incident into account and should have applied the best case scenario because of the workers good record—Respondent argued the key element in the authorities was that a participant in a fight as opposed to a victim may be treated the same as a person who has inflicted harm on another—Commission reviewed authorities and found on evidence that the investigation into the incident was flawed and that the dismissal was tainted—Granted—C.M.E.U. *v.* R.R.I.A.—No. 1557 of 1991—Gregor C.—5/6/92—Iron Ore 1630

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant argued she had not been counselled in appropriate procedures and sought payment in lieu of unused leave—Respondent argued that employee's failure to carry out her duties efficiently cost the company revenue which had justified termination—Commission found on evidence that Applicant was negligent in her work despite the fact that she was given adequate opportunity to conform with requirements of her employer—Commission further found that it was inappropriate to imply a term requiring that payment be made in lieu of taking leave in the absence of an expressed provision—Dismissed—Beale G. *v.* Curtin Consultancy Services Limited—No. 1473 of 1991—Parks C.—17/6/92—Consultancy Services 1626

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant argued on the basis of sexual harassment by fellow worker and failure of management to handle this situation—Respondent argued employee was rude, insubordinate, uncooperative, deceitful and failed to obey lawful instruction—Commission found on evidence that there was no attempt to rectify unacceptable behaviour by fellow employee nor a proper investigation therefore summary termination was flawed and ordered reinstatement and appropriate compensation—Granted—Taylor R.J. *v.* Dominion Mining Limited—No. 906 of 1991—Gregor C.—16/6/92—Mining 1642

Conference referred *re* termination of employee for breaches of safety procedures—Applicant union claimed employee had been unfairly summarily dismissed and sought reinstatement—Respondent argued that despite numerous warnings the employee had failed to observe proper safety precautions, had been paid wages in lieu of notice and other accrued benefits and sought costs to be awarded—Commission found on evidence that the conduct of the employee was such that he had placed himself outside the bounds of his contract of employment and he had not discharged the onus of establishing the claim and decided not to award costs—Dismissed—A.W.U. *v.* Kaltails Mining Services—No. CR150 of 1992—Gregor C.—30/6/92—Mining 1657

Application for reinstatement on the grounds of unfair dismissal, without loss of entitlements—Applicant argued she had not been sufficiently warned or counselled that her job was in jeopardy—Respondent argued that it had repeatedly communicated the need for changes but to no avail—Commission found on evidence that Applicant had been given more than adequate chance to improve her teaching abilities and that termination in this instance was not unfair—Dismissed—Peters S.L. *v.* Penrhos College—No. 179 of 1992—Negus C.—21/7/92—Education 1843

Application for reinstatement on the grounds of alleged unfair summary dismissal—Applicant sought outstanding salary and one weeks pay in lieu of notice—Respondent argued that Applicant was terminated for alleged gross misconduct and had withheld wages said to be owing to offset missing money from the till—Commission found on evidence that whilst notice payment in this instance was not applicable, payment up till the time of dismissal was due—Granted in Part—Kerridge T.M. *v.* B.P. Victoria Park—No. 555 of 1992—Beech C.—28/8/92 2072

CUMULATIVE DIGEST—*continued*

Page

REINSTATEMENT—*continued*

[2]Appeal against decision of Commission (72 WAIG 173) *re* dismissed claim for reinstatement on the grounds of unfair dismissal—Appellant argued Commission erred in finding the Respondent entitled to summarily dismiss the employee as there was insufficient evidence of striking or intending to strike another employee—Respondent argued employee was dismissed for hostile behaviour and the likelihood that it might occur again—Full Bench reviewed authorities and found on evidence it was open for the Commission to make various findings as it did—However Full Bench found the Commission failed to take into account all of the relevant circumstances and all alternatives were not canvassed—The Appellant had therefore discharged the onus upon it—Upheld and Decision Varied—T.W.U. *v.* BHP Iron Ore Limited—Appeal No. 26 of 1992—Sharkey P., Coleman C.C., Parks C.—3/8/92—Iron Ore 1994

[2]Appeal against decision of Commission (70 WAIG 853) *re* reinstatement on the grounds of unfair dismissal—Appellant argued Commission had erred in making various findings of fact in relation to alleged assault and sexual harassment—Full Bench reviewed authorities and found on evidence Commission had not erred in its discretion—Dismissed—Royal Perth Hospital *v.* Lynn T.—Appeal No. 405 of 1992—Sharkey P., Salmon C., Kennedy C.—25/8/92—Health 1976

Application for reinstatement on the grounds of unfair dismissal—Applicant argued that she had done everything in her power to inform that she would be temporarily away and that Respondent should have left the job open for her—Respondent argued that due to the length of time that Applicant was away beyond the expected time, it has been forced to find a replacement—Commission found that whilst there was ignorance of the employment relationship on both sides which probably caused the ultimate problem the Applicant had abandoned her position therefore failed to substantiate her claim—Dismissed—Healy M. *v.* Owners of Victoria Apartments Strata Plan 1659—No. 681 of 1992—Kennedy C.—27/8/92—Domestic Cleaning 2070

Appeal against dismissal of an employee—Appellant argued on the basis of a denial of natural justice and lack of due process and sought reinstatement—Respondent argued that employee had maltreated a client and that coupled with the false declaration of the application form decision to terminate was warranted—Commission reviewed evidence and found that Appellant had failed to discharge the onus of establishing his claim—Dismissed—Jennings D.B. *v.* The Authority for Intellectually Handicapped Persons—No. PSAB 6 of 1992—Negus C., Gregory/Kaub—7/9/92—Health 2110

Appeal against dismissal of an employee for allegedly striking a patient—Appellant argued on the basis of unfair dismissal and sought reinstatement without loss of entitlements—PSAB found on evidence that although the incident was serious, it was the employers responsibility to create a safe work environment and coupled with the Appellant's unblemished employment record termination in this instance was unfair—Ordered Accordingly—Rees M.R. *v.* The Authority for Intellectually Handicapped Persons—No. PSAB 1 of 1992—Negus C., Middleton/Purdie—28/5/92—Health 2114

Application *re* unfair dismissal—Respondent argued that contrary to previous warnings and instructions the Applicant had failed to comply with the Respondent's procedures and his work performance was unsatisfactory—Respondent also stated that the Applicant had been paid in lieu of reasonable notice period—Commission reviewed authorities *re* declaration and found on evidence and having heard the Applicant's case that further proceedings would incur expense to no useful end—Dismissed—Rennardson M.B. *v.* Dynamic Business Resources Pty Limited—No. 381 of 1992—Fielding C.—11/8/92 2076

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that the Applicant had breached the confidentiality of the company in photocopying a proposed letter and showing it to a fellow worker and that compensation ought not to be paid as the company was running on a budget deficit—Commission found on evidence that as no warnings being given to the Applicant the action taken by the employer was unwarranted—Granted—Yarran R.L. *v.* Manguri—No. 1220 of 1991—Parks C.—3/3/92—Gardening 2079

Conference referred *re* termination of employee—Applicant union claimed that employee was unfairly dismissed and sought reinstatement—Respondent argued that employee was given adequate warnings prior to termination—Commission, in light of all evidence, found that Applicant's complaints about insufficient staff warranted more of Respondent's attention and the result of that failure led to Applicant's dismissal—Granted- S.D.A. *v.* Coles Supermarkets—No. CR411 of 1992—Salmon C.—7/9/92—Food 2285

Conference referred *re* unfair dismissal claim—Applicant union argued that Respondent had not taken employee's length of service into account at time of dismissal and sought an order that the employee be re-employed into the position prior to that which he was dismissed from—Respondent argued that employee was terminated due to the serious discontent over employee's attitude amongst supervisors after receiving numerous verbal counsellings—Commission found on evidence that the onus of establishing unfairness had not been discharged and could see no warrant for intervention—Dismissed—A.D.S.T.E. *v.* Brambles Manford—No. CR297 of 1992—Kennedy C.—10/9/92—Crane Driver 2267

Application for reinstatement on grounds of unfair dismissal—Applicant claimed that satisfactory work performance had been maintained and no clear warnings were given—Respondent contended that Applicant's performance was not satisfactory and that counselling had occurred regarding work attitude—Commission found on evidence that there had been little improvement in Applicant's performance and decision to dismiss was not unfair—Dismissed—Simpson G. *v.* Meridian Services Pty Ltd—No. 209 of 1992—Halliwell S.C.—23/9/92—Report Writer 2245

Conference referred *re* dismissal of an employee for alleged misconduct—Applicant union argued that employee had been unfairly dismissed and sought reinstatement without loss of entitlements—Respondent argued that employee should be held responsible for losses incurred through the disappearance of money and a customers property and through damages caused to a customer's vehicle which had warranted termination—Commission found on evidence that a suspicion existed which caused a breakdown in the relationship and trust between employer and employee therefore dismissal in this instance was not unfair—Dismissed—A.W.U. *v.* Sage Holdings Pty Ltd—No CR342 of 1992—George C.—14/9/92—Petrol Station 2275

Application for reinstatement on the grounds of alleged unfair summary dismissal without loss of entitlements—Respondent argued that employee had put the Company's reputation and the security of its employees at risk as well as offending a client which had justified termination—Commission reviewed authorities and found on evidence that action of Applicant was not sufficient enough to warrant dismissal therefore was wrongful and unfair—Granted—McMeikan P. *v.* Lamb Printing Pty Limited—No. 977 of 1992—Salmon C.—18/9/92—Sales & Marketing 2236

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant further sought, as an alternative, a payment for an allegedly fixed term employment contract—Respondent argued Applicant was unfairly dismissed as there had been a failure to raise the performance level of night shift crew to required standard and opposed alternate remedy—Commission found on evidence Applicant had been warned of performance level by senior management and dismissal was neither harsh or oppressive—Dismissed—Himsworth A. *v.* Cape Modern Bains Joint Venture—No. 886 of 1992—George C.—13/10/92—Mining 2233

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that employee had resigned and was not able to bring the matter before the Commission—Commission found on evidence that Applicant was constructively dismissed—Commission however further found that the Applicant had refused to obey a reasonable and lawful command by Respondent warranting dismissal—Dismissed—Clarke D.A. *v.* Capricorn Society Ltd—No. 980 of 1992—Beech C.—9/10/92—Clerical 2228

Application for reinstatement on the grounds of alleged summary unfair dismissal without loss of entitlements—Applicant argued that he was entitled to a reasonable period of prior notice of termination and claimed reimbursement of expenses—Respondent argued that employee committed acts without required authority, failed to provide written reports and disregarded instructions—Commission found on evidence that the incidents related did not constitute a breach of duty so serious as to amount to repudiation of the employment contract however reinstatement was not possible as the company and operations had been disbanded—Granted—Miller W.A. *v.* Phoenix Technology (Aust) Pty Ltd—No. 1282 of 1991—Parks C.—8/10/92—Communications 2238

Application for reinstatement on the grounds of unfair dismissal—Applicant after several communications to the Commission requesting extension of time for a later hearing date failed to appear—Commission found on evidence that there was an obligation on Applicants to act with expedition and due to the inordinate delays in prosecuting claim and the necessity of the Applicant to respond by making himself available in person the claim must fail—Dismissed For Want Of Prosecution—Real M.A. *v.* Worsley Alumina Pty Ltd (Boddington Gold Mine)—No. 1755 of 1991—Gregor C.—14/9/92—Mining 2242

CUMULATIVE DIGEST—*continued*

Page

REINSTATEMENT—*continued*

Conference referred *re* claim for reinstatement on the grounds of a constructive and unfair dismissal—Applicant union claimed that employee was forced to resign under threat of dismissal—Respondent argued that due to the workers' ill feeling towards the employee the option of resignation was suggested and taken—Commission found that there was no threat of dismissal present—Dismissed—A.W.U. and Hamersley Iron Pty Limited—No. CR197 of 1992—Fielding C.—3/11/92—Mining 2624

