Government of Western Australia
The Western Australian Industrial Relations Commission

Industrial Relations Act 1979

Report of the Chief Commissioner of The Western Australian Industrial Relations Commission 2018-19

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THE HONOURABLE BILL JOHNSTON MLA, MINISTER FOR INDUSTRIAL RELATIONS

ANNUAL REPORT 2018-19

In accordance with s 16(2) of the *Industrial Relations Act 1979*, I am pleased to provide to you the following report relating to the operation of the Act for the year ended 30 June 2019.

(L.S.) (Sgd.) P.E. SCOTT

Pamela Scott
Chief Commissioner

19 September 2019

Table of contents

1 The objects of the *Industrial Relations Act 1979* 1
2 Membership and principal officers 2
3 Structural changes within the Commission 2
4 Farewell to the President 2
5 Appointment of Commissioner Walkington 4
6 Summary of main statistics 7
7 Access to justice 17
8 State Wage Case 21
9 Location Allowances General Order 23
10 Conciliation and case management 23
11 Awards and agreements – records updated 25
12 Private sector coverage 25
13 Ongoing Matters before the Commission 27
14 Impediments to effective and efficient operation of the Commission 29
15 Community engagement 29
16 Website access 30
17 Conclusion 30
18 Decisions and disputes of interest 31
19 Appendices 45

1 The objects of the *Industrial Relations Act 1979*

The objects of the *Industrial Relations Act 1979* (the IR Act) include, but are not limited to:

- promoting goodwill in industry;
- facilitating the efficient organisation and performance of work according to the needs of an industry and the enterprises within it, balanced with fairness to the employees in the industry and enterprises;
- encouraging employers, employees and organisations to reach agreements appropriate to the needs of enterprises within the industry and the employees in those enterprises; and
- encouraging and providing means for conciliation and hearing and determination, to prevent and settle work-related disputes.

The IR Act pursues these objects through the establishment and operation of a number of tribunals and courts, being:

(a) The Western Australian Industrial Relations Commission (the Commission) and its constituent authorities. These include the Public Service Arbitrator and the Public Service Appeal Board.

Other legislation, set out in *Appendix 1 – Legislation*, enables the Commission to deal with a variety of other disputes.

(b) The Full Bench of the Commission hears and determines appeals from decisions of the Commission and the Industrial Magistrate's Court. The Full Bench also deals with the registration and cancellation of registered organisations, and matters relating to the rules of those organisations.

(c) The Western Australian Industrial Appeal Court (IAC), constituted by three judges of the Supreme Court of Western Australia, hears appeals from decisions of the Full Bench, the Commission in Court Session, and certain decisions of the Chief Commissioner or the Senior Commissioner.

(d) The Industrial Magistrate's Court. In addition to enforcing acts, awards, industrial agreements and orders in the State industrial relations system, the Industrial Magistrate's Court is an 'eligible State or Territory court' for the purposes of the *Fair Work Act 2009* (Cth) (FW Act). It enforces matters arising under that Act and industrial instruments made under that Act.

The resolution of matters in dispute brought before the Commission, its constituent authorities and tribunals, in the vast majority, continue to be dealt with by conciliation or mediation in the first instance.

The Industrial Magistrate's Court also deals with claims before it, primarily in the first instance, by way of pre-trial conferences chaired by the Clerk of the Court (the Commission's Registrar or Deputy Registrar so appointed). The Court's pre-trial conferences often assist in the resolution of the entire matter or help to narrow the scope of the matters to be determined by an Industrial Magistrate.

2 Membership and principal officers

During this reporting period, the IAC was constituted by the following members:

Presiding Judge	The Honourable Justice M J Buss
Deputy Presiding Judge	The Honourable Justice G H Murphy
Members	The Honourable Justice R L Le Miere The Honourable Justice K J Martin

The Commission was constituted by the following members:

President	The Honourable J H Smith (*acting until 26 December 2018*)
Chief Commissioner	P E Scott
Senior Commissioner	S J Kenner (*acting until 26 December 2018)*
Commissioners	T Emmanuel D J Matthews T B Walkington (*appointed on 26 November 2018)*

3 Structural changes within the Commission

The *Industrial Relations Amendment Act 2018* came into effect on 19 December 2018, amending the IR Act. The most significant aspect was the abolition of the position of the President of the Commission and a structural change in the constitution of the Commission. This resulted in matters before the Full Bench, previously presided over by the President, now being presided over by the Chief Commissioner or the Senior Commissioner.

Other matters which were within the President's jurisdiction are now dealt with by the Chief Commissioner.

4 Farewell to the President

On 20 December 2018, a Ceremonial Sitting was held to recognise the abolition of the position of President of the Commission and to farewell and celebrate the service of the Honourable J H Smith, Acting President.

The role of the President came into being upon the enactment of the *Industrial Conciliation and Arbitration Act 1902* (WA). That Act established the Court of Arbitration in which Chief Justice Sir Edward Albert Stone first held the role of President. The office of the President of the Court of Arbitration continued until 1 February 1964, when the Court was succeeded by the Commission. At that time, the position of President was abolished.

The office of the President was then re-established in 1979 as a result of the enactment of the IR Act.

From that time, the position of President has been held by their Honours P L Sharp, G D Clarkson, D J O'Dea and P J Sharkey. Their Honours S R Edwards and G L Fielding were acting Presidents during periods of absence of the President. Following President Sharkey's retirement in 2005, Presidents of the Commission were appointed to the position in an acting capacity. Those Acting Presidents included their Honours M T Ritter and J H Smith. His Honour Justice R Le Miere, a justice of the Supreme Court of Western Australia, also filled the role of President for the hearing and determination of one appeal.

The Honourable Jennifer Hilda Smith held the role of Acting President for nine years and was the only female to undertake the role of President. Speakers at the ceremonial sitting acknowledged her Honour's reputation for dedication and integrity in her work. Of note, the Commission heard that while maintaining the role of Acting President, her Honour sought further opportunities to make a contribution to the State. She was subsequently appointed as an Acting Judge of the Supreme Court of Western Australia in June 2017 and was permanently appointed to the Supreme Court the following year.

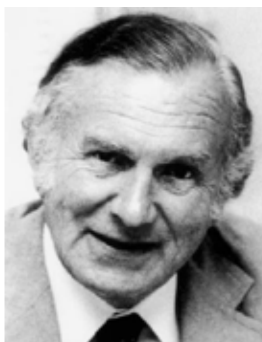
Ms Meredith Hammat, speaking on behalf of UnionsWA, commented during the ceremonial sitting that her Honour had contributed greatly to the work and the reputation of the Commission over many years of service and there is no doubt that her Honour's service has had a very positive impact on the working people of Western Australia and their families.

Mr Ryan Martin, appearing on behalf of the Chamber of Commerce and Industry of Western Australia, noted that Commission members like her Honour, who demonstrate not only a great technical understanding of the law, but also a genuine interest in and compassion toward the people involved in the disputes is an invaluable strength.

Mr Nicholas Ellery, on behalf of the Law Society of Western Australia, thanked and commended her Honour for her generous contributions over many years to the events at the Law Society, some of which included professional development programs and training for advocates.

The Ceremonial Sitting of the Commission to Farewell the President, 20 December 2018.
The Honourable Bill Johnston, Minister for Industrial Relations (standing);
Ms Meredith Hammat, UnionsWA; Mr Ryan Martin, Chamber of Commerce and Industry of Western Australia; Mr David Parker, Australian Mines and Metals Association; Mr Nicholas Ellery, Law Society of Western Australia.

4.1 Presidents of the Commission


Honourable P L Sharp

Honourable G D Clarkson

Honourable D J O'Dea

Honourable S R Edwards

Honourable P J Sharkey

Honourable G L Fielding

Honourable M T Ritter

Honourable J H Smith

5 Appointment of Commissioner Walkington

Commissioner Toni Beverley Walkington was appointed to the Commission on 26 November 2018.

A Ceremonial Sitting of the Commission formally welcomed Commissioner Walkington on 30 November 2018.

Commissioner Walkington has a long history and vast experience in industrial relations. She has held positions at the highest levels in the union movement in Western Australia and nationally, as well as having participated as a delegate to a number of international conferences relating to industrial relations. She was elected as the General Secretary of the Civil Service Association of Western Australia Incorporated in 2002, leading one of the State's most significant public sector unions.

5.1 Current members of the Commission

Chief Commissioner
P E Scott

Senior Commissioner
S J Kenner

Commissioner
T Emmanuel

Commissioner
D J Matthews

Commissioner
T B Walkington

5.2 The constitution of the Commission

The Commission now has a Chief Commissioner, a Senior Commissioner and three Commissioners. This is the minimum number necessary to enable the Commission to exercise its various areas of jurisdiction to:

- constitute the Full Bench;
- deal with urgent matters; and
- allow for the normal administrative arrangements including leave and illness.

During this reporting period, members of the Commission held the following appointments:

5.3 Public Service Arbitrators

The *Industrial Relations Amendment Act 2018* enabled, for the first time, the appointment of the Chief Commissioner as a Public Service Arbitrator. Given the small number of members of the Commission, this has been a welcome improvement in the flexibility of the Commission.

Previously, Public Service Arbitrators have been appointed on various dates throughout the year and ordinarily appointed for a period of one year only.

To more effectively administer the appointments of Public Service Arbitrators, in June of this year I moved to align all appointments to take effect on the same date and for a period of two years, as permitted by s 80D(4) of the IR Act.

As such, Senior Commissioner Kenner continues his appointment as the Public Service Arbitrator. His appointment is due to expire on 30 June 2021.

Chief Commissioner Scott, Commissioner Emmanuel, Commissioner Matthews and Commissioner Walkington are now additional Public Service Arbitrators. Those appointments are also due to expire on 30 June 2021.

5.4 Public Service Appeal Board

In addition to the members of the Commission who are appointed as Public Service Arbitrators and who chair Public Service Appeal Boards, those people listed in *Appendix 2 – Members of the Public Service Appeal Board* have served as members of Boards on the nomination of a party pursuant to s 80H of the IR Act.

5.5 Railways Classification Board

The Railways Classification Board is effectively defunct. There have been no applications made to it since 1998, and the union designated by s 80M of the IR Act to nominate representatives ceased to exist in 2010. In the absence of a union, the Minister may nominate a person.

5.6 Occupational Safety and Health Tribunal

Senior Commissioner Kenner continued as the Occupational Safety and Health Tribunal from 1 July 2018 until 31 December 2018.

From 1 January 2019, Commissioner Walkington was appointed as the Tribunal.

Commissioner Walkington's appointment operates for the purposes of s 51H of the *Occupational Safety and Health Act 1984* (the OSH Act) and s 16(2A) of the IR Act, and will expire on 31 December 2019.

5.7 Road Freight Transport Industry Tribunal

During this year, Senior Commissioner Kenner constituted the Road Freight Transport Industry Tribunal.

The Road Freight Transport Industry Tribunal operates under the *Owner-Drivers (Contracts and Disputes) Act 2007* (the OD Act).

5.8 Industrial Magistrate's Court

Magistrate M Flynn and Magistrate D Scaddan, both Stipendiary Magistrates, were appointed as Industrial Magistrates during this reporting period to undertake this specialist area of work.

