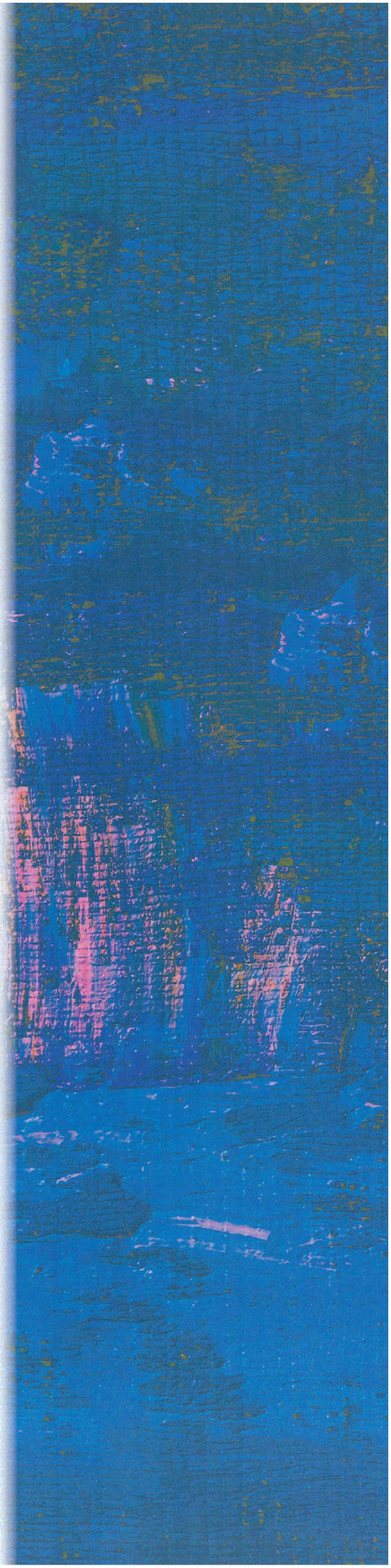
Government of **Western Australia**
Western Australian Industrial Relations Commission

Industrial Relations Act 1979

Report of the Chief Commissioner of The Western Australian Industrial Relations Commission 2016-17



Annual Report

Report of the Chief Commissioner of the Western Australian Industrial Relations Commission

THE HONOURABLE BILL JOHNSTON MLA
MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS

ANNUAL REPORT 2016/17

In accordance with s 16(2) of the *Industrial Relations Act 1979*, I am pleased to provide to you the following written report relating to the operation of the Act up to the year ended 30 June 2017.

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

Pamela Scott
Chief Commissioner

22 September 2017

1 The Western Australian Industrial Relations Commission – structure and function

The Western Australian Industrial Relations Commission is established under the *Industrial Relations Act 1979* (the Act). The objects of the Act include the promotion of goodwill in industry and to encourage and provide means for conciliation, and hearing and determination, to prevent and settle industrial disputes.

The structure of the Commission and its essential work centres on a single Commissioner conciliating, and if necessary, arbitrating employment disputes. Those disputes are referred to the Commission by:

- unions;
- employers;
- individual employees:
  - (i) in the private sector – unfair dismissal and denied contractual benefits claims;
  - (ii) in the public sector, appeals against particular types of decisions, generally relating to disciplinary, dismissal or redundancy matters;

or on the Commission's own initiative in the case of union-employer disputes where they affect public safety or the public interest.

Commissioners are obliged to act with maximum expedition and minimum of technicalities and legal forms, and generally to seek common sense, practical solutions.

1.1 Commissioners

The Chief Commissioner, Senior Commissioner and single Commissioners all constitute the Commission when sitting alone. They conciliate and arbitrate a broad range of employment-related matters pursuant to the Act. The Commission is obliged to conciliate matters unless satisfied that it is unlikely to be of assistance. A very high proportion of matters are resolved by conciliation.

The Commission also deals with disputes regarding a range of matters arising under other legislation, including:

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

The Chief Commissioner is the administrative head of the Commission, allocating matters to the members of the Commission, dealing with a range of matters of policy and procedure and providing an Annual Report to the Minister.