Application for reinstatement on the grounds of unfair dismissal without loss of contractual benefits—Applicant claimed termination resulted from continuing injuries from Workers Compensation claim and no warnings had been given—Respondent argued that Applicant's circumstances forced termination—Commission found on evidence that Respondent undertook a genuine restructuring to cut costs—Dismissed—Wittenbaker C.A. *v.* L&M Radiator Pty Ltd—No. 1114 of 1992—Kennedy C.—9/11/92 2619

Application for reinstatement on the grounds of unfair dismissal—Applicant argued that she had not been given any warnings or counselling to the effect that her job was in jeopardy—Respondent argued that the employee had failed to comply with appropriate administrative directions and failure to provide an explanation as to the damaged motor vehicle were sufficient reasons to justify termination—Commission reviewed authorities and found on evidence that the Applicant had not properly complied with reasonable requests of the employer, therefore dismissal was not harsh or unfair—Dismissed—Macale D.M. *v.* Ngnowar-Aerwah Aboriginal Corporation—No. 779 of 1992—Gregor C.—29/19/92—Health and Welfare 2613

Application for reinstatement on the grounds of unfair dismissal—Applicant claimed he had no prior warning and was a victim of blacklisting—Respondent argued that dismissal was result of unsatisfactory work attitude—Commission found on evidence that Respondent had been more than patient in maintaining the relationship for as long as he did—Dismissed—Scott T. *v.* Visarelle Pty Ltd t/a Woodsies Windscreen—No. 901 of 1992—Negus C.—10/11/92—Automotive 2617

Claim *re* dispute over limited partnership agreements and subsequent withdrawal of labour—Applicant Union sought a declaration that Respondent's action in imposing the limited partnership documents on the employees involved in the dispute was in breach of the I.R. Act, that the employees were unfairly dismissed and sought reinstatement and payment of wages from the termination to date of reinstatement—Respondent argued that the business had undergone a significant change and that reinstatement of the workers would be impracticable—Commission found on evidence that employees had abandoned their work, that the agreement was not imposed on the workers and that it was not possible to determine the true working relationship of the employees in this instance—Dismissed—M.I.E.U. *v.* The Preston River Abattoir—No. 536 of 1992—Fielding C.—16/10/92—Meat 2602

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that termination was due to incompetent behaviour and work practices, not stealing—Commission found on evidence that Applicant had not been spoken to about work behaviour and was therefore unfairly dismissed—Granted—Clein G. *v.* Emmett Investments Pty Ltd t/a Shell Road House—No. 679 of 1992—Fielding C.—16/10/92 2608

Application for reinstatement on the grounds of alleged unfair summary dismissal—Applicant argied that his termination was effected to make way for another person and that he had not been given any warning that his job was in jeopardy—Respondent argued that Applicant had insulted three clients and that the company could not afford such a problem—Commission reviewed evidence and found that Respondent acted unfairly in denying employee to be heard on any complaints but as Applicant sought different terms from his original contract there could be no order for re-employment—Dismissed—Hemsley R.J. *v.* Manor Homes Pty Ltd—No. 875 of 1992—Kennedy C.—4/12/92—Real Estate 2833

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant argued that his termination was effected due to litigation between his father and the Respondent and that he had had no warnings or notice of any dissatisfaction with his performance—Respondent argued that Applicant's employment was on the basis that there was no further breakdown in the relations between the parties but which had occurred to an extent that notice of termination was given—Commission found on evidence that although both parties were at fault the Applicant had not been able to discharge the onus of establishing his claim—Dismissed—Fry S.R. *v.* Hancock Prospecting Pty Ltd—No. 1006 of 1992—Kennedy C.—27/11/92—Farming 2827

Conference referred *re* claim for reinstatement without loss of entitlements on the grounds of unfair dismissal—Respondent argued that the employee's services were terminated due to poor work performance and that the company was going out of business—Commission reviewed authorities and found on evidence that dismissals were unfair however was not able to order reinstatement as the Respondents no longer engaged in the business—In Supplementary Reasons, the Commission addressed the issue of compensation found it did have jurisdiction, and adopted figures from the Bureau of Statistics to determine the amounts due—Granted in Part—Miscellaneous Workers' Union *v.* Nappy Happy Service—No. CR 517 of 1992—Halliwell S.C.—20/10/92—Laundry 2872

Application for reinstatement on the grounds of unfair dismissal—Applicant union argued that employee had been terminated as a result of complaints about his wage rates and conditions and because he sought to negotiate improvements in the terms of his employment—Respondent argued on the basis of downturn in operations—Commission reviewed authorities and found on evidence that the termination was unjustified and that employee had not been given a "fair go all round"—Granted—Forest Products, Furnishing and Allied Industries Union *v.* T.J. and M.B. Waugh—No. CR 465 of 1992—Coleman C.C.—11/11/92—Timber 2867

Conference referred *re* dispute over summary dismissals for alleged misconduct—Applicant union argued that the terminations were disproportionate to the importance of the disagreement between the employees therefore unfair—Commission reviewed authorities and found on evidence that the two members had breached their contracts of employment in trying to cover up the incident and that decision to terminate was neither harsh nor unfair—Dismissed—A.W.U. *v.* Argyle Diamond Mines Pty Ltd—No. CR561 of 1992—Gregor C.—13/11/92—Mining 2859

SAFETY—

Conference referred *re* payment for lost time over safety issue—Applicant union claimed that payment should be made on the basis of a usual work week of 54 hours and 60 hours respectively—Respondent argued that it should be based on a 38 hour week—Commission reviewed the meaning of "usual", S.28 of the OHSW Act and found that the wider construction contended for by the Applicant should be implemented—Granted—M.E.W. *v.* Ical Limited and Another—No. CR221 of 1992—Salmon C.—24/6/92 1660

Conference referred *re* payment for lost time and other benefits over alleged safety issue—Applicant Union argued that employees had reasonable grounds that there may be imminent or serious injury on site due to hazardous chemicals and that Respondent showed a disregard for the health and welfare of their workforce—Commission found on evidence that there was alternative work at the time for the employees and that the tests carried out had indicated no risks to the workforce therefore no payment should be made—Dismissed—C.M.E.W.U. *v.* Kirfield Engineering Australia Pty Ltd and Another and Western Construction Company and Another *v.* A.M.W.S.U. and Others—Nos. CR253 and 257 of 1991—Parks C.—27/7/92—Construction 1861

Application to vary award *re* transfer and termination provisions for health and safety representatives—Applicant argued provisions should be the same as for job stewards—Respondent argued Applicant had not proven that the representatives would be prejudiced in employment and that the OHSW Act had provisions for dealing with discrimination—Commission reviewed I.R. Act, OHSW Act, the Laing Report, Building Trades (Construction) Award and found in favour of the Applicant—Granted—B.T.A. *v.* Adsigns Pty Ltd & Others—No. 872B of 1991—Beech C.—20/7/92—Building Construction 1789

Conference referred *re* termination of employee for breaches of safety procedures—Applicant union claimed employee had been unfairly summarily dismissed and sought reinstatement—Respondent argued that despite numerous warnings the employee had failed to observe proper safety precautions, had been paid wages in lieu of notice and other accrued benefits and sought costs to be awarded—Commission found on evidence that the conduct of the employee was such that he had placed himself outside the bounds of his contract of employment and he had not discharged the onus of establishing the claim and decided not to award costs—Dismissed—A.W.U. *v.* Kaltails Mining Services—No. CR150 of 1992—Gregor C.—30/6/92—Mining 1657

CUMULATIVE DIGEST—*continued*

Page

SAFETY—*continued*

Conference referred *re* appeal against penalties and suspension of employees over derailment of an ore train—Applicant union argued that the inquiry procedure was misconceived and that the punishment was too severe—Respondent argued that there was considerable loss of revenue in this incident and as such penalties were reasonable—Commission found on evidence that Agreement authorised the Commission to amend the decision which broadened the powers under Section 44 and that a proper investigation into the event had been conducted which confirmed that drivers because of their special responsibility and skill carried an additional onus to ensure that signals were properly set—Dismissed—C.M.E.T.S.W.U. *v.* BHP Iron Ore Ltd—No. CR418 of 1992—Gregor C.—9/9/92—Iron Ore 2278

Conference referred *re* introduction of staggered shift changes—Applicant Employer argued that implementation of this proposal would enable the plant to be run and be manned continuously—Respondent union argued that there should be a running shift change and that Applicants plan when introduced into the Award was on the understanding that it would have a limited operation—Commission reviewed evidence and found that Applicant had indicated that there would be increased efficiency in particular work groups and that they had discharged the onus of establishing claim and issued a Declaration to the effect of the claim—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No CR461 of 1992—Fielding C.—10/9/92—Iron Ore 2273

Conference referred *re* claim of reinstatement to original classification on grounds of unfair treatment—Respondent argued that employee failed to comply with basic safety requirements after repeatedly being warned by supervisors—Commission found on evidence that action of the Respondent was not unfair—Dismissed—A.E.E.F.E.U. *v.* Robe River Iron Associates—No. CR212 of 1992—Gregor C.—16/10/92 2633

Application to vary award *re* asbestos allowance—Parties sought to bring allowance in line with Midland Workshops allowance for similar work—Commission was satisfied that claim complied with State Wage Fixing Principles and variations sought should issue—Granted—A.R.U. *v.* W.A.G.R.C.—No. 395 of 1992—Fielding C.—23/10/92—Railways 2582

Claim *re* failure to follow agreed procedure over lack of amenities and payment of wages—Applicant union argued that power had not been restored to the site by the next "meal break" and that as alternative arrangements were not made employees were entitled to payment for that period not worked—Respondent argued that as some power was restored then it was unreasonable for the workforce to have left the site—Commission declined to exclude Respondent's witnesses from the court when the other was giving evidence and found that Applicant had established claim but was advised that agreement had been reached between the parties—Discontinued—Building Trades Association *v.* Building Management Authority—No. CR 288(1) of 1992—Beech C.—22/6/92—Construction 2629

[2]Appeal against decision of Commission (72 WAIG 872) *re* establishment of safety committee to resolve dispute over asbestos removal and cessation of industrial action—Appellant argued Order was not in accordance with Section 44(6)(b)(a) of the I.R. Act and that the OHSW Act prevailed over the powers of the Commission under the I.R. Act—Respondent argued matter was dead and the order mute therefore the appeal should be dismissed—Majority of Full Bench reviewed authorities and found the matter was not of such public interest that an appeal should lie and the issue was dead—Dissenting Full Bench member gave reasons in favour of Appellant—Dismissed—S.E.C.W.A. *v.* A.M.W.S.U. and Others—No. 463 of 1992—Sharkey P., Halliwell S.C., Beech C., 3/11/92—Energy Supply 2504

SHIFT WORK—

Application to vary award *re* Shift Work by consent—Parties sought to include provision to provide a guarantee of work for slaughtermen so long as there is stock to be slaughtered—Commission was satisfied that variation sought should issue—Granted—W.A.M.C. *v.* M.I.E.U.—No. 445 of 1992—Fielding C.—5/8/92—Meat 1805

[3]Application to vary award *re* Shift Allowance and Annual Leave Entitlements for shift workers—Applicant argued claims were justified under Work Value Principle (1989) and Inequities Principle (1989) or as a special case under the 1992 State Wage Principles—Respondent argued claim ignored terms and conditions established in the award reflecting the uniqueness of the Argyle operation—CICS restricted intervention to the matter of flow-on and refused legal representation—CICS reviewed transcript of award application, establishment of the commute cycle, history of award variations and found the award was not a "pre-start" agreement—CICS found no merit in claims and commented in relation to the Enterprise Bargaining Principle—Dismissed—M.E.W.U. *v.* Argyle Diamond Mines Pty Limited—No. 873A of 1991—Coleman C.C., Gregor C., Kennedy C.—17/9/92—Diamond Mines 2167

Conference referred *re* introduction of staggered shift changes—Applicant Employer argued that implementation of this proposal would enable the plant to be run and be manned continuously—Respondent union argued that there should be a running shift change and that Applicants plan when introduced into the Award was on the understanding that it would have a limited operation—Commission reviewed evidence and found that Applicant had indicated that there would be increased efficiency in particular work groups and that they had discharged the onus of establishing claim and issued a Declaration to the effect of the claim—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No CR461 of 1992—Fielding C.—10/9/92—Iron Ore 2273