5.9 Registry

During the reporting period, the principal officers of the Registry were:

Registrar	Ms S Bastian
Deputy Registrars	Ms S Hutchinson (*retired on 2 August 2018)*
	Ms S Kemp

6 Summary of main statistics

6.1 The Commission

	MATTERS CONCLUDED			
	2015-16	**2016-17**	**2017-18**	**2018-19**
IAC				
Appeals	5	2	2	3
Full Bench				
Appeals	18	15	17	9
Other matters	2	3	5	12
President or Chief Commissioner				
Section 66 matters	2	6	0	1
Section 66 Orders issued	3	6	1	1
Section 72A(6) matters	0	0	0	0
Consultations under s 62	3	6	3	3
President, Chief Commissioner or Senior Commissioner				
Section 49(11) matters	0	1	2	2
Commission in Court Session				
General Orders	1	2	2	3
Other matters	1	6	3	1
Commissioners sitting alone				
Conciliation conference applications (s 44) [1]	88	60	56	77
New agreements	56	41	36	25
New awards	0	1	1	0
Variation of agreements	0	0	0	1
Variation of awards	36	11	11	7
Other matters [2]	130	77	50	66
Section 29 matters concluded				
Unfair dismissal applications	118	101	91	66
Contractual benefits claims	121	89	73	69
Public Service Arbitrator				
Award/agreement variations	11	0	0	2
New agreements	3	4	15	2
Orders pursuant to s 80E	0	1	0	0
Reclassification appeals	86	12	3	24
Public Service Appeal Board				
Appeals to Public Service Appeal Board	12	21	27	27
Totals	**696**	**465**	**398**	**401**

Table 1 – Matters concluded 2015-16 to 2018-19

6.1.1 Notes to Table 1

[1] **CONFERENCE applications include the following:**	**2015-16**	**2016-17**	**2017-18**	**2018-19**
Conference applications (s 44)	*40*	*34*	*30*	*40*
Conferences referred for arbitration (s 44(9))	*12*	*4*	*1*	*5*
Public Service Arbitrator conference applications	*34*	*18*	*22*	*27*
Public Service Arbitrator conferences referred for arbitration	*2*	*4*	*3*	*3*
Totals	***88***	***60***	***56***	***75***

[2] **OTHER MATTERS include the following:**	**2015-16**	**2016-17**	**2017-18**	**2018-19**
Apprenticeship appeals	*7*	*7*	*1*	*0*
Applications for interpretation of an award (s 46)	*0*	*0*	*1*	*2*
Occupational Safety and Health Tribunal	*2*	*2*	*5*	*2*
Public Service applications	*12*	*2*	*1*	*3*
Requests for mediation	*15*	*26*	*18*	*17*
Road Freight Transport Industry Tribunal	*31*	*31*	*5*	*4*
Totals	***67***	***68***	***31***	***28***

6.2 Awards and agreements in force under the IR Act – totals

Year	Number as at 30 June
2015	2,458
2016	1,505
2017	1,395
2018	1,178 #
2019	610 #

Table 2 – Awards and agreements in force

The total number of agreements and awards in force fell significantly during 2017-18, and 2018-19, because the Commission has been reviewing existing agreements to cancel those that are defunct, to ensure that its records are up to date.

6.3 Award and agreement variations

Nature of application	Number of awards/agreements affected
State Wage Case General Order	218
Location Allowances General Order	82
New industrial agreements (private sector)	23
New industrial agreements (public sector)	2
Agreements – retirements from	0
Agreements – cancelled	716

Table 3 – Number of awards and agreements affected by some applications

6.4 Full Bench matters

6.4.1 Appeals – heard and determined from decisions of the:

Commission – s 49	6
Industrial Magistrate – s 84	3

6.4.2 Organisations – cancellation/suspension of registration of organisations pursuant to s 73 of the IR Act:

Within this reporting period, investigations were undertaken by the Registrar concerning the status of a number of registered organisations. These investigations considered various factors, including whether those organisations were continuing to meet their reporting obligations under the IR Act, whether there were current financial members or whether the organisations, on the face of it, appeared to have become defunct.

Applications were made by the Registrar, to the Full Bench, to seek the cancellation of the registration of a number of organisations.

The Full Bench, upon hearing and determining those applications, issued orders cancelling the registration of ten organisations. Those organisations were:

- West Australian Psychiatric Nurses' Association (Union of Workers);
- Meat and Allied Trades Federation of Australia (Western Australian Division) Union of Employers, Perth;
- Licenced Car Salesmen's Association, Union of Workers, of Western Australia;
- Metal Industries Association (Industrial Union of Employers) of W.A.;
- Mining Unions Association of Employees of Western Australia (Iron Ore Industry);
- Real Estate Salespersons Association of Western Australia (Inc);
- The Australian Collieries' Staff Association, Western Australian Branch;
- The Footwear Repairers' Association of W.A. (Union of Employers);

- The Western Australian Gold and Nickel Mines Supervisors Association Industrial Union of Workers;
- The Disabled Workers' Union of Western Australia;
- Master Plasterers' Association of Western Australia Union of Employers; and
- The Boot Trade of Western Australia Union of Workers, Perth.

The status of a further three registered organisations remained under investigation as at 30 June 2019.

6.5 Matters dealt with by the President, Chief Commissioner or Senior Commissioner

6.5.1 Applications to stay the operation of a decision appealed against pending the determination of the appeal pursuant to s 49(11) of the IR Act

Applications made	2

6.5.2 Applications regarding union rules pursuant to s 66 of the IR Act

Applications made	3
Applications finalised	1

6.5.3 Consultations

The Registrar is required to consult with the President (prior to 26 December 2018) or Chief Commissioner regarding particular matters set out in s 62 of the IR Act.

Consultations by the Registrar regarding amendments to rules of registered organisations pursuant to s 62 of the Act	3

6.6 Commission in Court Session

The Commission in Court Session matters in the reporting period comprised of the following:

6.6.1 State Wage Order

Pursuant to s 50A, the Commission is required to determine the increases to rates of pay for the purposes of the *Minimum Conditions of Employment Act 1993* (MCE Act) and awards. See also *8 – State Wage Case* below.

6.6.2 Location Allowances General Order – s 50

The Commission in Court Session issued its annual Location Allowances General Order, which took effect on and from 1 July 2019. See also *9 – Location Allowances General Order* below.

6.6.3 Equal Remuneration Principle

The creation of a Principle dealing with claims for equal remuneration for men and women for work of equal or comparable value was initiated on the Commission's Own

Motion in June 2018. That matter was heard and determined as part of this year's State Wage Case.

The Commission's *Statement of Principles – July 2018* was replaced by the *Statement of Principles – July 2019* which contains a new 'Principle 8 - Equal Remuneration for Men and Women for Work of Equal or Comparable Value'.

6.7 *Police Act 1892*

Appeals pursuant to s 33P of the *Police Act 1892* are filed by police officers who have been removed from the Western Australian Police Force under s 8 of that act. These appeals are heard by three Commissioners, including one of either the Chief Commissioner or the Senior Commissioner.

No new appeals were filed during 2018-19. However, one matter is currently in the process of being dealt with. Appeals lodged in previous years are often adjourned at the request of the appellant in circumstances including where the officer is the subject of criminal charges and those charges are dealt with prior to the appeal against removal. This often means lengthy delays before the appeals to the Commission may be resolved.

6.8 *Prisons Act 1981*

A prison officer who has been removed from office by the Chief Executive Officer, Department of Justice, may file an appeal against that decision under s 106 of the *Prisons Act 1981*.

No appeals of this nature were referred to the Commission during 2018-19.

6.9 *Young Offenders Act 1994*

A youth custodial officer who has been removed from office by the Chief Executive Officer, Department of Justice, may file an appeal against that decision under s 11CH of the *Young Offenders Act 1994*.

No appeals of this nature were referred to the Commission during 2018-19.

6.10 *Construction Industry Portable Paid Long Service Leave Act 1985*

A person who is aggrieved by a reviewable decision made by the Construction Industry Long Service Leave Payments Board may refer that decision to the Commission for review in accordance with s 50 of the *Construction Industry Portable Paid Long Service Leave Act 1985* (CIPPLSL Act).

Two such matters were lodged during this reporting period. One of those matters was heard and determined. The other has been heard but not yet concluded.

6.11 Claims by individuals – s 29, IR Act

Under s 29 of the IR Act, individual employees may refer claims alleging unfair dismissal or denial of contractual benefits. `

6.11.1 Applications lodged

	2015-16	2016-17	2017-18	2018-19
Unfair dismissal	114	113	87	95
Denial of contractual benefits	110	103	75	89
Totals	**224**	**216**	**162**	**184**

Table 4 – Section 29 applications lodged

6.11.2 Applications finalised

	2015-16	2016-17	2017-18	2018-19
Unfair dismissal	118	101	91	90
Denial of contractual benefits	121	89	73	80
Totals	**239**	**190**	**164**	**170**

Table 5 – Section 29 applications finalised

6.11.3 Applications lodged compared with all matters lodged

	2015-16	2016-17	2017-18	2018-19
All matters lodged	1,075	1,046	984	1026
Section 29 applications lodged	224	216	162	184
Total (%)	**21%**	**21%**	**16%**	**18%**

Table 6 – Section 29 applications lodged compared with all matters lodged

NOTE: All matters means the full range of matters that can be initiated under the IR Act for reference to the Commission.

The decrease in numbers of matters lodged is partly attributable to Registry staff being better trained to assist applicants, in particular, about whether they should lodge a claim in the State or Federal jurisdiction. This means that applicants are less likely to lodge a claim in both jurisdictions to ensure they find the correct one.

6.11.4 Matters – method of resolution

	Unfair dismissal	Contractual benefits	Total	%
Matters settled, withdrawn or discontinued following conciliation proceedings	43	38	81	60
Matters dismissed for want of prosecution following proceedings	1	0	1	1
Matters dismissed following arbitration – no jurisdiction	1	0	1	1
Matters discontinued following allocation but prior to conciliation proceedings	2	3	5	2
Matters where consent orders were issued following proceedings	2	10	12	9
Matters allowed following arbitration – order issued for entitlement, compensation or reinstatement	1	7	8	6
Matters withdrawn or discontinued in Registry prior to allocation	2	0	2	2
Matters dismissed following arbitration	13	11	24	18
Matters closed administratively following conciliation proceedings	1	0	1	1
Total finalised in 2018-19	**66**	**69**	**135**	**100%**

Table 7 – Section 29 applications method of resolution

6.12 Employer-employee agreements

Employer-employee agreements are confidential, individual employment agreements between an employer and an employee, which set out agreed employment terms and conditions relevant to them.

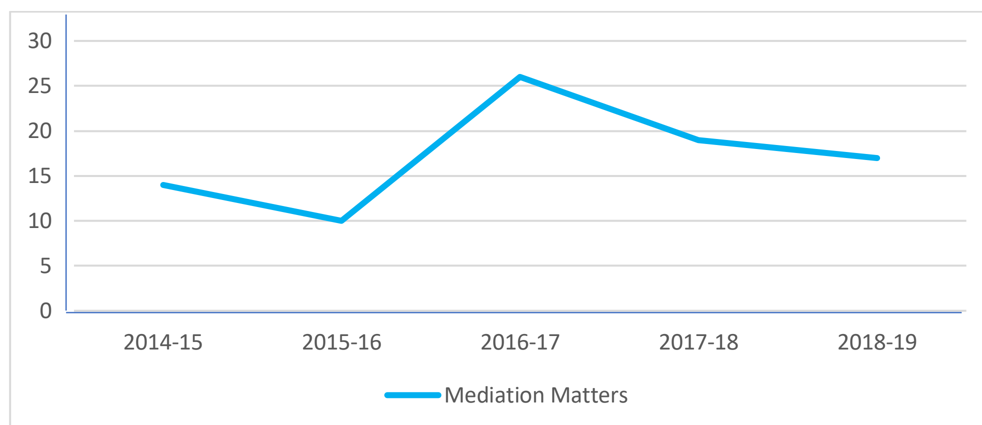
No Employer-employee agreements were lodged in the 2018-19 financial year.

6.13 Mediation applications pursuant to the *Employment Dispute Resolution Act 2008*

The *Employment Dispute Resolution Act 2008* (EDR Act) provides that the Commission may mediate or otherwise resolve any question, dispute or difficulty that arises out of or in the course of employment by way of a voluntary mediation process. The scope of this is wider than an 'industrial matter' as defined under the IR Act. The EDR Act has been utilised by parties to industrial disputes which are not within the jurisdiction of the Commission pursuant to the IR Act.

During the reporting period, 17 mediation matters were lodged. All matters were finalised.

The trend of the number of matters that the Commission has dealt with under the EDR Act over the last five years is shown below.



6.14 Boards of Reference

Each award in force provides for a Board of Reference to assist in resolving certain types of disputes (s 48, IR Act). There have been no Boards of Reference during this reporting period.

6.15 Industrial agents registered by Registrar

The IR Act provides for the registration of industrial agents. Industrial agents are people or companies that carry on a business of providing advice and representation in relation to industrial matters, and who are not legal practitioners or registered organisations (s 112A).

Issues regarding the conduct and competency of industrial agents registered under the IR Act have been raised in decisions of the Commission and were reflected in the *Final Report of the Ministerial Review of the State Industrial Relations System*. The regulations which deal with the registration and conduct of industrial agents, the *Industrial Relations (Industrial Agents) Regulations 1997*, are inadequate to deal with the issues that arise. The conditions for registration and the lack of any real opportunity to either suspend or deregister industrial agents who are incompetent or whose conduct is unacceptable are such that parties may not have confidence in the standard of assistance, advice and representation they may receive by engaging an industrial agent. They would be entitled to assume that registration provides some quality standard assurance. However, it does not.

Registered agents currently include legal practitioners whose conduct, including criminal conduct, has resulted in their being struck off the roll of practitioners. However, the bar for registration as an industrial agent is so low as to enable their registration. The current industrial agents include companies who provide poor quality service to clients and whose competency to advise and represent is highly questionable.

The provision of a more stringent registration process, as well as a process for the Commission to deal with complaints about those agents, possibly suspending or

cancelling their registration, would greatly improve the standard of those who are able to conduct a business of advising and representing often vulnerable people or those who do not have the expertise to judge the standard of service they are paying for and receiving. I strongly recommend that arrangements be put in place for this to occur.

During the 2018-19 financial year, four new industrial agents were registered.

Total number of agents registered as body corporate	22
Total number of agents registered as individuals	16
Total number of agents registered as at 30 June 2019	**38**

Table 8 – Industrial agents registered as at 30 June 2019

6.16 Industrial organisations

6.16.1 Registered as at 30 June 2019

	Employee organisations	Employer organisations
Number of organisations	33	14
Aggregate membership	170,959	3,936

Table 9 – Industrial organisations registered as at 30 June 2019

6.16.2 Rule alterations by Registrar

Alterations to rules lodged with the Registrar and finalised during this reporting period	3

6.16.3 Right of entry authorities issued

Under Part II Division 2G of the IR Act, an authorised representative of a registered organisation may, during working hours, enter a workplace of employees who are eligible for membership of the authorised representative's organisation to:

- hold discussions with employees who wish to participate in discussions; and
- request inspection and copies of relevant documents, and inspect a worksite or equipment, for the purpose of investigating any suspected breaches of:
  - the IR Act; or
  - the *Long Service Leave Act 1958*; or
  - the MCE Act; or
  - the OSH Act; or
  - the *Mines Safety and Inspection Act 1994*; or
  - an award or order of the Commission; or
  - an industrial agreement; or
  - an employer-employee agreement.

The Registrar issues right of entry authorisations to representatives of registered organisations on the application of the secretary of the organisation. An authorisation cannot be issued to a person whose authorisation has previously been revoked by the Commission without the authority of the Commission in Court Session.

During the 2018-19 financial year, authorisations were issued to representatives of the organisations listed in *Appendix 3 – Right of entry authorisations by organisation*.

Authorisations:

Issued during 2018-19	57
Number of people who presently hold an authorisation	378
Number of authorisations that are current*	378
Number of authorisation holders who have had their authorisation revoked or suspended by the Commission in the current reporting period	0

* Authorisations issued in previous years, unless revoked or suspended, remain valid.

6.17 Industrial Magistrate's Court

The Industrial Magistrate's Court Registry received a total of 264 claims that fell within the Court's general jurisdiction during the reporting period.

Those claims were comprised of:

- claims alleging a breach of an industrial instrument covered under the IR Act;
- claims seeking to enforce an order of the Commission;
- claims alleging a breach of the CIPPLSL Act;
- small claims alleging a breach of an industrial instrument covered under the FW Act (up to and including $20,000); and
- claims alleging a breach of an industrial instrument covered under the FW Act (over and above $20,000).

Claims lodged	264
Resolved (total)	228
Resolved (lodged in the period under review)	154
Pending	143
Total number of resolved applications with penalties imposed	7
Total value of penalties imposed	$336,790
Total number of claims resulting in disbursements	7
Total value of disbursements awarded	$468
Claims resulting in awarding wages	25
Total value of wages in matters resolved during the period	$293,069

Table 10 – Industrial Magistrate's Court statistics

Claims seeking to enforce an order of the Commission and claims alleging a breach of the CIPPLSL Act also fall within the Court's general jurisdiction. Penalties may be imposed in relation to claims made under the CIPPLSL Act, where they are sought by the Construction Industry Long Service Leave Payments Board.

Small claims are dealt with under the Court's general jurisdiction in accordance with the FW Act. Parties are ordinarily unrepresented and must seek leave of the Court if they wish to be represented during a trial. Small claims cannot exceed $20,000 and penalties cannot be imposed.

When dealing with claims which allege a breach of an industrial instrument made under the FW Act (for amounts over and above $20,000), or an industrial instrument made under the IR Act, the Court allows parties to be represented without the need to seek leave. Penalties may be imposed by the Court in these matters, where they are sought by the claimant.

Pre-trial conferences are conducted by the Commission's Registrar or Deputy Registrar in claims lodged and responded to in relation to small claims and other claims made under the IR Act and the FW Act. No pre-trial conferences are held in matters which seek to enforce orders of the Commission or matters filed in accordance with the CIPPLSL Act.

During this reporting period, 82 claims proceeded to at least one pre-trial conference. Of those 82 claims, 25 claims were settled at a pre-trial conference and 21 were settled after a pre-trial conference, prior to a trial.

The Industrial Magistrates resolved 228 matters during the reporting period, 74 of which were from the previous financial year, and awarded payments in 25 instances, totalling $293,069. Penalties were imposed in seven instances, amounting to a total value of $336,790.

Disbursements referred to the in the table above relate to sundry administration costs, which in most instances, consist of fees payable upon the lodgement of Court documents.

7 Access to justice

The Commission is very conscious that individual employees and small business employers who are involved in matters before the Commission are often not familiar with the ways of tribunals and may find the process and the experience quite daunting. The Commission has established a number of opportunities for those self-represented parties to obtain external support. I express my appreciation to the people and organisations who give their time and effort to assist those people to navigate their way through, and make the most of, the opportunity provided by the legislation.

7.1 Commission's pro bono scheme

The Commission established a pro bono scheme in 2014. The following law firms and agents provide assistance and advice to employees and employers who meet strict criteria, to deal with matters before the Commission:

- Ashurst Australia
- Clayton Utz

- DLA Piper
- Jackson McDonald
- Kott Gunning Lawyers
- MinterEllison
- Workwise Advisory Services
- MDC Legal*
- Norton Rose Fulbright*
- John Curtin Law Clinic*

(*This year we welcomed MDC Legal, Norton Rose Fulbright and John Curtin Law Clinic (JCLC) as participants.)

A total of 15 applicants were referred to the pro bono scheme during the year. Eight of those were employees claiming to have been unfairly dismissed, with four employees claiming payment of benefits under their contracts of employment and two making appeals to the Public Service Appeal Board. All but one of these participants were employees.

The types of assistance provided ranged from advice on the merits of the claim and preparation of a written submission, to representation at a conciliation conference.

A number of pro bono recipients reported the very positive difference it made to how they managed the process and expressed their appreciation to the pro bono provider. For example, one recipient of the scheme commented how grateful and satisfied she was for the assistance provided, and in particular commented on how the pro bono firm helped her to understand the merits of her claim and supported her to achieve her preferred outcome of an agreed resolution.

Eight applicants for pro bono assistance did not receive assistance in 2018-19 because:

- the applicant was not eligible for access to the scheme;
- the pro bono application was not proceeded with at the request of the applicant;
- the matter settled prior to the applicant being referred to the pro bono provider;
- no pro bono provider was available or willing to provide assistance; and/or
- the coordinator was currently ascertaining the availability of pro bono provider.

7.2 Employment Law Centre of WA (Inc.) and JCLC

During the reporting period, the Commission has also been able to refer people in particular need, for guidance and advice to the Employment Law Centre of WA (Inc.) (ELCWA) and the JCLC.

7.2.1 ELCWA information sessions

In 2018, the Commission extended its relationship with the ELCWA as a means of making the Commission more accessible. The Commission facilitates information sessions for applicants and respondents to claims of unfair dismissal and denied contractual benefits. These sessions are conducted at the Commission's premises and are presented by the ELCWA. They provide information about the conciliation

process. Parties are able to attend in person or they may elect to attend by video link or telephone link.

Nine sessions were held over the 2018-19 year, with a total of 24 attendees. Twenty-two of those attendances were in person, one via video link and one via telephone link.

7.2.1.1 Feedback from information sessions

At the end of each session, participants were asked to provide feedback:

- 86% of participants responded that they felt more comfortable dealing with their matter before the Commission;
- 100% of participants responded that they found the information session useful or very useful; and
- 93% of participants rated the service as good or excellent.

One participant reported having found the information session 'very useful' with a 'very knowledgeable and intelligent speaker'. Another said that the session was 'amazing' and stated further 'I wish all courts and tribunals did this'. A third participant commented the session was 'very good and informative. Excellent realistic information and very welcoming'.

Where the ELCWA is able to provide direct assistance to employees coming before the Commission, the JCLC has offered to provide assistance to small business employers. The Commission is now able to refer those employers to the JCLC.

I record my most sincere appreciation to the ELCWA for its involvement in providing direct assistance to employees and in delivering the information sessions, and the JCLC for their assistance to small business employers. In addition to being of great benefit to the parties concerned, it is of considerable assistance to the Commission in dealing with the matter. The parties who receive assistance have a better understanding of the issues, are better prepared for proceedings and do not require the same level of intervention and guidance by the Commission. It also makes the process easier for the opposing party as they are dealing with a better-informed person.