Conference referred *re* unfair dismissal claim—Applicant union alleged that when the employee was re-employed by Respondent a verbal promise of non shift work hours occurred—Respondent denied allegation and argued that on the contract the employee agreed to shift work and as no other work was available termination occurred—Commission found on evidence that the termination of employee was not unfair—Dismissed—A.W.U. *v.* Cable Sands (WA) Pty Ltd—No. CR405 of 1992—Fielding C.—2/10/92—Mining 2271

SICK LEAVE—

Application to vary award *re* finalisation of June 1991 Structural Efficiency Agreement—Parties sought to effect an enterprise agreement which mirrored the outcome of proceedings before the Federal Commission and had only three points of disagreement—Commission found parental leave provisions did not conflict with Conditions of Employment Principle and determined matters of Standing Down of Employees, Annual Leave, Absence Before and After Holidays—Commission found no ambiguities or unfairness and accepted the package provided the parties examined the minimum rates configuration—Granted—A.E.E.F.E.U. *v.* John Lysaght (Australia) Limited—No. 1337(B) of 1991—George C.—19/3/92—Electrical and Manufacturing Work 1594

STAY OF PROCEEDINGS—

[4]Application for orders *re* breach of union rules—continuing matter—President dealt with application for interim orders and found Industrial Appeal Court lift of stay did not preclude applications to vary orders in the matter—President after hearing further addresses, was not disposed to make the orders sought at the time other than some provisions to facilitate negotiations in relation to awards—President further determined application to amend the substantive Application to include allegations of fraudulent activity within the financial affairs of the union—President found it was such a substantial matter that it might be said to be unjust to graft it onto the existing proceedings at that stage—Ordered Accordingly—Drake M.A. *v.* Carter L.B. and Others—Nos. 1053, 1478, 1479, 1529 of 1991 and 127 of 1992—Sharkey P.—10/4/92 & 28/5/92—Unions 1529

[4]Application for stay of an order *re* denied contractual entitlements—President found that the Appellant had not been properly served with the initial application, was a serious issue to be tried, that the balance of convenience favoured the Applicant and ordered a stay with a limited period—Granted—Thomas Fletcher T/A Friendly Helpers and F.H. Promotions *v.* Galbraith D.W.J.—No. 315 of 1992—Sharkey P.—7/7/92—Promotions 1527

[4]Application for stay of order *re* denied contractual entitlements pending appeal to Full Bench—President found even if there were serious matters to be tried nothing was established that the balance of convenience favoured the Applicants—Dismissed—Southern Cross Koala and St Croix Pty Ltd *v.* Leigh Mullon—No. 460 of 1992—Sharkey P.—6/5/92 1528

[4]Application for stay of order *re* reduced hours and earnings pending appeal to Full Bench—Applicant argued its business would suffer severe damage without a stay—Respondent argued workforce had already been heavily reduced—President found balance of convenience did not favour the Applicant—Dismissed—Westralian Equipment Pty Ltd *v.* A.E.E.F.E.U.—No. 798 of 1992—Sharkey P.—10/7/92—Electrical Equipment Manufacturer 1765

CUMULATIVE DIGEST—*continued*

Page

STAY OF PROCEEDINGS—*continued*

[4]Application for stay of order *re* cessation of industrial action pending appeal to Full Bench—Applicant argued question of private rights of union officials were serious matters to be tried and the balance of convenience favoured the democratic right to dissent—President found possible unlawful conduct of officials was not a relevant consideration for the Commission and there was not a serious issue to be tried—President further found he was not required to consider the wider community controversy and inconvenience to unions was outweighed by the Respondent's inability to go about their affairs and employees whose employment would be postponed—Dismissed—C.M.E.T.S.W.U. *v.* Multiplex Constructions Pty Ltd and Others—No. 1089 and 1090 of 1992—Sharkey P.—31/8/92—Construction 2000

[4]Application for stay of order *re* reinstatement of employee pending appeal to Full Bench—Applicant argued that employees were redundant due to business downturn and could not be re-employed—Respondent argued balance of convenience favoured the payment of the wages—President found serious issue to be tried and was reluctant to readily interfere with s.44(6)(b)(a) orders—However President found that while the question of whether a business to employ the people existed remained an issue the order might cause inconvenience to both sides and ordered wages to be paid into a trust account—Ordered Accordingly—Nappy Happy Hire Pty Ltd *v.* F.M.W.U.—No. 1171 of 1992—Sharkey P.—23/9/92—Laundry 2173

Application to vary award by consent—Respondent union secretary treasurer sought leave to intervene to object to proposed variations in that amendment may be affected by an undertaking given in the Supreme Court and therefore proceedings should be adjourned until the hearing of the objection—Respondent union argued that objector did not have authority to represent the union in this matter therefore intervention should be disallowed—Commission found on evidence that Respondent union had not fully informed secretary treasurer of the application and that objector had sufficient interest to warrant intervention—Ordered Accordingly—W.A.H.H.A. and Others *v.* L.A.I.E.U.—No. 386 of 1992—Parks C.—29/9/92—Hospitality 2643

[4]Application for stay of Order *re* production of documents pending appeal to Full Bench—President found there was a serious issue to be tried as to jurisdiction and the balance of convenience favoured the Applicant—Granted—J—Corp Pty Ltd *v.* A.B.L.F.—No. 1216 of 1992—Sharkey P.—20/10/92—Building 2531

[4]Application for stay of proceedings *re* production of documents relating to determination of jurisdiction—President found there was no decision to be stayed—Dismissed—J-Corp Pty Ltd *v.* A.B.L.F.—No. 1331 of 1992—Sharkey P.—16/11/92—Building .. 2756

SUPERANNUATION—

[3]Application to vary award *re* redundancy—Applicant union sought that superannuation benefits paid under the award not be offset against severance pay on termination—Respondent argued an interpretation would have been a more appropriate approach that the need for the variation had not been established and CICS had to apply the Caris the Jewellers case—CICS reviewed authorities and found TCR test case had not created a standard for all other awards and that it was appropriate that the difference status of Occupational or Award Based Superannuation be recognised in award provisions—Granted—A.E.E.F.E.U. *v.* A.C. Electrical Engineering Pty Ltd and Others—No. 678 of 1991—George C., Beech C., Parks C.—1/7/92—Metal and Electrical Trades 1518

Application for allegedly denied contractual entitlements *re* superannuation payments—Applicant argued that he was induced to take up employment with Respondent due to offer of superannuation scheme—Respondent argued that no such proposal was approved by the Directors of the company—Commission found on evidence that whilst parties did not reduce their agreement to complete written form, the implication of a term providing for such benefits existed in employment contract therefore Applicant was entitled to claim—Granted—Escudier D.R. *v.* Advanced Electrical Equipment Pty Ltd—No. 462 of 1992—George C.—1/9/92—Electrical 2065

Application for allegedly denied contractual entitlements *re* pro-rata payment of Bonus—Applicant claimed pro-rata payment was due for seven months work and was a term of contract in lieu of Annual Leave Loading and Superannuation payments—Commission found that Applicant had misconstrued said agreement with Respondent—Dismissed—Baugh N.J. *v.* Ribbon Distributors and Trading Pty Ltd—No. 719 of 1992—Kennedy C.—30/10/92—Retail 2604

Application to vary Award *re* modernisation of Occupational Superannuation Fund by consent—Parties sought to streamline the administration of the scheme by enabling the enrolment procedure to be simplified and redefining the ordinary time earnings to provide for a commuted sum—Commission was satisfied that variations complied with Wage Fixing Principles and should issue—Granted—A.M.E.I.U. *v.* W.A.M.C.—No. 446 of 1992—Fielding C.—6/11/92—Meat 2808

SUPPLEMENTARY PAYMENTS—

Application to vary award *re* 2.5% Structural Efficiency Wage Adjustment, supplementary payments and other provisions—Respondent argued Union's proposals did not satisfy State Wage Principles—Commission in absence of parties agreement, heard and determined claims and counterclaims relating to: Contract of Employment, Hours, Annual Leave, Overtime, Time and Wages Record, Special Rates and Provisions, Wages, Dispute Settlement Procedure, Trade Union Training Leave, Training Leave Structural Efficiency and Award Modernisation, Record Keeping, Essential Services, Stand-Down, Transfer to Another Workplace, and Employee Counselling of Operational Meetings clauses—Award varied—F.M.W.U. *v.* Canine Security and Others—No. 1415 of 1991—Parks C.—10/7/92—Security 1813

TALLIES—

[2]Appeal against decision of Commission (72 WAIG 131) *re* variation of an award—Appellant argued Commission had misconstrued evidence and erred in finding an extra difficulty in slaughtering ram lambs of 8 to 24% of ewe lambs—Full Bench reviewed authorities and having regard for the evidence found one could not find on the balance of probabilities that it had been established otherwise and the Commission had not erred in its discretion—Dismissed—W.A Meat Commission *v.* A.M.I.E.U.—Appeal No. 35 of 1992—Sharkey P., Gregor C., Parks C.—29/7/92—Meat 1732

TERMINATION—

Appeal against the constructive dismissal of an employee—Appellant felt he had been unfairly forced to resign and sought reinstatement without loss of entitlements—Respondent argued that it had lost confidence and faith in the ability and credibility of the employee to the point where the question of reinstatement could not be a serious option—Commission reviewed the matter de novo and found that the way employee was summarily dismissed was unfair, however there was a reasonable and lawful instruction which employee had disobeyed, that coupled with other charges of peculation and misconduct was sufficient grounds to terminate contract of employment and ordered one months pay in lieu of notice as well as pro-rata long service leave—Ordered Accordingly—Greenaway T.G. *v.* Country High School Hostels Authority—No. PSAB11 of 1991—Negus C./Gornik/Kaub—15/5/92—Education 1700

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that employee as a customer after working hours had moved goods past but not across the scanning beam which had not registered, that Applicant was a casual employee therefore there was no dismissal and that Respondent had lost confidence in employee's ability to perform the work—Commission found that there had been a dismissal, that although the Applicant's conduct had raised doubts about her future reliability this could be corrected by admonition therefore the termination was unfair—Granted—Anderson N.P. *v.* Supa Value Supermarket, Beechboro—No. 683 of 1992—Salmon C.—17/6/92—Retail Food 1624

Application for reinstatement on the grounds of unfair constructive dismissal—Applicant claimed she felt she had been forced to leave her job therefore had submitted a letter of resignation—Respondent argued that as claim had been tried in another jurisdiction which had not been successful and the inordinate delay in the prosecution of the claim, Commission should apply doctrine of Laches against the Applicant—Commission reviewed authorities (Fosbury's Case) and found that there was a requirement for persons to act with expedition in pursuing a claim and that reinstatement could not reasonably be effected where a long period of time had elapsed following dismissal—Dismissed—Morgan K. *v.* BHP Iron Ore (Goldsworthy) Ltd—No. 102 of 1992—Gregor C.—15/6/92—Iron Ore 1638

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

[1]Appeal against decision of Full Bench (71 WAIG 2480) *re* order for reinstatement and consequential matters—Appellant argued Full Bench erred in law in holding that the dismissal was for misconduct thus applying the wrong principles and in upholding that the evidentiary onus was not discharged—IAC reviewed matter's chequered history of case, authorities and found that to be a constructive dismissal the employer had to be guilty of conduct which was a significant breach going to the root of the contract which entitled the employee to accept the breach and leave—IAC further found that Full Bench had erroneously focussed attention away from the fairness or unfairness of the dismissal to whether the employee was guilty of misconduct sufficient to justify summary dismissal when there was an agreed resignation and a negotiated payment in lieu of notice—Upheld—Cargill Australia Limited, Leslie Salt Division *v.* F.C.U.—IAC Appeal No. 12 of 1991—Rowland J., Wallwork J., Owen J.—11/6/92—Salt Production and Mining 1495