7.3 Legislation

7.3.1 Industrial Relations Commission Regulations 2005

7.3.1.1 Review

I noted in my Annual Report of 2017-18 that I had commenced a review of the *Industrial Relations Commission Regulations 2005* (the Regulations), during which key stakeholders were invited to make comments. The Commission's forms were also reviewed, with a view to modernising the forms and assisting the broader community to better understand the information required to be provided to the Commission by adopting a plain English approach.

This review of the Regulations has been concluded, new regulations issued and the modernised forms are publicly available on the Commission's website.

In the period from March to June 2018, it took an average of nine days for a party to file a statutory declaration of service with the Commission to confirm that they had served their document on the other party. Further delays were encountered where Registry staff identified deficiencies in the statutory declaration or the process of service, which then had to be rectified by the party concerned and re-filed.

The revised Regulations have provided for the Registrar to now be responsible for service of almost all forms and documents.

As a result of the Registrar effecting service of documents, there has been a consequential decrease in time taken for a respondent to file a response. In the period from March to June 2018, there was an average of 31 days between the date of filing of an application to the date the respondent filed a response. In the same period this year, the average time has decreased to 22 days, almost ten days less than in 2018 and much closer to the required 21 day timeframe to file a response to an application or claim.

I record my thanks to those who gave time and thought to participating in this review.

7.3.1.2 Amendments

The *Industrial Relations Commission Amendment Regulations 2019* amended the Regulations with effect from 5 March 2019 (see Western Australian Government Gazette (No. 30), dated 5 March 2019, at pages 585 to 641).

The amendments included:

- service of all documents, apart from a summons to witness and appeal books, is now the responsibility of the Registrar, rather than that of the parties;
- an extension of time for the electronic lodgement of documents to midnight, rather than the previous time of 4.30pm (reg 6);
- Commission forms are consolidated and modernised in plain English, with suitable guiding information;
- a copy, rather than the original, of an industrial agreement may be filed, therefore providing the ability to lodge such applications electronically (reg 55);
- the Commission can conduct a hearing on the papers in a particular case, where the Commission determines that it is appropriate to do so; and
- the Commission may give directions for outlines of evidence to be filed, as an alternative to witness statements (reg 43).

The purpose and effect of these amendments is to provide for the streamlining and modernising of the Commission’s processes. The changes have also assisted with increasing the timeliness and efficiency of these processes.

A very positive response to these changes has been received from those who interact with the Commission.

7.3.2 Industrial Relations (General) Regulations 1997

There have been no amendments to these regulations during 2018-19.

8 State Wage Case

2019 State Wage Case Hearing – Day 1, 22 May 2019

Section 50A of the IR Act requires that, before 1 July in each year, the Commission is to make a General Order setting the minimum weekly rate of pay applicable under the MCE Act to adults, apprentices and trainees and to adjust rates of wages paid under State awards.

The application for the 2019 State Wage Order was created on the Commission's own motion. The Commission advertised the proceedings. Written and oral submissions were received on behalf of the Honourable Minister for Industrial Relations (the Minister), the Chamber of Commerce and Industry of Western Australia Incorporated (CCIWA), UnionsWA and the Western Australian Council of Social Service (WACOSS). In addition, evidence was given by Mr Brian Christmas, Director of the Economic and Revenue Forecasting Division, Department of Treasury.

Mr Brian Christmas, Director of the Economic and Revenue Forecasting Division, Department of Treasury giving evidence to the State Wage Case hearing on Day 1, 22 May 2019

2019 State Wage Case Hearing – Day 1, 22 May 2019

After hearing submissions and considering the evidence, on 14 June 2019, the Commission in Court Session delivered its reasons for decision in the 2019 State Wage Case ([2019] WAIRC 00290; (2019) 99 WAIG 509), and issued a General Order that increased the minimum wage for award covered employees and award-free employees covered by the MCE Act to $746.90.

The operative date for the amended rates was from the first pay period on or after 1 July 2019.

In addition, the Commission's *Statement of Principles* was amended to include a new 'Principle 8. Claims for Equal Remuneration for Men and Women for Work of Equal or Comparable Value'.

As at 30 June 2019, 233 awards remained in force. Of those awards, 218 were varied as a result of the 2019 State Wage Order.

The Commission again webcast the proceedings, as it has done since 2007.

8.1 Statutory minimum rate for award apprentices 21 years of age and over

The State Wage Order also ordered that the minimum weekly rate of pay applicable under s 14 of the MCE Act to an apprentice who has reached 21 years of age be increased. That rate increased to $638.20 from 1 July 2019.

8.2 Minimum weekly wage rates for apprentices and trainees under the MCE Act

Minimum weekly rates of pay for junior apprentices and trainees pursuant to s 14 of the MCE Act were also dealt with in the State Wage Order.

The MCE Act refers to the classes of apprentice and trainee, respectively, to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into. It was ordered that the minimum weekly rate of pay for apprentices and trainees is to be the rate of pay determined by reference to apprentices' rates of pay and the minimum weekly rate of

pay at the relevant industry/skill level for trainees respectively, based on the *Metal Trades (General) Award*. The date of operation was the commencement of the first pay period on or after 1 July 2019.

9 Location Allowances General Order

The Location Allowances General Order prescribes allowances to compensate employees employed at specified locations for the cost of living, isolation and climate associated with those locations. Each year, of its own motion, the Commission reviews the prices component of the allowances and adjusts them by the Perth Consumer Price Index. Such a review was again undertaken at the Commission's own motion, and the allowances contained in 82 awards were adjusted from 1 July 2019 ([2019] WAIRC 00298; (2019) 99 WAIG 615).

10 Conciliation and case management

The Commission is required to endeavour to resolve matters by conciliation as a first step, unless satisfied that this is not likely to assist (s 32, IR Act). Conciliation is usually undertaken by bringing the parties face-to-face in a conference chaired by a Commissioner. The IR Act provides two means for conciliation.

10.1 Compulsory conferences

Section 44 of the IR Act allows a union or employer to apply for a compulsory conciliation conference. Under this section, the Commission has power to summons a party to attend and to make orders to, amongst other things, prevent the deterioration of industrial relations. The s 44 regime deals well with urgent industrial disputes within both the private and public sectors. Following allocation of the matter to a Commissioner by the Chief Commissioner, which occurs after the application has been appropriately served on the respondent, the Commission contacts the applicant to ascertain the urgency of the application.

The Registry aims to serve s 44 applications on relevant parties within two to four hours of an application being filed. This turnaround time is dependent on the urgency of each particular matter.

In cases where an application appears to not be particularly urgent, or the applicant is uncontactable, the matter may be dealt with the following business day.

Conferences are then convened according to the urgency of the matter. The following table sets out the length of time from filing until the first conference is convened:

Average time to conference	Number of matters
Within five days	2
Within six - seven days	5
Within eight - ten days	7
Within 11- 14 days	28
Within 15 - 21 days	10
Within 22 - 28 days	7
Within one – two months	10

10.2 More than one conference per application

Some matters may require only one conciliation conference before:

(a) agreement is reached;

(b) in the absence of agreement, the matter is to be arbitrated; or

(c) the applicant decides not to proceed.

Others though, require more than one conference.

10.2.1 Conferences convened in s 44 matters

Of the 58 conference applications made under s 44 of the IR Act concluded in this year, without being referred for hearing and determination, 46 required only one conference.

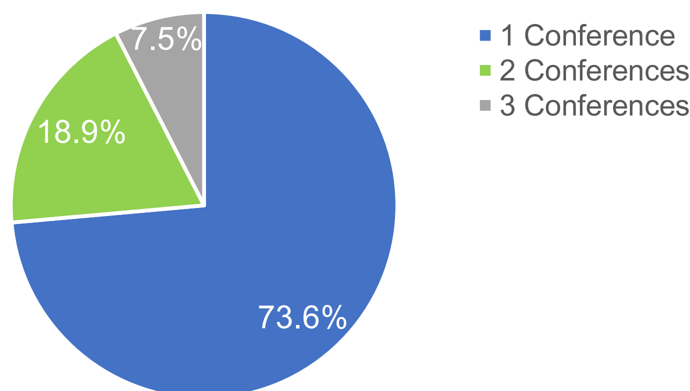
Subsequent conferences may be scheduled as a means of setting deadlines for action and reporting back to the Commission about progress.

If agreement is not reached, the Commission will usually convene a conference to direct the parties in preparation for and to schedule a hearing. If there is a preliminary issue such as a challenge to the Commission's jurisdiction or the applicant's standing to bring the application, this involves a further process. Once all preliminary issues are resolved, a final hearing and determination can occur.

10.2.2 Conferences convened in s 29 matters under s 32 of the IR Act

Section 32 of the IR Act provides an alternative avenue for conciliation. It is generally used for claims by individual employees, particularly those made under s 29 of the IR Act, and for award variation applications.

In 2018-19, 170 applications made by individuals claiming either unfair dismissal or denied contractual benefits were resolved. The Commission convened a conference in 106 of those matters. More than one conference was convened with parties in 26.4% of matters.



10.3 Conferences by telephone and video link

During the 2018-19 reporting period, a total of 214 conferences were convened by the Commission under s 32 and s 44 of the IR Act. Where possible, the parties are expected to attend conferences in person as this results in more effective conciliation and better outcomes. However, this is not always practicable so the conference may be conducted by telephone or video link.

Conferences convened by telephone link	7
Conferences convened by video link	2

Commissioners and the parties prefer telephone links to video links for conciliation because they are easier to set up, do not require the external party to have additional infrastructure and the technology is more reliable.

During this reporting year, the Commission improved the soundproofing and acoustic facilities in all conference rooms to improve audio quality for the conferences convened by telephone.

In addition, the Commission’s video link technology has been upgraded to provide a more user friendly and reliable service to the community.

11 Awards and agreements – records updated

11.1 Industrial agreements

In last year’s Annual Report, I referred to a review I had instigated in September 2017 to assess the status of a large number of registered industrial agreements to determine whether they were defunct.

In addition to the 160 defunct industrial agreements that were cancelled during the 2017-18 reporting period, a further 716 industrial agreements were deemed to be defunct and therefore cancelled during 2018-19.

12 Private sector coverage

12.1 Previous recent annual reports have commented on the lack of maintenance of private sector awards.

On 28 June 2018, the Commission, of its own motion, created applications to vary 18 awards in order to ensure that payment of wages for hours in excess of 38 per week complies with statutory minimum requirements. The awards are:

Matter number	Name of award
APPL 33/2018	Engine Drivers' Minerals Production (Salt) Industry Award 1970
APPL 35/2018	Theatrical Employees Entertainment, Sporting and Amusement Facilities (Western Australian Government) Award 1987
APPL 36/2018	Bespoke Bootmakers' and Repairer's Award No.4 Of 1946
APPL 37/2018	Prison officers award
APPL 38/2018	Performers Live Award (WA) 1993
APPL 39/2018	Nurses (Day Care Centres) Award
APPL 40/2018	Masters, Mates and Engineer's Passenger Ferries Award

Matter number	Name of award
APPL 41/2018	Building and Engineering Trades (Nickel Mining And Processing) Award
APPL 42/2918	Theatrical Employees (Perth Theatre Trust) Award 1968
APPL 44/2018	Iron Ore Production and Processing (Locomotive Drivers Rio Tinto Railway) Award 2006
APPL 45/2018	The Dried Vine Fruits Industry Award 1951
APPL 46/2018	Engine Drivers (General) Award
APPL 47/2018	Iron Ore Production and Processing (Locomotive Drivers) Award 2006
APPL 48/2018	The Fruit Growing and Fruit Packing Industry Award
APPL 49/2018	Fruit and Produce Market Employees Award
APPL 50/2018	Engine Drivers (Gold Mining) Consolidated Award 1979
APPL 51/2018	Engine Drivers (Nickel Mining) Award 1968
APPL 52/2018	Fast Food Outlets Award 1990

After consultation with CCIWA, the Minister and UnionsWA, it was determined that the *Prison Officers Award*, the *Iron Ore Production and Processing (Locomotive Drivers Rio Tinto Railway) Award 2006* and the *Iron Ore Production and Processing (Locomotive Drivers) Award 2006* did not require any variation and those applications were dismissed.

Of the remaining 15 awards, 13 were varied by order of the Commission before the end of the reporting year. The remaining two awards, the *Theatrical Employees Entertainment, Sporting and Amusement Facilities (Western Australian Government) Award 1987* and the *Theatrical Employees (Perth Theatre Trust) Award 1968* are due to be finalised by the end of September 2019.

12.2 The above matters highlighted issues within State awards, particularly in regard to the respondency schedules. To illustrate: *the Engine Drivers (General) Award* has 43 respondents. Of those, 17 have been deregistered with the Australian Securities and Investment Commission and/or no longer exist. The Commission sent letters to the remaining 26 respondents. In response, two of the letters were returned marked 'return to sender'. No other responses were received.

The Commission also advertised the proposed changes on the Commission's website, in the *Western Australian Industrial Gazette* and in the *Weekend West Newspaper*. No responses were received by the Commission. This lack of response from any of the respondents was endemic across all 18 awards. It is likely that the majority of these awards no longer have any active named respondents that fall within the State industrial relations system.

12.3 I was pleased to note that the issue of awards being out of date was addressed in the Final Report of the Ministerial Review of the State Industrial Relations System. Two issues require attention in particular:

1. *The scope of existing awards*

   Most of the Commission's awards were established decades ago and contain complicated provisions setting out their scope. There are also many callings in the private sector that are award-free.

   Currently, the IR Act does not give the Commission capacity to initiate a review of the scope of an award to overcome these issues. I note the Minister's announcement of an intention to amend the IR Act to enable the Commission to initiate such matters.

2. *Updating awards*

   With the lack of applications by unions in the private sector to keep their awards up to date, I propose to initiate reviews, pursuant to s 40B of the IR Act, to do so. My intention is to start with the awards most commonly applicable to small business.

These two reviews may be best undertaken in tandem. However, this will depend on the timing of changes to the legislation to enable the Commission to initiate variations to the scope of awards.

13 Ongoing Matters before the Commission

13.1 The Civil Service Association of Western Australia Incorporated v Chemistry Centre and Ors - Applications to vary awards in relation to representation rights

The Civil Service Association of Western Australia Incorporated has made applications to vary public sector awards in regard to the Union Facilities for Union Representatives clauses, concerning the rights of the CSA to represent members in the workplace and for employers to recognize those rights.

The claims assert that there have been repeated examples of workplace level disputes where employers have not properly recognized the right of employees to be represented by the CSA and where the right to do so has been denied.

The CSA contends that its rights to represent its members and to pursue the variations to the awards is consistent with the objects of the Act in s 6 and with International Labour Organization Conventions in relation to freedom of association; the right to organize; collective bargaining and workers' representatives.

The Commission has convened a number of conciliation conferences and the issues in dispute are being explored. The parties have agreed to progress high level consultations on the issues in dispute with a report back conference to be convened by the Commission.

13.2 Western Australian Police Union v Commissioner of Police

The Western Australian Police Union of Workers commenced s 44 proceedings in relation to bargaining for a new industrial agreement. The Union formally commenced

bargaining under s 42(1) of the IR Act in April 2019. Several conciliation conferences have been convened in an endeavour to assist the parties in resolving the issues in dispute.

The Commission has made a recommendation to the parties, which is the subject of further discussions between them. The matter is ongoing.

13.3 General Issues

During the last two years in particular, the Commission has dealt with, and continues to deal with, a range of matters with common themes, through conciliation. They are:

13.3.1 Fitness for work

A number of disputes, involving various unions on behalf of individual members, and against different employers, have raised issues of the way the employees are dealt with in respect of their fitness for work. These issues involve mental health concerns and the use of leave. Some have been resolved by the transfer or secondment of the employee and alternative working arrangements. Others are still in the process of resolution.

13.3.2 Lengthy investigation processes

A number of matters have related to the length of time taken by employers to complete investigations into grievances and allegations. Some employers are content that an investigation can take many months, and sometimes more than a year. It has been noted in previous annual reports that there are occasions when the length of time taken has resulted in significant stress for and unfairness to those who are either the complainant or the person the subject of the investigation. There also appears to be a view amongst some employers that if the employee is on leave with pay during the process, then there is no damage done. However, being at home for an extended period while under investigation may be damaging to that person's health and family relationships, and to their reputation and they may lose touch with events in the workplace. Regardless of the outcome, the length of delay results in unfairness in the process and can be destructive of good working relationships.

13.3.3 Overpayments

A number of applications have related to audits of leave which have discovered system-wide overpayments. Employers have then dealt with those overpayments by unilaterally adjusting leave balances or instigating deductions from wages.

13.3.4 Working with Children (Criminal Record Checking) Act 2004

The Buttery case referred to in the Decisions of Interest, is one of a number over recent years, particularly relating to teachers, who have had their employment terminated because they have been issued with an interim negative notice under the Working with Children (Criminal Record Checking) Act 2004 (WWC Act). The WWC Act enables the employer to terminate the services of an employee before any investigation or decision has been made about any relevant allegations against the employee. The WWC Act prohibits the Commission granting the employee a remedy in a claim of unfair dismissal, even when the allegation is withdrawn, was fabricated

or malicious, or was not proven. In this case, an employee who was subsequently exonerated after the issuance of an interim negative notice, still suffered the consequence of unemployment, as the employer is under no legal obligation to reinstate or re-employ an employee in circumstances where an interim negative notice is subsequently revoked and there is no other barrier to their employment.

I recommend that consideration be given to amendments the WWC Act, to provide a "cooling off" period between the issuance of an interim negative notice and a final notice, so that an employee who subsequently is exonerated after the issuance of an interim notice, and no longer faces any impediment to returning to their employment, does not suffer ongoing unfairness and prejudice. Another option could be a requirement that the employer at least consider the engagement of the employee in other than child related employment, if available, over such a transitional period, to avoid the need to terminate an employee's employment.

14 Impediments to effective and efficient operation of the Commission

In previous Annual Reports, I have noted the continuing impediments to the Commission's effective and efficient operation brought about by:

1. the Chief Commissioner not being able to be a Public Service Arbitrator (see s 80D(3) of the IR Act). Given that a significant proportion of the Commission's work is now related to the public sector, the removal of this limitation would enhance the Commission's flexibility and efficiency; and
2. the difficulties associated with the Public Service Appeal Board's jurisdiction.

Section 80D of the IR Act was amended with effect from 19 December 2018 to allow the Chief Commissioner to be appointed as a Public Service Arbitrator (see s 80D(2)).

The difficulties associated with the jurisdiction of the Public Service Appeal Board remain. I note recommendations made by a number of reviews of the Commission, including the Ministerial Review of the State Industrial Relations System, and support those proposals to absorb the jurisdictions of the Public Service Arbitrator and the Public Service Appeal Board into the Commission's general jurisdiction. This would remove confusion, increase efficiency and provide greater consistency in dispute resolution.

15 Community engagement

Members of the Commission have once again participated in a number of events throughout the year, aimed at providing the community generally and stakeholders in the industrial relations system in particular, with information about the Commission and its processes.

15.1 Information sessions

Training and orientation sessions have been provided to unions and employers by Chief Commissioner Scott, Registrar Bastian, Deputy Registrar Kemp and Acting Executive Assistants to the Chief Commissioner, Thomas Klaassen and Elizabeth Roberts.

These were delivered to:

- the Bunbury Geographe Chamber of Commerce and Industry;
- the Interstate Directors Industrial Relations Conference Perth;
- the Department of Mines, Industry Regulation and Safety, Public Sector Labour Relations Division; and
- Curtin University Law Students.

15.2 Papers presented by Commissioners

Commissioner Emmanuel participated in a joint presentation with the Fair Work Commission’s Deputy President Beaumont to the Industrial Relations Society of Western Australia’s State Conference titled ‘Workplace Investigations’.

15.3 Work experience at the Commission

The Commission regularly provides opportunities for students to undertake familiarisation and work experience at the Commission. Under the supervision of a Commissioner, they attend hearings and conferences, undertake research and receive inductions through various parts of the Commission, the Registry and the Industrial Magistrate’s Court. In the last year, the Commission has provided formal opportunities for students from the University of Western Australia and Curtin University.

This arrangement assists in raising awareness among the students of law and industrial relations as to the role and functions of the Commission and the issues that arise in the employment relationship and how they may be resolved.

15.4 Other events supported by the Commission

A number of members of the Commission attended the Industrial Relations Society of Western Australia’s 'Women in Industrial Relations' breakfast held on 16 October 2018, and its State Conference which was held on 9 November 2018.

In addition, members of the Commission attended and spoke at functions at the invitation of employee and employer organisations, and other stakeholders, throughout the reporting period.

16 Website access

Access to the Commission's website is actively monitored. A Google report indicates that there was a 10% increase in the number of hits on the website during the reporting period which continues to demonstrate the use made of the Commission’s online resources.

17 Conclusion

I wish to record my thanks and appreciation to my colleagues, the Registrar and all of the staff of the Commission for their work, to the court reporting service for their services to the Commission, to those who give their time and resources to assisting vulnerable parties before the Commission through the Commission’s pro bono scheme, and the work of the ELCWA and the JCLC.

18 Decisions and disputes of interest

18.1 IAC

18.1.1 Jurisdictional limits of police officer's removal

The IAC has upheld an appeal against a decision of the Commission that found that the appellant, the Police Commissioner, had unfairly removed a police officer from the Western Australian Police Service.

While off duty, the police officer was charged with criminal offences. Prior to the determination of the criminal charges, the Commissioner of Police commenced removal action against the officer under pt IIB of the *Police Act 1892* for the conduct relating to the criminal charges. The Commissioner invited the officer to respond to the proposed removal action but the officer declined, saying that it would undermine his right to silence and his presumption of innocence whilst the criminal charges were being defended and asked the Commissioner to defer his decision. The Commissioner continued with the removal action and removed the officer from the Police Force. After his removal, the officer was acquitted of both charges. The officer appealed to the WAIRC on the grounds that the decision of the Commissioner to take removal action was harsh, oppressive or unfair. The WAIRC declared that the Commissioner's decision to take removal action was unfair because he had not allowed the officer a reasonable chance to respond and ordered compensation to be paid for loss and injury caused by the removal.