Conference referred *re* summary dismissal of employee for alleged misconduct—Applicant Union claimed dismissal was unfair and sought reinstatement without loss of entitlements—Respondent argued that employee had behaved in a threatening intimidatory manner and violent way towards a fellow worker and that a review procedure had been undertaken—Commission found on evidence that review process had been compromised, the employee's behaviour had arisen out of genuine concern as Union Convenor for fellow employee, that the punishment was disproportionate to the offence and therefore unfair—Granted in Part—A.W.U. *v.* BHP Iron Ore Ltd—No. CR322 of 1992—Gregor C.—11/6/92—Mining 1656

Application for allegedly denied contractual entitlements—Applicant sought a letter from Respondent stating that her dismissal was unfair and claimed contractual entitlements, namely unpaid commissions—Respondent argued Commission ought to refrain from hearing unfair dismissal claim but admitted that benefits were due and consented to an order requiring the sum to be paid—Commission found that as it had no power to order relief sought the matter should not proceed further—Granted In Part—Scaffidi M. *v.* Tarragan Holdings Pty Ltd T/A Roy Weston Hillarys—No. 293 of 1992—Fielding C.—12/6/92—Real Estate 1640

Conference referred *re* unfair dismissal claim—Applicant sought reinstatement and payment of appropriate compensation—Respondent argued that termination was brought about by frustration of contract due to ill health of employee—Commission reviewed authorities and found from evidence that the operation of law had led to the frustration of the contract of employment, that despite subsequent prognosis of employees condition which had been favourable, at the time of the dismissal the Respondent was entitled to the view that the legal right to terminate had been fairly exercised—Dismissed—F.M.W.U. *v.* R.D. Miles and Company Pty Ltd T/A Undercliffe Hospital Complex—No. CR723 of 1991—Gregor C.—5/6/92—Health 1663

[2]Appeal against decision (71 WAIG 3032) *re* failure to order re-employment having found an unfair dismissal—Appellant argued Commission erred in accounting for, *inter alia*, extraneous factors outside the employment relationship in determining whether re-employment should be ordered or not and sought an order for re-employment and loss benefits—Full Bench found Commission had erred by not informing parties of its intention and not allowing them to be heard on the question of industrial harmony outside the particular contract of employment—Upheld—Woodberry N.M *v.* Koolan Island Club Inc—Appeal No. 1720 of 1991—Sharkey P., Fielding C., Parks C.—16/6/92—Iron Ore/Recreation 1751

Application to vary award *re* transfer and termination provisions for health and safety representatives—Applicant argued provisions should be the same as for job stewards—Respondent argued Applicant had not proven that the representatives would be prejudiced in employment and that the OHSW Act had provisions for dealing with discrimination—Commission reviewed I.R. Act, OHSW Act, the Laing Report, Building Trades (Construction) Award and found in favour of the Applicant—Granted—B.T.A. *v.* Adsigns Pty Ltd & Others—No. 872B of 1991—Beech C.—20/7/92—Building Construction 1789

[2]Appeal against decision of Commission (72 WAIG 151) *re* order for reinstatement and payments of entitlements for unfair dismissal—Full Bench reviewed authorities and found the Commission had erred in failing to find that there was a binding agreement to settle the matter which the Respondent had repudiated—Upheld—Polygon Holdings Pty Ltd T/A The Boulevard Alehouse *v.* Malone T.N.—Appeal No. 1965 of 1991—Sharkey P., Gregor C., Parks C.—10/7/92—Hotels 1744

Application for reinstatement on the grounds of unfair dismissal—Applicant argued he was not given the opportunity to respond to misdeeds alleged against him and was denied natural justice—Respondent argued that Applicant had been warned about his interference with an employee's personal affairs but had persisted in the "harassment"—Commission found on evidence that whilst the manner of the dismissal was unfair, the Applicant's conduct had fallen well below that expected of a person in his position therefore termination was not unfair—Dismissed—Van Witsen E.W. *v.* World Services and Construction Pty Ltd Ltd—No. 223 of 1992—Fielding C.—23/7/92—Engineering 1849

Application for reinstatement on the grounds of unfair dismissal—Applicant argued that she had not at any stage any intention of acting dishonestly about a "tip" and did nothing more than follow her understanding of the usual practice—Respondent argued that there was a difference between a tip and unclaimed money and the actions of the Applicant were regarded as being a breach of duty sufficient to warrant termination—Commission found on evidence that retaining large amounts of money was not an usual or acceptable practice therefore Applicant had not discharged onus of establishing claim—Dismissed—"C" *v.* Quality Pacific Management Pty Ltd—No. 628 of 1992—Beech C.—Hospitality 1838

Application for reinstatement on the grounds of unfair dismissal, without loss of entitlements—Applicant argued she had not been sufficiently warned or counselled that her job was in jeopardy—Respondent argued that it had repeatedly communicated the need for changes but to no avail—Commission found on evidence that Applicant had been given more than adequate chance to improve her teaching abilities and that termination in this instance was not unfair—Dismissed—Peters S.L. *v.* Penrhos College—No. 179 of 1992—Negus C.—21/7/92—Education 1843

Application for alleged non payment of contractual benefits—Applicant sought payment of wages to end of trial period on the basis that it was a fixed term contract—Commission found on evidence that the Applicant failed to come up to the reasonable standard of performance or behaviour which resulted in a breach in the implied terms of the contract, entitling the employer to terminate the contract—Dismissed—Buck D. *v.* Wizard Soft Computers—No. 160 of 1992—Halliwell S.C.—16/7/92—Computers 1837

Appeal against dismissal of an employee—Appellant claimed he had been unfairly dismissed and sought reinstatement and transfer to a more suitable position—Respondent argued that employee was unable to produce volume of work required and continually disobeyed specific instruction despite counselling—PSAB found on evidence that employee had failed to fulfil his duties adequately and that termination in this instance was not unfair—Dismissed—Arnold E. *v.* S.G.I.C.—No. PSAB 10 of 1991—Negus C., Middleton/Carr—3/7/92—Insurance 1698

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant argued she had not been counselled in appropriate procedures and sought payment in lieu of unused leave—Respondent argued that employee's failure to carry out her duties efficiently cost the company revenue which had justified termination—Commission found on evidence that Applicant was negligent in her work despite the fact that she was given adequate opportunity to conform with requirements of her employer—Commission further found that it was inappropriate to imply a term requiring that payment be made in lieu of taking leave in the absence of an expressed provision—Dismissed—Beale G. *v.* Curtin Consultancy Services Limited—No. 1473 of 1991—Parks C.—17/6/92—Consultancy Services 1626

Application for reinstatement on the grounds of unfair dismissal—Applicant union argued employer should not have taken an earlier incident into account and should have applied the best case scenario because of the workers good record—Respondent argued the key element in the authorities was that a participant in a fight as opposed to a victim may be treated the same as a person who has inflicted harm on another—Commission reviewed authorities and found on evidence that the investigation into the incident was flawed and that the dismissal was tainted—Granted—C.M.E.U. *v.* R.R.I.A.—No. 1557 of 1991—Gregor C.—5/6/92—Iron Ore 1630

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant argued on the basis of sexual harassment by fellow worker and failure of management to handle this situation—Respondent argued employee was rude, insubordinate, uncooperative, deceitful and failed to obey lawful instruction—Commission found on evidence that there was no attempt to rectify unacceptable behaviour by fellow employee nor a proper investigation therefore summary termination was flawed and ordered reinstatement and appropriate compensation—Granted—Taylor R.J. *v.* Dominion Mining Limited—No. 906 of 1991—Gregor C.—16/6/92—Mining 1642

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Conference referred *re* termination of employee for breaches of safety procedures—Applicant union claimed employee had been unfairly summarily dismissed and sought reinstatement—Respondent argued that despite numerous warnings the employee had failed to observe proper safety precautions, had been paid wages in lieu of notice and other accrued benefits and sought costs to be awarded—Commission found on evidence that the conduct of the employee was such that he had placed himself outside the bounds of his contract of employment and he had not discharged the onus of establishing the claim and decided not to award costs—Dismissed—A.W.U. *v.* Kaltails Mining Services—No. CR150 of 1992—Gregor C.—30/6/92—Mining 1657

Appeal against dismissal of an employee—Appellant argued on the basis of a denial of natural justice and lack of due process and sought reinstatement—Respondent argued that employee had maltreated a client and that coupled with the false declaration of the application form decision to terminate was warranted—Commission reviewed evidence and found that Appellant had failed to discharge the onus of establishing his claim—Dismissed—Jennings D.B. *v.* The Authority for Intellectually Handicapped Persons—No. PSAB 6 of 1992—Negus C., Gregory/Kaub—7/9/92—Health 2110

Application for reinstatement on the grounds of alleged unfair summary dismissal—Applicant sought outstanding salary and one weeks pay in lieu of notice—Respondent argued that Applicant was terminated for alleged gross misconduct and had withheld wages said to be owing to offset missing money from the till—Commission found on evidence that whilst notice payment in this instance was not applicable, payment up till the time of dismissal was due—Granted in Part—Kerridge T.M. *v.* B.P. Victoria Park—No. 555 of 1992—Beech C.—28/8/92 2072

[2]Appeal against decision of Commission (72 WAIG 173) *re* dismissed claim for reinstatement on the grounds of unfair dismissal—Appellant argued Commission erred in finding the Respondent entitled to summarily dismiss the employee as there was insufficient evidence of striking or intending to strike another employee—Respondent argued employee was dismissed for hostile behaviour and the likelihood that it might occur again—Full Bench reviewed authorities and found on evidence it was open for the Commission to make various findings as it did—However Full Bench found the Commission failed to take into account all of the relevant circumstances and all alternatives were not canvassed—The Appellant had therefore discharged the onus upon it—Upheld and Decision Varied—T.W.U. *v.* BHP Iron Ore Limited—Appeal No. 26 of 1992—Sharkey P., Coleman C.C., Parks C.—3/8/92—Iron Ore 1994

Application for reinstatement on the grounds of unfair dismissal—Applicant argued that she had done everything in her power to inform that she would be temporarily away and that Respondent should have left the job open for her—Respondent argued that due to the length of time that Applicant was away beyond the expected time, it has been forced to find a replacement—Commission found that whilst there was ignorance of the employment relationship on both sides which probably caused the ultimate problem the Applicant had abandoned her position therefore failed to substantiate her claim—Dismissed—Healy M. *v.* Owners of Victoria Apartments Strata Plan 1659—No. 681 of 1992—Kennedy C.—27/8/92—Domestic Cleaning 2070

Application *re* unfair dismissal—Respondent argued that contrary to previous warnings and instructions the Applicant had failed to comply with the Respondent's procedures and his work performance was unsatisfactory—Respondent also stated that the Applicant had been paid in lieu of reasonable notice period—Commission reviewed authorities *re* declaration and found on evidence and having heard the Applicant's case that further proceedings would incur expense to no useful end—Dismissed—Rennardson M.B. *v.* Dynamic Business Resources Pty Limited—No. 381 of 1992—Fielding C.—11/8/92 2076

[2]Appeal against decision of Commission (70 WAIG 853) *re* reinstatement on the grounds of unfair dismissal—Appellant argued Commission had erred in making various findings of fact in relation to alleged assault and sexual harassment—Full Bench reviewed authorities and found on evidence Commission had not erred in its discretion—Dismissed—Royal Perth Hospital *v.* Lynn T.—Appeal No. 405 of 1992—Sharkey P., Salmon C., Kennedy C.—25/8/92—Health 1976

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that Commission did not have jurisdiction to deal with matter as employee was covered by Public Service Appeal Board jurisdiction—Commission reviewed the Industrial Relations Act, 1979, the Public Service Act 1978 and the Hospital Act No. 23 of 1927 and found that Applicant was a government officer as defined and the maxim generalia specialibus non-derogant applied—Dismissed for want of jurisdiction—Tremain P.C. *v.* King Edward Memorial Hospital for Women—No. 1932 of 1991—Gregor C.—21/8/92—Clerical 2078