The majority of the IAC, Buss J and Murphy J, found that s 33W of the *Police Act 1892* does not require the Commissioner to grant the officer an extension of time, suspension or adjournment of the process of removal. The majority held that the WAIRC erred by reading an unexpressed condition based on fairness into the relevant section of statute. The majority was satisfied that the Commissioner afforded the officer a reasonable opportunity to be heard.

Le Miere J (dissenting) found that the WAIRC did not misconstrue the statute. His Honour found that the effect of s 33W of the *Police Act 1892* is that the circumstance of an officer having been charged with committing an offence does not prevent the Commissioner from taking removal action. However, it may be unfair for the Commissioner to take removal action where the officer has been charged with a related criminal offence. His Honour stated that where different conclusions are reasonably possible it cannot be inferred that the WAIRC has misunderstood or misconstrued the statutory provision.

The IAC set aside the declarations and orders made by the WAIRC and substituted an order that the officer's appeal to the WAIRC be dismissed.

Commissioner of Police v Shane Michael Ferguson
[2019] WAIRC 00073; (2019) 99 WAIG 61

18.1.2 Full Bench can only hear points raised at first instance

The IAC has dismissed an appeal against a decision of the Full Bench of the WAIRC after finding that one of the appellant's complaints was about a matter not raised in earlier proceedings.

After being summarily dismissed by the Shire of Denmark, the applicant commenced proceedings in the WAIRC claiming that he had been denied contractual benefits. The

applicant claimed that the termination of his employment was invalid and ineffective because the Shire had not complied with s 5.37(2) of the *Local Government Act 1995*. The Shire denied the applicant's claims and argued that the applicant was barred from bringing the claim because of a settlement agreement made between the parties during the course of proceedings in the Fair Work Commission. The Commissioner at first instance found that the dismissal of the applicant was invalid and ineffective and ordered the Shire to pay the applicant.

The Shire then appealed to the Full Bench and said that the termination was valid and effective, and that the settlement agreement was a bar to the applicant's claim. The Full Bench, by majority, upheld both grounds of the appeal and set aside the decision of the Commissioner at first instance's decision and ordered that the applicant's claim be dismissed.

The applicant appealed to the IAC on two grounds. Ground 1 was that the Full Bench erred in finding that the termination of employment was valid or effective. The IAC found that s 5.37(2) of the *Local Government Act 1995* confers on the Chief Executive Officer (CEO) power to dismiss a senior employee only if the CEO has informed the Council of the proposed dismissal and the Council has accepted the CEO's recommendation. As this did not occur, the IAC found that ground 1 of the appeal was made out.

Ground 2 of the appeal was that the Full Bench erred in finding that the settlement agreement between the parties bars the applicant's claim. The applicant submitted that he had been denied the right to be heard by the Full Bench and argued that the CEO did not have the authority to enter a legally binding contract on behalf of the Shire. The Full Bench ruled that the applicant could not raise that point because it had not been raised at the matter of first instance. The Full Bench said that it is a very well-established principle that, except in exceptional cases, a party to an appeal cannot raise a point or objection on appeal that was not raised in the primary proceedings. The IAC found that the Full Bench did not deny the applicant the right to be heard.

The Full Bench upheld the appeal from the first instance Commissioner on the basis that, if they were wrong about Ground 1, the applicant's claim would still be dismissed based on Ground 2. The IAC found that the error of the Full Bench in regard to Ground 1 did not affect Ground 2. The IAC dismissed the appeal and confirmed the decision of the Full Bench to quash the decision of the Commissioner at first instance and order that the applicant’s claim be dismissed.

Robert Whooley v Shire of Denmark
[2019] WAIRC 00071; (2019) 99 WAIG 93

18.2 President and Chief Commissioner matters

18.2.1 Operation of an order stayed

The Chief Commissioner issued a stay of operation of a decision of the Commission pending the hearing and determination of 2 appeals against the decision.

The Commission at first instance had interpreted that *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* (Shop Award) and found that it covers the retail pharmacy industry.

The Chief Commissioner said that the applicants are legally obliged to apply the Award and any decision not to take enforcement action by The Shop, Distributive and Allied Employees' Association of Western Australia or the Minister did not alter those legal obligations.

The Chief Commissioner found that, should the order not be stayed, the applicants would face significant structural, financial and staffing consequences such as being required to audit, reconsider and recalculate the rates of pay for present and former employees, and, reassess their operating hours, rosters and staffing generally. These consequences carry implications which, if the appeals are successful, would result in substantial disruption and waste that could not be completely restored. This amounted to special circumstances and demonstrated that the balance of convenience lay with granting the stay.

The Chief Commissioner determined that the grounds of appeal were arguable, and the application was upheld and stay order granted.

Pharmacy Guild of Western Australia Organisation of Employers v The Shop, Distributive and Allied Employees' Association of Western Australia, Minister for Commerce and Industrial Relations, Samuel Gance T/A Chemist Warehouse Perth

Samuel Gance T/A Chemist Warehouse Perth v Shop, Distributive and Allied Employees' Association of Western Australia, Pharmacy Guild of Western Australia, Minister for Commerce and Industrial Relations
[2019] WAIRC 00098; (2019) 99 WAIG 252

18.3 Full Bench matters

18.3.1 Full Bench must consider the practicability of a remedy

The Full Bench has unanimously upheld an appeal by the State School Teacher's Union of W.A. Incorporated (SSTU), acting on behalf of a teacher. The appeal was against a decision that awarded compensation to the teacher for having been unfairly dismissed by the Director General of the Department of Education (the Director General).

The teacher had worked for the Department of Education for 36 years and taken extended leave after being diagnosed with PTSD and an anxiety disorder. While on leave, the teacher received a letter advising that there would be an investigation into an incident that occurred just prior to him having taken leave. In December 2017, the Department's doctor stated that the prospect of a successful return to work appeared poor at that time and sought further medical information from the teacher's doctor and psychologist. In early 2018, the Department terminated the teacher's employment on the grounds of ill health.

The Commissioner at first instance concluded that if all the relevant information was available to the decision-maker they could not have determined that the teacher was unable to work due to ill health. The Commissioner decided that reinstatement or redeployment was impracticable and awarded compensation.

The SSTU argued in ground 1 that the Commissioner erred in fact and in law when determining why the teacher was not attending work. The Full Bench noted that there was conflict between and a lack of clarity in the medical opinions and that the decision-

maker should have made further enquiries prior to terminating the teacher's employment. For this reason, the Full Bench determined that the Commissioner's conclusion that the teacher was not going to work for reasons unrelated to his health was premature and in error.

The SSTU argued in 2 further grounds that the Commissioner erred in law by considering irrelevant considerations when finding that reinstatement was impracticable, that the teacher's response to the investigation process was abnormal or extreme. However, the Full Bench concluded that the medical evidence was that the teacher's response to the process was normal.

The Full Bench found that the SSTU's three grounds of appeal were made out and upheld their appeal.

The Full Bench then considered an appeal by the Director General which argued that the Commissioner erred in his reasoning in the calculation of compensation to the sum of 20 weeks' salary, by finding that the teacher suffered compensable loss or injury. The Full Bench found that the Director General's submission assumed that the teacher was fit to work.

The Full Bench dismissed the Director General's appeal as evidence indicated that the employee was not fit to work at the school at which he had been teaching and his suitability to work elsewhere was not assessed.

The Full Bench allowed the SSTU's appeal and ordered that the decision at first instance be suspended and the matter remitted to the Commission for further hearing and determination on the practicability of reinstatement or reemployment in consideration of the employee's current state of health and whether he ought to be reemployed at another school.

The State School Teachers' Union of W.A. (Incorporated) v
Director-General, Department of Education

Director-General, Department of Education v
The State School Teachers' Union of W.A. (Incorporated)
[2019] WAIRC 00175; (2019) 99 WAIG 336

18.3.2 Forced sick leave not what the doctor ordered

The Full Bench unanimously upheld an appeal by the Civil Service Association of Western Australia Incorporated against a decision of the Public Service Arbitrator that an employer was entitled to direct an employee to take unpaid sick leave.

The Western Australian Industrial Gazette and the Western Australian Arbitration Reports have reported the decisions of the State's industrial courts and tribunals since 1901

The employee had a history of complex illnesses and had used up all of her sick leave. Her employer directed her to take sick leave and remain away from work. As she had no sick leave left, this leave was be unpaid. The Arbitrator held that *Administrative Instruction 601* (AI 601) and the relevant clause of the *Public Service and Government Officers CSA General Agreement 2017* (PSGOGA) read together, give rise to the employer's right to direct an

employee to remain away from work and that such period be regarded as sick leave. The circumstances where this right arises are where an employee is in such a state of ill health as to constitute a danger to themselves, other employees or the public. When the employer directed the employee to take unpaid sick leave, he had no evidence that the employee would be a danger to colleagues or members of the public. The employer's power to direct the employee to take sick leave was therefore not enlivened.

The Full Bench also rejected the employer's argument that its *Ill Health Retirement Policy* allowed it to withhold payment because a dispute about her medical fitness was not raised. The Full Bench held that at the material time the employee had raised a dispute with the employer's assertion that she should be medically retired by providing medical reports to substantiate her continued employment from two medical practitioners, in rebuttal of the employer's medical report.

The Full Bench also noted that the principle of 'no work, no pay' does not necessarily apply to public servants because there is a distinction between payment as a consequence of holding office and payment for work performed.

The Civil Service Association of Western Australia Incorporated v
Commissioner of Police, WA Police Service
[2019] WAIRC 00020; (2019) 99 WAIG 110

18.3.3 Full Bench cancels prohibition notice

The Full Bench has unanimously upheld an appeal against a decision of the Occupational Health and Safety Tribunal and found that a prohibition notice relating to asbestos containing materials did not comply with the *Mines Safety and Inspection Act 1994* (MSI Act).

Smith AP and Scott CC found that in order to comply with s 31AD(2)(a) of the MSI Act, a prohibition notice must require the removal of a hazard or likely hazard. The prohibition notice in this case did not put in place a regime to remove the hazard or likely hazard. Instead, the direction to prohibit persons from being in a place where they might be exposed to a hazard or likely hazard could be said to be a regime to avoid exposure to a hazard. They also found that a requirement to remove persons from an area can only be authorised for the time it takes to remove a hazard or a likely hazard, that is, for a limited time and not ongoing.

The Full Bench also found that the prohibition notice must unambiguously identify and make clear what is to be done to remove the hazard or likely hazard and what requirements are to be complied with until the inspector is satisfied that the hazard or likely hazard has been removed. Smith AP and Scott CC found that the use of the words 'might' and 'has been' in the prohibition notice were ambiguous. They found that this was not sufficiently clear to a person in receipt of the prohibition notice. They are entitled to know, with a high degree of specificity, what they are prohibited from doing. The manner in which the prohibition notice had been written left the appellant to work out what it meant and how it might be managed. This was problematic as the imposition of a prohibition notice placed the appellant in jeopardy of prosecution and penalty if it breached the prohibition notice.

The Full Bench varied the decision of the Tribunal by revoking the decision of the State Mining Engineer and ordered the cancellation of the prohibition notice.

Alcoa of Australia Limited v
Andrew Chaplyn, State Mining Engineer, Department of Mines and Petroleum
[2019] WAIRC 00011; (2019) 99 WAIG 93

18.3.4 Continuous service means service in the Western Australian “Public Sector”

The majority of the Full Bench upheld an appeal and quashed a decision of the Commission regarding the determination of 'continuous service' for the purpose of severance payments in the public sector. It determined that, in order to be entitled to a severance payment under the 'Voluntary Targeted Separation Scheme for Publish Sector Renewal', any continuous service in the public service must occur in Western Australia.

Acting President Smith (dissenting) found that the appeal should be dismissed. Her Honour found that the term "Public Sector" should be defined as it is in the Wages Employees Long Service Leave General Order and that the PSM Act expressly states that regulations are to be made to provide terms and conditions to apply to a registered employee who accepts voluntary severance.

This decision is subject to an appeal to the IAC.

Director General Department of Water and Environmental Regulation v
Floyd Bedford Browne
[2018] WAIRC 00817; (2018) 98 WAIG 1373

18.3.5 Use of heavy vehicle may be express or implied in owner-driver contracts

The Full Bench upheld an appeal against a decision of the Road Freight Transport Industry Tribunal and found the Tribunal’s interpretation of s 5(1) of the *Owner-Drivers (Contracts and Disputes) Act 2007* (OD Act) to be too narrow and inconsistent with the purpose of the OD Act. It found that for a contract to be an owner-driver contract under the OD Act, it is not necessary for the contract to expressly specify the use of a heavy vehicle, provided that a term can be implied that, objectively, a heavy vehicle is required to transport goods.

The Hon A/President gave an example of where a contract required the transportation of a tank, it may be implied that a heavy vehicle would be required. However, if the contract required the transportation of a pizza then a heavy vehicle would not be necessary to fulfil the contract.

The decision of the Road Freight Transport Industry Tribunal was suspended, and the matter remitted for further hearing and determination.

DELIVER2U (WA) Pty Ltd v
GD Mitchell Enterprises Pty Ltd t/as Lite n' Easy Perth
[2018] WAIRC 00734; (2018) 98 WAIG 1101

18.4 Private Sector Matters

18.4.1 Registered industrial agent

The Commission has ordered that an application not be formally filed by the Registrar after the applicant's agent, Unfair Dismissals Direct, did not pay the filing fee in time despite reminders, and provided no adequate explanation for this.

Scott CC determined that the lack of communication and poor systems within Unfair Dismissals Direct had caused them to fail in their duty to their client. Scott CC found that the applicant was bound by the conduct of their agent and held that the application should not be accepted for filing because the explanation provided for the failure to pay the filing fee did not withstand scrutiny.

Chief Commissioner Scott recorded her concern that although industrial agents may receive the benefit of registration under the *Industrial Relations Act 1979 (WA)*, there is no scheme in place for the supervision of these agents once they are registered, or to deal with any whose registration ought to be the subject to scrutiny and possibly cancelled.

Shaun Maher v The Trustee for The Croker Unit Trust
[2019] WAIRC 00245

18.4.2 Retail Pharmacy Employees covered by State Shop Award

The Commission made a declaration that *The Shop and Warehouse (Wholesale and Retail Establishments) State Award* applies to retail pharmacy employees in Western Australia.

The Shop Distributive and Allied Employees' Association of Western Australia applied to the Commission for interpretation and a declaration under s 46(1)(a) of the IR Act because it disagreed with Chemist Warehouse about how the Award should be interpreted, particularly in light of the scope clause, clause 40. - Chemist Shops and schedule C, which set out the respondents.

The Pharmacy Guild of Western Australia Organisation of Employers and the Minister for Commerce and Industrial Relations intervened in this application.

The parties and interveners agreed that when the Award was made, its coverage extended to the retail pharmacy industry. They also agreed that, as the Award currently stands, there are no known respondents in schedule C carrying on the retail pharmacy industry, as those carrying on businesses in the retail pharmacy industry had been removed. They disagreed about whether other clauses that reference chemist shops or pharmacies, for example cl 40, can have an effect on the scope of the Award.

The Commission found that it is not limited to considering the scope clause when considering the scope of an award, and held that it is appropriate to construe the Award as a whole. In doing so, the Commission found the Award is intended to apply to the retail pharmacy industry.

The Commission also found that the Award must be interpreted by reference to the scope at the date the Award was made, by reference to the named respondents and their industries at that time.

This decision is subject to an appeal to the Full Bench.

Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance (ABN 50 577 312 446) T/A Chemist Warehouse Perth
[2018] WAIRC 00015; (2018) 99 WAIG 121

18.4.3 Restricted legal practitioner an employee

A solicitor claimed that he had been denied contractual benefits and had been unfairly dismissed. The Commission decided that the applicant, a restricted legal practitioner under s 50 of the Legal Profession Act 2008 (WA), cannot be an independent contractor. The Commission considered that the close supervision and need for regulatory oversight of a restricted legal practitioner by an Australian legal practitioner under s 50 of the LP Act, was entirely inconsistent with the notion of independence and autonomy necessary as part of an independent contractor and principal relationship. The Commission also held that other indicia supported the conclusion that the applicant was an employee and not an independent contractor.

The Commission found the arrangement between the parties was for a commission or “fee split”. Therefore, the applicant fell into the exclusion contained in Schedule 1 to the MCE Act, as a “class of persons”, being persons whose services were remunerated wholly by commission or percentage reward. The Commission rejected the applicant’s arguments that the intent behind Schedule 1 was to restrict the exclusion to persons such as canvassers or real estate agents paid by commission.

The Commission concluded that a term should be implied into the applicant’s contract of employment that he be entitled to annual leave as a notoriously known entitlement of employees under employment contracts. As to remuneration, the Commission rejected the applicant’s claim that he be remunerated on the basis of a reasonable sum for the work performed. The Commission concluded that in this case, there was a valid agreement in place between the parties and on its face, was not struck down by the terms of the LP Act or any other legislation.

The Commission expressed concern about the arrangement entered into between the applicant as an employed solicitor and the respondent, given the very low rate of remuneration earned by the applicant and the risk to the applicant inherent in such an arrangement. Such arrangements should not be encouraged in the legal profession.

This decision was appealed by the employer. The appeal was dismissed by the Full Bench on 5 July 2019.

Ian Gregory Sampson v Paul Lothar Ralf Meyer
[2018] WAIRC 00914; (2018) 99 WAIG 219

18.5 Public Sector - Police

18.5.1 Employees either work prescribed hours or are shift workers

The applicant brought proceedings under s 46 of the IR Act for an interpretation of shift work provisions in the Public Service and General Officers CSA General Agreement 2017 (the Agreement) seeking a declaration on five questions relating to the issue of whether particular members are shift workers.

The Public Service Arbitrator applied the general principles of interpretation and construction and declared that:

- In the absence of the working of shifts on a roster, an officer is not a shift worker.
- An employee can be deemed a shift worker and a day worker without working prescribed shifts which attract a shift allowance but only if the employee agrees in writing. This is because, the Award requires that an officer, as a shift worker, must agree in writing to be kept on day shifts or any other shifts indefinitely that do not attract a shift allowance.
- An employee cannot be deemed a shift worker and a day worker without prescribed shifts which attract a shift allowance as it is not permissible to work both the prescribed hours of duty and the varied prescribed hours of duty at the same time.
- Employers wishing to vary the prescribed hours of work for an employee need to follow a specific regime for the alteration, including making provision for work to be performed on a shift work basis in accordance with a roster. These specific provisions, outlined in the Agreement, override and displace the general consultation and change provisions in the Agreement.
- An employer cannot provide a one-off letter to employees varying their prescribed hours to be both shift employees and employees working their ordinary hours on a weekend or a public holiday. Employers providing a letter of this nature will not eliminate any requirement to give employees one month's notice for any future changes to prescribed hours. This is because, it is not possible to effectively designate employees to be shift workers when they are not working shifts in accordance with a roster. Employees can be working one or the other working hours arrangement, but not both at the same time.

The Civil Service Association of Western Australia Incorporated v Commissioner, Western Australia Police Department
[2019] WAIRC 00142; (2019) 99 WAIG 358

18.6 Public Sector – Education

18.6.1 Claim of unfair refusal to employ teacher upheld

The State School Teachers' Union of W.A. (Incorporated) claimed that the Director General of Education had unfairly refused to re-employ a teacher, Mr Buttery, when all impediments to his reemployment were removed.

Mr Buttery was involved in an incident with a student in his classroom and he was charged with a criminal offence arising from that incident. Because of the charge, he was issued with an interim negative notice under the *Working with Children (Criminal Record Checking) Act 2004 (WA)* (WWC Act). This prevented him being employed in

child related work. The Director General dismissed him to comply with the interim negative notice.

The interim negative notice was then withdrawn, and the charge was subsequently withdrawn. However, the Director General refused to reemploy Mr Buttery,

The Commission held that the respondent's refusal to employ or re-employ Mr Buttery was unfair and re-employment was not precluded by the WWC Act.

The Commission also rejected the respondent's argument that the refusal to employ Mr Buttery was covered by a public sector standard and therefore was beyond the Commission's jurisdiction under s 23(2a) of the IR Act.

The Commission also found that the investigation into Mr Buttery's misconduct was flawed and that the respondent's ongoing refusal to employ him was unfair. The Commission ordered that Mr Buttery be offered a contract of employment and that he receive payment of an amount representing the salary that he had lost from the date of the outcome of the respondent's investigation into his conduct and the date of his reemployment.

This decision is the subject of an appeal to the Full Bench.

The State School Teachers' Union of W.A. (Incorporated) v
The Director General, Department of Education
[2018] WAIRC 00820; (2019) 98 WAIG 1316

18.6.2 Dismissal for substandard performance fair

The applicant was dismissed for substandard performance. He argued that he was not a substandard teacher and that if he was performing at a substandard level it was a direct result of a lack of support from the school's administration team. The applicant also argued that the process followed to determine that he was performing at a substandard level was flawed.

The Commission determined that the evidence showed that the applicant was a substandard teacher regardless of whether the applicant had been incorrectly assessed against the proficient level in the Australian Professional Standards for Teachers rather than the graduate level. The Commission also found that any failings on behalf of the school's administration team to manage classroom behaviour were not such as to affect or undermine the clear finding from the evidence that the applicant was a substandard teacher who had been given every opportunity to improve. The evidence brought by the applicant relating to the improved NAPLAN results for some of his classes was found by the Commission to not undermine the weight of evidence brought against the applicant.

The Commission found that the respondent could not have been said to have acted harshly, unfairly or oppressively in terminating the applicant's employment and dismissed the application.

This decision is the subject of an appeal to the Full Bench.

Colin R Dixon v Director General, Department of Education
[2018] WAIRC 00795; (2018) 98 WAIG 1231

18.7 Public Service Appeal Board

18.7.1 Appeal against the decision to take disciplinary action

The Public Service Appeal Board dismissed an appeal against a decision of the Department of Justice to impose a penalty of reprimand and transfer after it found that the appellant had committed a breach of discipline. The appellant was working as a trainee Judicial Support Officer who provided in and out of court support to a Magistrate when he contacted a witness after a trial had concluded to obtain further information that he then included into draft reasons for decision.

The appellant argued that his conduct did not warrant a finding of a breach of discipline because it was the result of an honest and mistaken belief about his course of action and that any penalty imposed by the Department should be remedial action by way of further training. The Department argued that the finding of a breach of discipline was justified on the facts and that the penalty imposed was fair and reasonable.