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that the Applicant had breached the confidentiality of the company in photocopying a proposed letter and showing it to a fellow worker and that compensation ought not to be paid as the company was running on a budget deficit—Commission found on evidence that as no warnings being given to the Applicant the action taken by the employer was unwarranted—Granted—Yarran R.L. *v.* Manguri—No. 1220 of 1991—Parks C.—3/3/92—Gardening 2079

Appeal to Public Service Appeal Board against decision *re* termination—Board found on evidence that the Respondent was left with no alternative but to terminate employee's contract of employment—Board further found that due to the sensitivity of the issues involved no further reasons for decisions would be published—Dismissed—Cooke A. *v.* West Australian Alcohol and Drug Authority—No. PSAB 7 of 1992—Negus C., Horden/Wall—27/8/92 2110

Appeal against dismissal of an employee for allegedly striking a patient—Appellant argued on the basis of unfair dismissal and sought reinstatement without loss of entitlements—PSAB found on evidence that although the incident was serious, it was the employers responsibility to create a safe work environment and coupled with the Appellant's unblemished employment record termination in this instance was unfair—Ordered Accordingly—Rees M.R. *v.* The Authority for Intellectually Handicapped Persons—No. PSAB 1 of 1992—Negus C., Middleton/Purdie—28/5/92—Health 2114

Conference referred *re* termination of employee—Applicant union claimed that employee was unfairly dismissed and sought reinstatement—Respondent argued that employee was given adequate warnings prior to termination—Commission, in light of all evidence, found that Applicant's complaints about insufficient staff warranted more of Respondent's attention and the result of that failure led to Applicant's dismissal—Granted- S.D.A. *v.* Coles Supermarkets—No. CR411 of 1992—Salmon C.—7/9/92—Food 2285

Application for allegedly denied contractual entitlements *re* monies and holiday pay—Applicant claimed that period of notice to terminate was unreasonable—Respondent argued that under common law where there is no notice given in the contract an entitlement to dismiss without notice occurs—Commission found on evidence that Applicant's claim for costs were fair and reasonable—Granted—Bigelman H. *v.* Mahdie Pty Limited—No. 953 of 1992—Salmon C.—25/9/92 2226

Conference referred *re* unfair dismissal claim—Applicant union argued that Respondent had not taken employee's length of service into account at time of dismissal and sought an order that the employee be re-employed into the position prior to that which he was dismissed from—Respondent argued that employee was terminated due to the serious discontent over employee's attitude amongst supervisors after receiving numerous verbal counsellings—Commission found on evidence that the onus of establishing unfairness had not been discharged and could see no warrant for intervention—Dismissed—A.D.S.T.E. *v.* Brambles Manford—No. CR297 of 1992—Kennedy C.—10/9/92—Crane Driver 2267

Conference referred *re* unfair dismissal claim—Applicant union alleged that when the employee was re-employed by Respondent a verbal promise of non shift work hours occurred—Respondent denied allegation and argued that on the contract the employee agreed to shift work and as no other work was available termination occurred—Commission found on evidence that the termination of employee was not unfair—Dismissed—A.W.U. *v.* Cable Sands (WA) Pty Ltd—No. CR405 of 1992—Fielding C.—2/10/92—Mining 2271

Application for reinstatement on grounds of unfair dismissal—Applicant claimed that satisfactory work performance had been maintained and no clear warnings were given—Respondent contended that Applicant's performance was not satisfactory and that counselling had occurred regarding work attitude—Commission found on evidence that there had been little improvement in Applicant's performance and decision to dismiss was not unfair—Dismissed—Simpson G. *v.* Meridian Services Pty Ltd—No. 209 of 1992—Halliwell S.C.—23/9/92—Report Writer 2245

Application for allegedly denied contractual entitlements *re* benefit deducted without authorisation—Respondent argued that the said amount was a debt paid by the Respondent on behalf of the Applicant in the form of an advance against wages—Commission found on evidence that the Respondent had failed to pay Applicant full benefits due under contract of employment defined as 'Wages' in the Truck Act—Granted—Hassen M.J. *v.* BHB Challenge Pty Ltd—No. 592 of 1992—Parks C—31/9/92 2232

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Conference referred *re* dismissal of an employee for alleged misconduct—Applicant union argued that employee had been unfairly dismissed and sought reinstatement without loss of entitlements—Respondent argued that employee should be held responsible for losses incurred through the disappearance of money and a customers property and through damages caused to a customer's vehicle which had warranted termination—Commission found on evidence that a suspicion existed which caused a breakdown in the relationship and trust between employer and employee therefore dismissal in this instance was not unfair—Dismissed—A.W.U. *v.* Sage Holdings Pty Ltd—No CR342 of 1992—George C.—14/9/92—Petrol Station 2275

Conference referred *re* unfair dismissal claim—Applicant union claimed that employee was dismissed due to being on Workers Compensation without warning of termination—Respondent argued that the absence of employee on Workers Compensation was not material to dismissal whereas a dissatisfaction with employee's performance was—Commission found on evidence that the dismissal claim did not meet the test set for the Commission intervention—Commission further found that Union's claim for 1 week's wages in lieu of notice had been paid—Dismissed—F.P.F.A.I.U. *v.* Lexcraft Pty Ltd T/A Kembla Furniture—No. CR471 of 1992—Beech C.—23/9/92—Furniture 2281

Application for reinstatement on the grounds of alleged unfair summary dismissal without loss of entitlements—Respondent argued that employee had put the Company's reputation and the security of its employees at risk as well as offending a client which had justified termination—Commission reviewed authorities and found on evidence that action of Applicant was not sufficient enough to warrant dismissal therefore was wrongful and unfair—Granted—McMeikan P. *v.* Lamb Printing Pty Limited—No. 977 of 1992—Salmon C.—18/9/92—Sales & Marketing 2236

Application for reinstatement on the grounds of unfair dismissal—Applicant claimed that no criticism or discipline had been received about work performance—Respondent argued it was not acting unfairly in dismissing the last helpful employee despite the last on first off principle—Commission found in favour of Respondent—Dismissed—Williams C. *v.* W.A. Football League Members Club (Inc)—Salmon C.—15/9/92—Hospitality 2253

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant further sought, as an alternative, a payment for an allegedly fixed term employment contract—Respondent argued Applicant was unfairly dismissed as there had been a failure to raise the performance level of night shift crew to required standard and opposed alternate remedy—Commission found on evidence Applicant had been warned of performance level by senior management and dismissal was neither harsh or oppressive—Dismissed—Himsworth A. *v.* Cape Modern Bains Joint Venture—No. 886 of 1992—George C.—13/10/92—Mining 2233

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Parties advised Commission that dismissal issue had been resolved—Applicant further claimed unpaid redundancy payments—Respondent argued that as the termination occurred before starting date of the redundancy package it was not obliged to make payment—Commission found on evidence that another date was selected and Applicant entitled to benefit of contract as varied by a letter—Granted—Foster D.A. *v.* Central Kalgoorlie Gold Mines N/L—No. 629 of 1992—Gregor C.—24/9/92—Mining 2230

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that employee had resigned and was not able to bring the matter before the Commission—Commission found on evidence that Applicant was constructively dismissed—Commission however further found that the Applicant had refused to obey a reasonable and lawful command by Respondent warranting dismissal—Dismissed—Clarke D.A. *v.* Capricorn Society Ltd—No. 980 of 1992—Beech C.—9/10/92—Clerical 2228

Application for reinstatement on the grounds of alleged summary unfair dismissal without loss of entitlements—Applicant argued that he was entitled to a reasonable period of prior notice of termination and claimed reimbursement of expenses—Respondent argued that employee committed acts without required authority, failed to provide written reports and disregarded instructions—Commission found on evidence that the incidents related did not constitute a breach of duty so serious as to amount to repudiation of the employment contract however reinstatement was not possible as the company and operations had been disbanded—Granted—Miller W.A. *v.* Phoenix Technology (Aust) Pty Ltd—No. 1282 of 1991—Parks C.—8/10/92—Communications 2238

Application for reinstatement on the grounds of unfair dismissal—Applicant after several communications to the Commission requesting extension of time for a later hearing date failed to appear—Commission found on evidence that there was an obligation on Applicants to act with expedition and due to the inordinate delays in prosecuting claim and the necessity of the Applicant to respond by making himself available in person the claim must fail—Dismissed For Want Of Prosecution—Real M.A. *v.* Worsley Alumina Pty Ltd (Boddington Gold Mine)—No. 1755 of 1991—Gregor C.—14/9/92—Mining 2242

Application for reinstatement on the grounds of unfair dismissal—Applicant argued that she had not been given any warnings or counselling to the effect that her job was in jeopardy—Respondent argued that the employee had failed to comply with appropriate administrative directions and failure to provide an explanation as to the damaged motor vehicle were sufficient reasons to justify termination—Commission reviewed authorities and found on evidence that the Applicant had not properly complied with reasonable requests of the employer, therefore dismissal was not harsh or unfair—Dismissed—Macale D.M. *v.* Ngnowar-Aerwah Aboriginal Corporation—No. 779 of 1992—Gregor C.—29/19/92—Health and Welfare 2613

Application for reinstatement on the grounds of unfair dismissal—Applicant argued effect of alcohol consumed was minimal—Respondent argued that Applicant was aware of work rules as employee handbook had been issued and that clear breach of rule occurred—Commission found summary termination justified—Dismissed—Ovens P.M. *v.* Hills Industries Limited, Communication Division—No. 923 of 1992—Parks C.—26/10/92 2617

Claim *re* dispute over limited partnership agreements and subsequent withdrawal of labour—Applicant Union sought a declaration that Respondent's action in imposing the limited partnership documents on the employees involved in the dispute was in breach of the I.R. Act, that the employees were unfairly dismissed and sought reinstatement and payment of wages from the termination to date of reinstatement—Respondent argued that the business had undergone a significant change and that reinstatement of the workers would be impracticable—Commission found on evidence that employees had abandoned their work, that the agreement was not imposed on the workers and that it was not possible to determine the true working relationship of the employees in this instance—Dismissed—M.I.E.U. *v.* The Preston River Abattoir—No. 536 of 1992—Fielding C.—16/10/92—Meat 2602

Application for reinstatement on the grounds of unfair dismissal without loss of contractual benefits—Applicant claimed termination resulted from continuing injuries from Workers Compensation claim and no warnings had been given—Respondent argued that Applicant's circumstances forced termination—Commission found on evidence that Respondent undertook a genuine restructuring to cut costs—Dismissed—Wittenbaker C.A. *v.* L&M Radiator Pty Ltd—No. 1114 of 1992—Kennedy C.—9/11/92 2619

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that termination was due to incompetent behaviour and work practices, not stealing—Commission found on evidence that Applicant had not been spoken to about work behaviour and was therefore unfairly dismissed—Granted—Clein G. *v.* Emmett Investments Pty Ltd t/a Shell Road House—No. 679 of 1992—Fielding C.—16/10/92 2608

Application for reinstatement on the grounds of unfair dismissal—Applicant claimed he had no prior warning and was a victim of blacklisting—Respondent argued that dismissal was result of unsatisfactory work attitude—Commission found on evidence that Respondent had been more than patient in maintaining the relationship for as long as he did—Dismissed—Scott T. *v.* Visarelle Pty Ltd t/a Woodsies Windscreen—No. 901 of 1992—Negus C.—10/11/92—Automotive 2617

Conference referred *re* claim of reinstatement to original classification on grounds of unfair treatment—Respondent argued that employee failed to comply with basic safety requirements after repeatedly being warned by supervisors—Commission found on evidence that action of the Respondent was not unfair—Dismissed—A.E.E.F.E.U. *v.* Robe River Iron Associates—No. CR212 of 1992—Gregor C.—16/10/92 2633

Conference referred *re* claim for reinstatement on the grounds of a constructive and unfair dismissal—Applicant union claimed that employee was forced to resign under threat of dismissal—Respondent argued that due to the workers' ill feeling towards the employee the option of resignation was suggested and taken—Commission found that there was no threat of dismissal present—Dismissed—A.W.U. and Hamersley Iron Pty Limited—No. CR197 of 1992—Fielding C.—3/11/92—Mining 2624