The Appeal Board resolved that the Department's finding that the appellant had committed a breach of discipline was not unreasonable.

The Appeal Board also found that it was reasonable for the Department to consider the appellant's prior disciplinary history when determining the appropriate penalty for this matter.

The fact that a reprimand is the lowest level of penalty that may be imposed and that a transfer is a middle order penalty was noted by the Appeal Board when it determined that the penalty imposed by the Department was not so harsh or excessive that it should be adjusted.

Richard Titelius v Director General of the Department of Justice
[2019] WAIRC 00195; 99 WAIG 597

18.7.2 Dismissal upheld following guilty plea to unlawful access charge

The Public Service Appeal Board dismissed an appeal against the Commissioner of Police's decision to dismiss a Call Taker/Radio Operator. The appellant's computer was used to access the registration numbers of four vehicles and the details of eight females connected with those vehicles, using the respondent's Information Management System (IMS). The appellant was charged and pleaded guilty in the Magistrates Court to unlawful access to a restricted computer system under the *Criminal Code* (WA).

Despite the appellant's guilty plea, he told the Appeal Board that he left his computer login open and someone else must have used his access. The Appeal Board found that the appellant's plea of guilty and his conviction for the offence must be taken on their face. The Appeal Board noted the appellant's explanation, that he only told his counsel he would plead guilty because of the possibility of a custodial sentence and he understood that he was only pleading guilty to leaving his computer logged on. However, these explanations only emerged for the first time in this appeal and had not been mentioned to the respondent at any stage after the Magistrates Court proceedings. The Appeal Board found that the respondent was entitled to be concerned as to the nature of the searches, to form the view that there had been a breach of trust and that the appellant's suggestion, that someone else had accessed his login, was not credible.

The appeal was dismissed.

Mr Michael Williams v Commissioner of Police, Western Australia Police
[2018] WAIRC 00720; (2018) 98 WAIG 1180

18.8 Road Freight Transport Industry Tribunal

18.8.1 Owner-driver contract not breached in relation to fuel prices

The Road Freight Transport Industry Tribunal dismissed two claims made by the applicant arising from an owner-driver contract between the parties.

The Tribunal found that the applicant had not brought any evidence to show that the respondent had engaged in unconscionable conduct in relation to the acquisition of the applicant's services or that the owner-driver contract was uncommercial or unfair in any way.

The Tribunal then found that there was no evidence which suggested that the price that the applicant was paying for fuel, at a discount of 11%, was not substantially cheaper than bowser price and contrary to the owner-driver contract.

Guy Court v Bis Industries
[2019] WAIRC 00096; (2019) 99 WAIG 326

18.9 Occupational Safety and Health Tribunal

18.9.1 Applicant not a validly elected safety and health representative

The Occupational Safety and Health Tribunal dismissed an application for payment of an unspecified amount for continued pay and benefits entitlements and a loss of earnings arising from alleged discrimination against a safety and health representative.

The Tribunal noted that there is a mandatory process in place for resolving health and safety issues in the workplace where employees wishing to make a claim must demonstrate that they have refused to work on particular tasks, have notified the employer of their belief of the risk to their safety and health and have made themselves available for alternate duties if it is safe to do so. The Tribunal found that the applicant’s actions were not consistent with the provisions of the legislation and regulations.

The Tribunal dismissed the referral for lack of jurisdiction after finding that the applicant was not eligible to bring this application as he had not demonstrated that he was a validly elected safety and health representative.

Mr Stephane Armet v CFC Consolidated Pty Ltd (Centurion)
[2019] WAIRC 00157; (2019) 99 WAIG 379

18.9.2 Number of Safety and Health Representatives depends on circumstances of workplace

The Occupational Safety and Health Tribunal decided on the number of Safety and Health Representatives (SHRs) and the manner of electing them for a bus depot that services primarily CAT buses.

The Tribunal found that there was no standard formula to determine the appropriate number of SHRs for a workplace and it would instead depend on the circumstances of that workplace. It was necessary to look at the number of employees, working arrangements and hazards, the need for communication between SHRs and employees, the need for SHRs to be available to communicate with the employer on health and safety issues and for the SHRs to be visible and available to respond promptly to incidents and accidents.

The Tribunal noted that the 'workplace', as defined in the *Occupational Health and Safety Act*, in this circumstance included the depot and the buses – even when in transit. Evidence was given on the nature of health and safety hazards faced by CAT bus drivers and the limitations to communication during a shift with other employees and the control centre. The Tribunal accepted that the level of hazards in relation to CBD driving was high and that CAT bus drivers face additional hazards in the city environment.

It was determined by the Tribunal that there be 2 SHRs for each shift, 4 in total, and that a 'first past the post' method of voting following the Electoral Commission's preferred system of voting for only one candidate. The Transport Workers Union and the respondent would jointly conduct elections for any casual vacancies.

The WorkSafe Western Australian Commissioner v
Transdev WA Pty Ltd and another
[2018] WAIRC 00800; (2018) 98 WAIG 1260

18.10 Industrial Magistrate's Court

18.10.1 Leave to attend and give evidence at an appeal before the PSAB

The Industrial Magistrate's Court dismissed a claim by a member of the Civil Service Association of Western Australia (CSA) for paid leave to attend union business in accordance with cl 37 of the *Public Service Award 1992* (Award). The union member sought paid leave to attend two directions hearings and a hearing of the appeal before the Public Sector Appeal Board.

Industrial Magistrate Scaddan found that the appeal was instituted by the CSA member personally on matters personal to him, rather than by the union as an organisation on behalf of one of its members. Additionally, although the CSA was representing their member in the matter, the character of the appeal could not be said to be union business.

Scaddan IM found that the intention of cl 37(1)(a) is not to provide a separate type of paid leave for individual officers to attend litigation unrelated to the commercial activities and professional operation of the union.

The Industrial Magistrate’s Court observed that the drafters of the Award could not have intended for a clause to operate preferentially to union members and dismissed the applicant's claim and associated claim for a penalty.

The Civil Service Association of Western Australia Inc v
Director General, Department of Justice
[2019] WAIRC 00206; (2019) 99 WAIG 487

18.10.2 Findings required to justify exercise of discretion

The Industrial Magistrate's Court partially upheld a claim made by a police officer regarding reimbursement claims made to the Police Commissioner. Under cl 36 of the *Western Australian Police Industrial Agreement 2014* (the Agreement), the Commissioner of Police may reimburse reasonable non-work related medical expenses where those expenses fall under the prescribed categories. The applicant made three such applications for expenses and the Police Commissioner refused the reimbursement claims.

The Police Commissioner contended that the three applications do not fall within the description of Non-Work Third Party Expenses Benefit because the expenses do not follow a 'referral' by a doctor for a 'service'. Industrial Magistrate Flynn found that the ordinary meaning of 'referral' in a medical context is the introduction of a patient by one medical practitioner to another medical practitioner for treatment. The fact that the claimant had such a letter that did not directly state it was a referral was insignificant as the purpose was to act as a referral. Flynn IM disagreed with the Police Commissioner’s assumption that 'service' has a technical meaning where the term appears in the context of 'x-ray or other service' and found that medical machine purchase, machine hire and hospital expense could all be 'services' under the agreement.

The claimant argued that the Police Commissioner was *required* to grant reimbursement. Flynn IM considered the meaning of 'may' within the agreement and found that the ordinary meaning of the word denotes a possible outcome and that the ordinary meaning of a word is to be preferred.

Flynn IM considered whether the Police Commissioner had exercised the discretion conferred by the Agreement as the responses by the Police Commissioner to the claimant suggested that the Police Commissioner may have incorrectly interpreted the Agreement.

The Industrial Magistrate’s Court ordered the Police Commissioner to re-consider reimbursement claims for non-work related medical expenses made by the claimant.

This decision is the subject of an appeal to the Full Bench.

Brian John McCormak v The Commissioner of Police
[2018] WAIRC 00809; (2018) 98 WAIG 1285

19 Appendices

19.1 Appendix 1 – Legislation

Construction Industry Portable Paid Long Service Leave Act 1985
Employment Dispute Resolution Act 2008
Long Service Leave Act 1958
Mines Safety and Inspection Act 1994
Minimum Conditions of Employment Act 1993
Occupational Safety and Health Act 1984
Owner Drivers (Contracts and Disputes) Act 2007
Petroleum (Submerged Lands) Act 1982
Police Act 1892
Prisons Act 1981
Public Sector Management Act 1994
Vocational Education and Training Act 1996
Young Offenders Act 1994

Appendix 2 – Members of the Public Service Appeal Board

Name	Party nominating the member
Mr Michael Aulfrey	Perth Children's Hospital; Health Support Services
Mr Charlie Brown	The Civil Service Association of Western Australia Incorporated
Mr George Brown	The Civil Service Association of Western Australia Incorporated
Mr Peter Byrne	Department of Communities
Mr Joshua Chapman	Department of Justice
Mr Nicholas Cinquina	Western Australia Police; Department of Education
Ms Bethany Conway	The Civil Service Association of Western Australia Incorporated
Mr Samuel Dane	Commissioner of Police, Western Australia Police Force
Mr Tony DiLabio	Department of Transport
Mr Grant Edmunds	WorkCover WA
Ms Trish Fowler	The Australian Nursing Federation, Industrial Union of Workers Perth
Mr Matthew Hammond	Department of Justice
Mr Dan Hill	Health Services Union of Western Australia (Union of Workers)
Ms Jaci Hills-Wright	Department of Transport
Mr Michael Jozwicki	Department of Premier and Cabinet
Ms Lois Kennewell	The Civil Service Association of Western Australia Incorporated
Mr Bruce Kirwan	East Metropolitan Health Service
Mr John Lamb	The Civil Service Association of Western Australia Incorporated
Mr Greg Lee	The Civil Service Association of Western Australia Incorporated
Mr Justin Lilleyman	WA Country Health Service
Ms Julie Love	East Metropolitan Health Service
Ms Mary McHugh	Department of Communities
Mr John O'Brien	Department of Justice
Mr Robert Parkes	Department of Communities
Mr Gavin Richards	The Civil Service Association of Western Australia Incorporated

Name	Party nominating the member
Ms Karen Roberts	Department of Justice
Mr John Rossi	Department of Education
Ms Rebecca Sinton	Department of Health; Path West Laboratory Medicine WA
Mr Damien Stewart	Commissioner of Police, Western Australia Police Force; Department of Biodiversity, Conservation and Attractions
Mr Grant Sutherland	The Civil Service Association of Western Australia Incorporated
Mr Mark Taylor	Department of Justice
Mr Robert Warburton	Department of Transport
Mr Peter Wishart	Department of Justice
Mr Neil Witkowski	Landgate

19.2 Appendix 3 – Right of entry authorisations by organisation

Australian Medical Association (WA) Incorporated
Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch - The
Australian Workers' Union, West Australian Branch, Industrial Union of Workers - The
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch - The
Civil Service Association of Western Australia Incorporated - The
Construction, Forestry, Mining and Energy Union of Workers - The
Electrical Trades Union WA
Independent Education Union of Western Australia, Union of Employees
State School Teachers' Union of W.A. (Incorporated) - The
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch
United Voice WA
Western Australian Municipal, Administrative, Clerical and Services Union of Employees

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Government of Western Australia
The Western Australian Industrial Relations Commission