CUMULATIVE DIGEST—*continued*

Page

TERMINATION—*continued*

Application for reinstatement on the grounds of alleged unfair summary dismissal—Applicant argied that his termination was effected to make way for another person and that he had not been given any warning that his job was in jeopardy—Respondent argued that Applicant had insulted three clients and that the company could not afford such a problem—Commission reviewed evidence and found that Respondent acted unfairly in denying employee to be heard on any complaints but as Applicant sought different terms from his original contract there could be no order for re-employment—Dismissed—Hemsley R.J. *v.* Manor Homes Pty Ltd—No. 875 of 1992—Kennedy C.—4/12/92—Real Estate 2833

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant argued that his termination was effected due to litigation between his father and the Respondent and that he had had no warnings or notice of any dissatisfaction with his performance—Respondent argued that Applicant's employment was on the basis that there was no further breakdown in the relations between the parties but which had occurred to an extent that notice of termination was given—Commission found on evidence that although both parties were at fault the Applicant had not been able to discharge the onus of establishing his claim—Dismissed—Fry S.R. *v.* Hancock Prospecting Pty Ltd—No. 1006 of 1992—Kennedy C.—27/11/92—Farming 2827

[2]Appeals against decision of Commission (72 WAIG 888, 2843) *re* excusing witness and dismissal of unfair dismissal/contractual entitlement claims—Appellant argued, *inter alia*, he was denied the opportunity to fairly and fully present his case and that in the public interest an appeal should lie—Full Bench reviewed authorities and found from evidence it was not possible to say that the Appellant was an employee of either of the Respondent—Full Bench found nothing which could lead to the conclusion that cause was shown for the witnesses to appear—Dismissed—Mosson B.C. *v.* Haymarket Publishing and Another—Appeal No. 503 of 1992—Sharkey P., Fielding C., Beech C.—22/10/92—Publishing 2517

Application for reinstatement on the grounds of unfair summary dismissal for alleged misconduct—Applicant sought payment for wages and accommodation allowance—Respondent argued that the employee had engaged in improper conduct and behaviour with another employee which had warranted termination—Commission found on evidence that Applicant's role in the incident was somewhat different to the other employee and that summary dismissal was not a fair exercise of the employer's rights and ordered reinstatement to prior position and compensation for wages and loss of allowances—Granted—Sverns U. *v.* Advanced Food Systems International Limited—No. 970 of 1992—George C.—3/11/92—Restaurant 2846

Conference referred *re* claim for reinstatement without loss of entitlements on the grounds of unfair dismissal—Respondent argued that the employee's services were terminated due to poor work performance and that the company was going out of business—Commission reviewed authorities and found on evidence that dismissals were unfair however was not able to order reinstatement as the Respondents no longer engaged in the business—In Supplementary Reasons, the Commission addressed the issue of compensation found it did have jurisdiction, and adopted figures from the Bureau of Statistics to determine the amounts due—Granted in Part—Miscellaneous Workers' Union *v.* Nappy Happy Service—No. CR 517 of 1992—Halliwell S.C.—20/10/92—Laundry 2872

Application for reinstatement on the grounds of unfair dismissal—Applicant union argued that employee had been terminated as a result of complaints about his wage rates and conditions and because he sought to negotiate improvements in the terms of his employment—Respondent argued on the basis of downturn in operations—Commission reviewed authorities and found on evidence that the termination was unjustified and that employee had not been given a "fair go all round"—Granted—Forest Products, Furnishing and Allied Industries Union *v.* T.J. and M.B. Waugh—No. CR 465 of 1992—Coleman C.C.—11/11/92—Timber 2867

Conference referred *re* claim for reinstatement on the grounds of unfair dismissal—Applicant claimed termination was due to a previous worker's compensation injury claim—Respondent argued that employment was on a casual "on and as when required" basis—Commission found on evidence that Applicant's employment was casual—Dismissed—T.W.U. *v.* Merman Pty Limited t/a Atlas Haulage Services—No. CR576 of 1992—Halliwell S.C.—17/11/92—Transport 2886

Application for reinstatement on the grounds of unfair dismissal without loss of entitlements—Applicant claimed dismissal was constructive—Respondent argued Applicant had resigned from position—Commission reviewed authorities and found on evidence that dismissal was unfair and ordered reinstatement—Granted—Christensen L. *v.* Gwalia Consolidated Limited—No. 411 of 1992—Fielding C.—13/11/92—Mining 2823

Application for reinstatement on the grounds of unfair dismissal—Respondent questioned Commission's jurisdiction due to 6 1/2 month time lapse since dismissal—Commission reviewed Pepler's Case and found that recentness was not a qualification for jurisdiction and the hearing of case ought to continue—Adjourned—Jackson G. *v.* Alco Pty Ltd—No. 1103 of 1992—Salmon C.—16/11/92—Retail 2835

Application for allegedly denied contractual entitlements *re* payment in lieu of notice—Applicant claimed entitlements were due as Respondent had failed to give notice of termination—Respondent argued that an agreement was reached in closing employment contract immediately—Commission found on evidence that at time of termination no residual benefit was present—Dismissed—Thambipillai T. *v.* J.H. Computer Services Pty Ltd—No. 1010 of 1992—Gregor C.—18/11/92—Computer Services 2849

Application for reinstatement on the grounds of unfair dismissal—Respondent argued that dismissal occurred as a result of information from a fraud investigation—Commission found on evidence that although manner of termination was unsatisfactory the dismissal was not harsh or unfair—Dismissed—Velletri F. *v.* Scottish Pacific Business Finances Pty Limited—No. 1047 of 1992—Beech C.—3/12/92—Financing 2850

Conference referred *re* dispute over summary dismissals for alleged misconduct—Applicant union argued that the terminations were disproportionate to the importance of the disagreement between the employees therefore unfair—Commission reviewed authorities and found on evidence that the two members had breached their contracts of employment in trying to cover up the incident and that decision to terminate was neither harsh nor unfair—Dismissed—A.W.U. *v.* Argyle Diamond Mines Pty Ltd—No. CR561 of 1992—Gregor C.—13/11/92—Mining 2859

TRAINING—

Application to vary award *re* finalisation of June 1991 Structural Efficiency Agreement—Parties sought to effect an enterprise agreement which mirrored the outcome of proceedings before the Federal Commission and had only three points of disagreement—Commission found parental leave provisions did not conflict with Conditions of Employment Principle and determined matters of Standing Down of Employees, Annual Leave, Absence Before and After Holidays—Commission found no ambiguities or unfairness and accepted the package provided the parties examined the minimum rates configuration—Granted—A.E.E.F.E.U. *v.* John Lysaght (Australia) Limited—No. 1337(B) of 1991—George C.—19/3/92—Electrical and Manufacturing Work 1594

TRANSFER—

[2]Appeal against decision of Commission (72 WAIG 168) *re* declaration that employee's performance was not at acceptable level and transfer of that employee—Appellant argued Commission had erred in making various findings of fact—Full Bench reviewed authorities and found on evidence that the Commission having the benefit of seeing the witnesses had not erred or miscarried in its discretion—Dismissed—F.M.W.U. *v.* C.A.L.M.—No. 6 of 1992—Sharkey P., Coleman C.C., Fielding C.—29/7/92—Parks and Wildlife 1737

Conference referred *re* dispute over transfer of temporary officers to permanent positions—Applicant Union argued Respondent had breached merit and equity agreements and sought that the positions be advertised so country officers had an opportunity to apply—Respondent argued the Applicant, having acquiesced and cooperated in the application of policies, was estopped from pursuing the instant claim—PSA reviewed promotion positions and redundancy policies and provisions, and found the requirements of section 26 leant further weight to the view that the claim must fail—Dismissed—C.S.A. *v.* Hon. Minister for Agriculture—No. PSA CR90 of 1991—Negus C.—5/8/92—Agricultural Protection 1859

CUMULATIVE DIGEST—*continued*

Page

TRANSFER—*continued*

Application to vary award *re* transfer and termination provisions for health and safety representatives—Applicant argued provisions should be the same as for job stewards—Respondent argued Applicant had not proven that the representatives would be prejudiced in employment and that the OHSW Act had provisions for dealing with discrimination—Commission reviewed I.R. Act, OHSW Act, the Laing Report, Building Trades (Construction) Award and found in favour of the Applicant—Granted—B.T.A. *v.* Adsigns Pty Ltd & Others—No. 872B of 1991—Beech C.—20/7/92—Building Construction 1789

TRAVELLING—

Application to vary award *re* Fares and Travelling, Liberty to Apply—Commission was satisfied that allowances would not set precedents or flow-ons to other employers as it was already well-established and that it was industrially reasonable that variations sought should issue—Granted—O.P.D.U. *v.* Blastcoaters Pty Ltd and Others—No. 53 of 1992—Halliwell S.C.—23/7/92—Spraypainting and Sandblasting 2051

UNIONS—

[4]Application for orders *re* breach of union rules—continuing matter—President dealt with application for interim orders and found Industrial Appeal Court lift of stay did not preclude applications to vary orders in the matter—President after hearing further addresses, was not disposed to make the orders sought at the time other than some provisions to facilitate negotiations in relation to awards—President further determined application to amend the substantive Application to include allegations of fraudulent activity within the financial affairs of the union—President found it was such a substantial matter that it might be said to be unjust to graft it onto the existing proceedings at that stage—Ordered Accordingly—Drake M.A. *v.* Carter L.B. and Others—Nos. 1053, 1478, 1479, 1529 of 1991 and 127 of 1992—Sharkey P.—10/4/92 & 28/5/92—Unions 1529

[2]Application for alteration of Union Rules *re* membership—Full Bench was satisfied that, all reasonable steps had been taken to allow for members objections—Granted—S.S.T.U.—No. 227 of 1992—Sharkey P., Gregor C., Kennedy C.—7/7/92—Unions 1516

[4]Application for orders *re* breach of union rules relating to an election, remitted from Industrial Appeal Court (72 WAIG 1727)—Applicant sought further orders *re* validity of rules and dismissal of Union President as an item at a conference—Respondent sought order discharging interim orders declaring election and dismissing application—President found I.A.C. finding was that the President acted without power in declaring the election void, the rules had not been declared invalid and in favour of the Respondent—Ordered Accordingly—Dornan B.A. and Others *v.* Harken E.J., President SSTU and Another—No. 1607 of 1991—Sharkey P.—27/7/92—Unions 1774

[4]Application for order *re* breach of union rules *re* officers and the management of a union (continued from 72 WAIG 1529)—Application for interim orders *re* validity of meetings and actions of Acting Union President—President reviewed background of Industrial Appeal, Court Decision, other authorities and found he was not persuaded on the evidence that equity, good conscience and the substantial merits as well as the balance of convenience would direct him to make any interim orders save one dealing with union mail—Granted in Part—President dealt with application remitted from Industrial Appeal Court *re* union election to fill vacancy of a Union President's office—President found and gave reasons therefore ordering the Registrar to update the Union's electoral role—President found and gave reasons therefore that it was not in equity, good conscious, the substantial merits of the case or public interest to truncate proceedings under section 27(1)(a) of the I.R. Act and gave further reasons regarding an order for an amended notice of answer and counter proposal—President was not persuaded to discharge interim orders—In Supplementary Reasons President found I.A.C. matters did not preclude an order that the Registrar examine mail of the union to determine the electoral role—Orders Issued Accordingly—Drake M.A. *v.* Carter L.B. and Others—Nos. 1053, 1478, 1479, 1529 of 1991 and 127 of 1992—Sharkey P.—17/6/92, 10/7/92 & 30/7/92—Unions 1776

[4]Application for orders *re* union election—Respondent argued membership had expressed desire to conduct an election under a different rule through the special general meeting—President found best interests of the union and its members was for one election to be held and suspended the rule—Ordered Accordingly—Robertson D.M. and Another *v.* General Secretary, C.S.A.—No. 630 of 1992—Sharkey P.—13/7/92—Unions 1778

[4]Application for order that a motion passed by union executive to pay General Secretary's legal fees be declared null and void—Applicant argued motion was not put and passed in accordance with democratic control of the union and the payments were *ultra vires* the union rules—Respondent argued that motion was passed in accordance with standing orders—President found on evidence that it had not been intended to give proper notice to the motion so that it could be introduced at the most advantage moment—President reviewed authorities and found without proper notice the resolution was not binding and the equity, good conscience and substantial merits of the case required the executive to resolve the matter properly—Ordered Accordingly—O'Neill C. *v.* S.S.T.U.—No. 1885 of 1991—Sharkey P.—18/6/92—Unions 1533

[4]Complaints *re* breach of union rules—Applicant argued Respondent had wrongly held himself out as occupying an office when he was ineligible to do so—President found there was no evidence that the Respondent was at any time an independent contractor—Dismissed—Mosson B.C. *v.* McLaughlan L.—No. 829 of 1992—Sharkey P.—10/8/92—Unions 1775

[4]Application for orders for the observance of union rules concerning the conduct of union business, resolutions arising out of general meetings and declaring certain rules and actions void—President found in initial reasons a prima facie right for relief on an interim basis and no irreversible consequences of issuing interim orders—Applicant argued, *inter alia*, levies and collection of membership's subscriptions had been done other than in accordance with the rules, that the second respondent had failed to maintain proper membership records and returns to the Industrial Registrar and that a particular rule contravened the Equal Opportunity Act, 1984—Respondent argued Applicant did not have sufficient interest in the matter and was abusing the processes of the Commission as the application was brought for the benefit of another union rather than the Respondent union's membership—Respondent further argued application was brought in bad faith with the objective having the union declared bankrupt and its registration cancelled or suspended—President reviewed statutory provisions, union rules and found members could not provide consensual approval of *ultra vires* acts or validate acts which were *ultra vires* as they were required to observe the union rules—President found whether a breach of the rules was a matter which attracted his exercise of jurisdiction was another matter—President found although Applicant was motivated more by the interests of another union because of the importance of the Respondent union properly handling funds in accordance with the rules and breaches found, it was necessary to consider the matters further—President further found having regard for the Supreme Court and the Trustees Act that there was jurisdiction to deal with the matters conferred specifically on the President by section 66 of the IR Act and that as a matter of law and fact no resolution to raise funds during a ten year period constituted a valid levy nor a valid increase in the subscription prescribed by the rules—President further found payments out of provident fund were *ultra vires*, there was no power to loan monies out of the Union's provident fund and that various committees of management had acted contrary to their duties—President, having regard to the objectives of the Industrial Relations Act, the good conscience and substantial merits of the case found it would be unfair and inequitable to order some members of the committee of management to repay monies and not others even if there was power to do so—President outlined reasons for exercising his discretion or not relating to various matters and orders to be issued—Ordered Accordingly—In further Reasons for Decision President found application remained competent despite Applicant's loss of employment as he "has been a member of an organisation"—President dealt with further matters relating to an auditor's report not earlier submitted or presented to the Applicant—President found costs claimed would normally be legal costs—Ordered Accordingly—O'Brien W. *v.* WAPNA and Others—No. 532 of 1991—Sharkey P.—18/4/91, 24/10/91, 4/3/92, 17/7/92—Unions 2004

[4]Application for true interpretation of Union Rules *re* Membership Status—President reviewed rules and found that an appointed member did not have full membership status regardless of membership prior to employment by the union—President consequentially found returning officer acted correctly in denying a seconded employee the right to attend a conference as a delegate—Declared Accordingly—Lloyd T.K., Returning Officer, S.S.T.U. *v.* S.S.T.U.—No. 1055 of 1992—Sharkey P.—11/9/92—Unions 2175

[4]Application to alter Union Rules *re* Name and Registered Office—Full Bench found no objections and both I.R. Act and Union's Rules complied with—Granted—Bread Manufacturers Association—Application No. 530 of 1992—Sharkey P., Coleman C.C., Halliwell S.C.—27/7/92—Unions 2166

CUMULATIVE DIGEST—*continued*

Page

UNIONS—*continued*

[4]Application for orders *re* breach of union rules—Applicant argued Union President had failed to carry out an order of the Commission constituted by the President and sought that the resolutions of a union's conference be nullified—Respondent argued, *inter alia*, it was entitled to change its meeting procedure, which it did by procedural motion—President reviewed I.R. Act and found union and members were subject to the jurisdiction of the Commission in particular the President and that a breach of rules was a contravention of section 61 under section 84(A)—President was not persuaded that the Executive or union had acted contrary to the orders—Dismissed—Sexton-Finck T.C and Others *v.* Harken E.J., President SSTU and Another—No. 749 of 1992—Sharkey P.—29/9/92—Unions 2178

[2]Application to amend union rules *re* Membership of Tool and Material Storepersons—Objections withdrawn following undertakings and amendments to application—Full Bench found it was not sufficient to paraphrase an alteration in the notice to members, however in this case the alteration was to all intents and purposes spelt out in full—Granted—A.E.E.F.E.U.—No. 427 of 1992—Sharkey P., Halliwell S.C., George C.—27/8/92—Unions 2639

[1]Appeal against decision of President [71 WAIG 1788] relating to the observance of the rules of the organisation—Industrial Appeal Court found that the President's finding, supported by the evidence which went unchallenged, was that the relevant committee of management resolutions in respect of which Orders of compliance were sought were part of a package and aimed at an improper exercise of power contrary to the rules of the organisation—As such they were within the supervisory jurisdiction of the President under s.66(2) of the Act for him to disallow—Dismissed—Carter L.B. *v.* Drake M.A.—IAC Appeal 8 of 1991—Rowland J., Franklyn & Nicholson JJ.—1/11/91—Unions 2501

[1]Appeal against decision of Full Bench (72 WAIG 706) *re* interlocutory orders relating to the conduct of union officers concerning award variation negotiations—Appellant argued orders were made when there was no serious question to be tried and the balance of convenience favoured the Appellant—Appellant further argued there was no evidence that the rules of the union had been breached—IAC stated it should generally be slow to find a fault in the making of interlocutory orders and should not act unless the case was clearly made out—IAC reviewed history of the matter, union rules and was satisfied that the requisite foundation for making of the orders in issue was not before the President when he made them and in the circumstances it was appropriate for the Court to allow the appeal—Upheld and Quashed—Carter L.B. *v.* Drake M.A.—IAC Appeal No. 2 of 1992—Franklyn J., Nicholson J., Ipp J.—20/10/92—Unions 2742

Application for leave to object to application to register a new organisation by the amalgamation of two registered organisations—Objecting employers argued decision of Full Bench in *re* Forest Products and Allied Industries Union had been wrongly decided—Full Bench reviewed Section 72 of the I.R. Act, Interpretation Act, Hansard and found word "may" did not indicate a discretion to be used at large and that the objections were incompetent—Dismissed—M.E.W.U.—No. 954 of 1992—Sharkey P., George C., Beech C.—21/10/92—Unions 2526

[1]Appeal against decision of Full Bench (72 WAIG 1295) *re* dismissal of application for declaration that union membership rules were the same as Federal Counterpart Body's Rule—IAC found Full Bench had misunderstood the operation of the I.R. Act in that it compared the rules of the State organisation with the rules of the Federal Body nationally rather than the West Australian Branch of the Federal Body as required by the definition of "Federal Counterpart Body"—Upheld and Returned—A.P.E.A.—IAC Appeal No. 8 of 1992—Rowland J., Nicholson J., Ipp J.—11/11/92—Unions 2741

[4]Application for an Order *re* deletion and substitution of a union rule and interpretation of union rules—Respondent argued President had no jurisdiction to make order sought—Respondent sought direction as to when an electoral role should close to comply with the rules—President reviewed authorities, union rules and found the interpretation of the rule was clear as to what constituted the "quarter night"—President found nothing which required the rule to be disallowed as oppressive or undemocratic—Declared Accordingly—Hassan D. *v.* O'Sullivan F. and Another—No. 1287 of 1992—Sharkey P.—3/11/92—Unions 2759

[2]Application to alter union rules *re* Eligibility of laundry and linen workers—Objections withdrawn following amendment to application—Full Bench found on evidence even if there were overlapping there was good reason to permit the alteration—Granted—F.M.W.U.—No. 745 of 1992—Sharkey P., Coleman C.C., Negus C.—10/11/92—Laundry and Linen . 2754

Application for orders *re* membership of organisation in compliance with union rules—Respondent argued that the Applicants had not actually been refused—President found that Applicants were employees, that they had been refused and that they should be admitted to membership of the Respondent organisation—Granted—Lewis C.P. and Another *v.* C.M.E.T.S.W.U.—Nos. 1193 and 1194 of 1992—Sharkey P.—11/11/92—Unions 2757

[4]Application for Orders *re inter alia*, the observance of union rules, and the validity of office bearers of the Union—President reviewed history of Union business, section 71 of the I.R. Act and found that the Applicant was validly the President notwithstanding the deregistration of the Federal Counterpart Body, as were other office bearers, until the next State election—President further found that the Respondent had not fulfilled the evidentiary onus to prove the Applicant ineligible for membership—President found there had been a series of breaches by the Respondent relating to by-elections for office bearers, the conduct of Union business, keeping of records, failure to permit the Applicant to inspect the records of the Union and the registered office of the Union—President found appointments made according to State rules as purported by Respondent were null and void—President made various orders relating to the observance of Union rules and directing the Registrar to report as to the compliance with any matters requiring compliance—In Supplementary Reasons President found that the Reasons for Decision were reflected in the orders made and made particular comments to specific aspects of the orders—President found no serious matters of dispute between parties as to what the orders would contain—Ordered Accordingly—Jeffery J.R. *v.* W.A.T.A.E.A. and Another—No. 1903 of 1991—Sharkey P.—24/9/92, 26/10/92—Unions 2534

VICTIMISATION—

Application for reinstatement on the grounds of unfair dismissal—Applicant claimed he had no prior warning and was a victim of blacklisting—Respondent argued that dismissal was result of unsatisfactory work attitude—Commission found on evidence that Respondent had been more than patient in maintaining the relationship for as long as he did—Dismissed—Scott T. *v.* Visarelle Pty Ltd t/a Woodsies Windscreen—No. 901 of 1992—Negus C.—10/11/92—Automotive 2617

Appeals against disciplinary action *re* failure to provide prisoner with adequate protection—Applicants argued that assault of prisoner was not due to wilful act of negligence but was due to the lack of prison procedure—PSAB found that both Applicants were equally culpable and so accepted decision of Public Service Commissioner to equalise fines—PSAB further found that the inadequate prison procedure was a factor leading to assault and ordered that recording of Applicants' transfer as disciplinary action be removed—Vyner A.B. and Another *v.* P.S.C.—PSAB Nos. 2 & 3 of 1991—Negus C., Floate/Chinnery—18/9/91—Corrective Services 2690

Conference referred *re* claim for reinstatement on the grounds of a constructive and unfair dismissal—Applicant union claimed that employee was forced to resign under threat of dismissal—Respondent argued that due to the workers' ill feeling towards the employee the option of resignation was suggested and taken—Commission found that there was no threat of dismissal present—Dismissed—A.W.U. and Hamersley Iron Pty Limited—No. CR197 of 1992—Fielding C.—3/11/92—Mining 2624

WAGES—

Conference referred *re* payment for lost time over safety issue—Applicant union claimed that payment should be made on the basis of a usual work week of 54 hours and 60 hours respectively—Respondent argued that it should be based on a 38 hour week—Commission reviewed the meaning of "usual", S.28 of the OHSW Act and found that the wider construction contended for by the Applicant should be implemented—Granted—M.E.W. *v.* Ical Limited and Another—No. CR221 of 1992—Salmon C.—24/6/92 1660

CUMULATIVE DIGEST—*continued*

Page

WAGES—*continued*

[3]Application to vary award *re* rates and conditions for construction work—Applicant argued proposal fit within Structural Efficiency Principle, established appropriate rates and conditions and would be in the public interest by reducing demarcation disputes—Respondents and Interveners argued *inter alia* Applicant had not fully comprehended the real financial impact and further emphasised the dangers of flow on—CICS found September 1989 Principles were the appropriate Principles to be applied, that the application did not satisfy the requirements of a special case and that the minimum rates adjustment process provided the vehicle for the industry to assess its needs—Dismissed—F.P.F.A.I.I.U. *v.* Allwood Furniture Industries and Others—No. 1226A of 1990—Coleman C.C., Halliwell S.C., Beech C.—16/6/92—Furniture/Construction 1524

Application to vary award *re* 3rd and final minimum rates adjustment—Commission found good reason to maintain approach of earlier decisions, thus maintain parity and establish coherence with the counterpart federal award—Granted—W.A.C.A.T.U. *v.* Fullin Tailoring Company and Others—No. 482 of 1992—Kennedy C.—29/6/92—Clothing 1572

Application to vary award *re* Structural Efficiency Wage Increase 1991—Applicant stated that in essence to previous proceedings the recent developments represented steps in the restructuring process and also the consolidation of the award—Commission regarded the Applicant's case and was satisfied that the application should be ratified—Ordered Accordingly—F.P.U. *v.* Walker Candy Co and Others—No. 588 of 1992—Kennedy C.—15/7/92—Confectionery 1797

Application to vary award *re* provisions to replace payment for work on the basis of results—Applicant argued variations sought were parallel to federal award amendments and federal decision as to merit and conformity with wages principles and therefore should be endorsed—Commission found award should be varied and commented on allowing for changes in Respondents—Granted—W.A.C.T.U. *v.* Fullin Tailoring Company and Others—No. 1740 of 1991—Kennedy C.—26/6/92—Clothing 1570

Application to vary award *re* Structural Efficiency Wage Adjustment—Contract of Service clause disputed only—Applicant Union argued clause should have a qualification to limit the magnitude of change while allowing flexibility—Respondent argued amended proposal was not as facilitative as initial application and did not comply with the Wage Fixing Principles—Commission found Applicant had not made out its case—Granted in Part—C.M.E.U. *v.* BHP Iron Ore Ltd—No. 159 of 1992—Gregor C.—29/5/92—Iron Ore 1587

Application to vary award *re* 2.5% Structural Efficiency Adjustment wage rates and allowances—Applicant Union argued that increases sought were in line with wage fixing principles—GSTT found on evidence that whilst wage increases should be effected, the other variations sought should be dealt with after further discussions and consultation between the parties—Ordered Accordingly—S.S.T.U. *v.* Hon Minister for Education—No. T2 of 1992 Kennedy C., Reeves/McKinnon—15/7/92—Education 1931

Application to vary award *re* 2.5% Structural Efficiency Wage Adjustment, supplementary payments and other provisions—Respondent argued Union's proposals did not satisfy State Wage Principles—Commission in absence of parties agreement, heard and determined claims and counterclaims relating to: Contract of Employment, Hours, Annual Leave, Overtime, Time and Wages Record, Special Rates and Provisions, Wages, Dispute Settlement Procedure, Trade Union Training Leave, Training Leave Structural Efficiency and Award Modernisation, Record Keeping, Essential Services, Stand-Down, Transfer to Another Workplace, and Employee Counselling of Operational Meetings clauses—Award varied—F.M.W.U. *v.* Canine Security and Others—No. 1415 of 1991—Parks C.—10/7/92—Security 1813

Conference referred *re* payment for lost time and other benefits over alleged safety issue—Applicant Union argued that employees had reasonable grounds that there may be imminent or serious injury on site due to hazardous chemicals and that Respondent showed a disregard for the health and welfare of their workforce—Commission found on evidence that there was alternative work at the time for the employees and that the tests carried out had indicated no risks to the workforce therefore no payment should be made—Dismissed—C.M.E.W.U. *v.* Kirfield Engineering Australia Pty Ltd and Another and Western Construction Company and Another *v.* A.M.W.S.U. and Others—Nos. CR253 and 257 of 1991—Parks C.—27/7/92—Construction 1861

Application to vary award *re* Contract of Service, Rates of Pay, Additional Rates for Ordinary Hours, Special Rates and Provisions and Casual Employees—Applicant Employer sought to increase wage rates and allowances by 2.5% and to provide for an increase in loading to time and one half for casual work—Respondent union failed to appear—Commission reviewed previous application and was satisfied that claim had merit and there was no need for further additional consideration under the Principles—Granted—W.A.T.A.E.A. *v.* Burswood Resort (Management) Limited—No. 473 of 1992—Kennedy C.—4/6/92—Casino 1566

Application to vary award *re* Wages and new classifications by consent—Parties sought to implement a new structure which involved distinct career pathing for on-train suburban rail staff—Commission having regard to the Principles found that the variations sought should issue and the allowance should be dealt with administratively—Granted—A.R.U. *v.* W.A.G.R.C. and Others—Fielding C.—16/6/92—Railways 1616

Application to vary award *re* Second Stage Structural Efficiency Wage Adjustment and first Minimum Rates Adjustment by consent—Parties sought changes to allowances, hours, overtime and annual leave which would introduce greater flexibility—Commission was satisfied that the variations sought should issue—Granted—W.A.C.A.T.U. *v.* Valiant Dry Cleaners and Others—No. 809 of 1991 (R2)—Kennedy C.—29/6/92—Dry Cleaning 1576

[3]Application to vary award *re* 2.5% Structural Efficiency Wage Adjustment—CICS divided application and dealt with salaries separately at request of Applicant—Applicant argued on the basis of a parent award and sought, *inter alia*, the insertion of a new classification—Respondent argued salary comparison with hospital pharmacists as quite inappropriate—CICS having regard for section 32 of the I.R. Act found the Shop and Warehouse (Wholesale and Retail Establishments) Award was more relevant for the day to day operations of the Respondent's businesses and established appropriate salary ranges—Ordered Accordingly—Salaried Pharmacists Association *v.* Pharmacy 777 and Others—No. 1050(1) of 1989—Salmon C., Negus C., Gregor C.—25/5/92—Retail Pharmacies 1756

Applications to vary award *re* 2.5% Structural Efficiency Wage Adjustments—Applications heard in conjunction with Federal applications—Applicant Union argued the industry was already lean, hungry and efficient through the efforts of its members who were amongst the lowest paid and most vulnerable of employees and saw little to gain unless employers were not firmly repelled in attempts at negative costs cutting—Respondents argued threatened industrial action was contrary to the dispute settlement procedures erected when negotiating the Second Tier Wage Increase—Commission outlined its attempts at conciliation and found the parties had not become imbued with the spirit of the Structural Efficiency Principle—Commission determined matters of union representation at enterprise level consultation committees, Accrued Days Off agreement to examine demarcation matters and further found that there were special circumstance to grant the agreed operative date—Ordered Accordingly—F.M.W.U. *v.* Anglican Homes (Inc) and Others—No. 1394, 1401, 1405, 1410, 1411, 1421, 1418, 1437, 1440, 1639 and 1641 of 1991—Negus C.—27/11/91—Health 1547

Applications to vary award by consent *re* salary rates and the introductions of horizontal career structure—Parties sought to give effect the 2nd phase of a 3 phase agreed program of 26 productivity initiatives and award variations—Commission found that the variations sought should be issued and that the horizontal pay structure initiative should be examined more intensely when the final phase was pursued by the parties—Granted—W.A.P.U. *v.* Minister for Police—Nos. P10A of 1990 and 1294A of 1991—Kennedy C.—12/8/92—Police 2031

Application for allegedly denied contractual entitlements *re* benefit deducted without authorisation—Respondent argued that the said amount was a debt paid by the Respondent on behalf of the Applicant in the form of an advance against wages—Commission found on evidence that the Respondent had failed to pay Applicant full benefits due under contract of employment defined as 'Wages' in the Truck Act—Granted—Hassen M.J. *v.* BHB Challenge Pty Ltd—No. 592 of 1992—Parks C—31/9/92 2232

Application for orders *re* cessation of industrial action over log of claims for 4.5% wage increases—Applicant Employer argued that real intent of dispute was pressure aimed at Company over writs issued by Supreme Court and to return to arrangements prior to "closed shop" dispute to which the writs related—Respondent Unions argued that industrial action arose over Company's alleged failure to reasonably discuss wage claims —Commission found on evidence that Respondent Unions were committed to a recommendation previously issued and that parties ought to be encouraged to return to further negotiation——Direction Issued—Hamersley Iron Pty Limited *v.* A.W.U. and Others—No. C549 of 1992—Kennedy C.—25/9/92—Iron Ore 2255

CUMULATIVE DIGEST—*continued*

Page

WAGES—*continued*

[2]Question of law referred to Full Bench *re* whether demand for monies paid by employer in error was an industrial matter—Applicant argued overpayment was made in the capacity of the employer of the employee—Respondent argued it was a matter of litigation over a mistake and not a dispute over remuneration—Full Bench reviewed authorities and found that the matter was plainly consequential and indirectly related to the relationship of employer and employee—Answered No—A.D.S.T.E. *v.* B.M.A.—No. CA164 of 1992—Sharkey P., Salmon C., George C.—24/9/92—Building 2162

Application to vary award *re* 2.5%, leading hands, contract of service, rates of pay and award modernisation and enterprise consultation—Applicant proposed additional wording for the provisions of the contract of service clause—Respondent opposed the extended provisions and sought to limit the wording as set out in paragraph (v) of the Structural Efficiency Principle—Commission reviewed evidence and found that the term proposed by the Applicant union were superfluous and that other variations sought should issue—Granted in Part—Miscellaneous Workers' Union *v.* Dulux Australia Limited & Others—No. 1423 of 1991—Coleman C.C.—28/10/92—Paint & Varnish Makers 2580

Application to amend award *re* 4.5% increase in wages and allowances by consent—Applicant employer claimed that Enterprise Bargaining Principle in Special Case imposed a no limit level on wages and allowances increases and that Principles should be used as policy guidelines—Respondent unions were concerned that future claims under Enterprise Bargaining Principle might be restricted—Commission found on evidence that the circumstances surrounding claim warranted a special case claim for purpose of the Principles—Granted—Hamersley Iron Pty Limited *v.* A.W.U.—No. 1115 of 1992—Fielding C.—27/11/92—Mining 2788

Conference referred *re* dispute over reduction of pay of an employee—Applicant union sought reinstatement of pay and to expunge breach of contract by payment of all monies rightfully due—Respondent argued that as genuine overpayment had occurred no monies were due—Commission found that overpayment had occurred but did not act as variation to work contract and employee was entitled to payments under the varied contract—Declared Accordingly—A.W.U. *v.* BHP Steel—No. CR381 of 1992—Gregor C.—13/11/92—Steel Works 2863

WORK VALUE—

[3]Application to vary award *re* 2.5% Structural Efficiency Wage Adjustment—CICS divided application and dealt with salaries separately at request of Applicant—Applicant argued on the basis of a parent award and sought, *inter alia*, the insertion of a new classification—Respondent argued salary comparison with hospital pharmacists as quite inappropriate—CICS having regard for section 32 of the I.R. Act found the Shop and Warehouse (Wholesale and Retail Establishments) Award was more relevant for the day to day operations of the Respondent's businesses and established appropriate salary ranges—Ordered Accordingly—Salaried Pharmacists Association *v.* Pharmacy 777 and Others—No. 1050(1) of 1989—Salmon C., Negus C., Gregor C.—25/5/92—Retail Pharmacies 1756

WORKERS COMPENSATION—

Conference referred *re* unfair dismissal claim—Applicant union claimed that employee was dismissed due to being on Workers Compensation without warning of termination—Respondent argued that the absence of employee on Workers Compensation was not material to dismissal whereas a dissatisfaction with employee's performance was—Commission found on evidence that the dismissal claim did not meet the test set for the Commission intervention—Commission further found that Union's claim for 1 week's wages in lieu of notice had been paid—Dismissed—F.P.F.A.I.U. *v.* Lexcraft Pty Ltd T/A Kembla Furniture—No. CR471 of 1992—Beech C.—23/9/92—Furniture 2281