1.2 The Commission in Court Session

The Commission in Court Session is constituted by at least three Commissioners, and deals with matters of particular importance and establishes principles to guide determinations. The annual State Wage Case is one of the matters dealt with by the Commission in Court Session.

1.3 The Full Bench

The Full Bench is constituted by the President and two Commissioners. It hears and determines appeals against decisions of Commissioners and of the Industrial Magistrates Court. The Full Bench also deals with matters relevant to the registration of employee and employer organisations, and answers questions of law referred to it by the Commission.

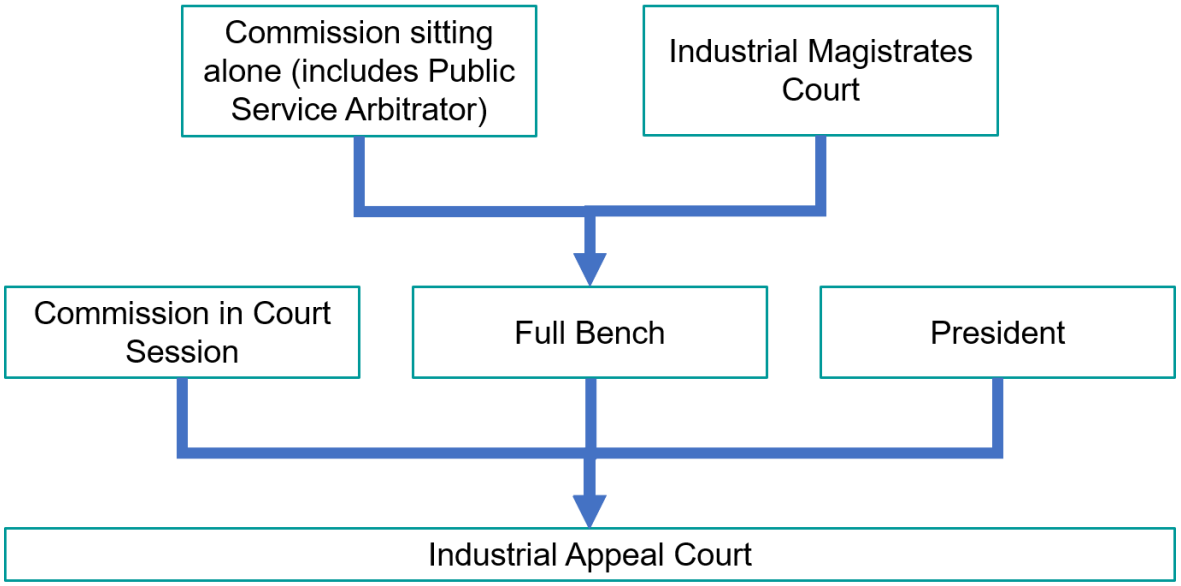
1.4 The President

The President chairs the Full Bench and also sits alone to determine matters such as applications to stay the operation of decisions of the Commission pending hearing and determination of the appeal by the Full Bench, and applications made by the Registrar and others relating to alleged non-observance of an organisation's rules. The President has the status of a Supreme Court Judge.

1.5 The Western Australian Industrial Appeal Court

The Western Australian Industrial Appeal Court is constituted by three Judges of the Supreme Court. It hears and determines appeals against decisions of the Commission's President, Full Bench and the Commission in Court Session, on the grounds that the decision is in excess of jurisdiction, is erroneous in law, or that the appellant has been denied the right to be heard.

1.6 Structure of the Commission



2 Membership and principal officers

During the year to 30 June 2017, the Western Australian Industrial Relations Commission was constituted by the following members:

President	The Honourable Jennifer Hilda Smith (*Acting*)
Chief Commissioner	Pamela Elizabeth Scott
Senior Commissioner	Stephen John Kenner (*Acting*)
Commissioners	Toni Emmanuel Damian John Matthews

2.1 The constitution of the Commission

The Commission now has, in addition to the President, four Commissioners. This is the minimum number necessary to enable the Commission to exercise its various areas of jurisdiction, to deal with urgent matters and to allow for the normal administrative arrangements including leave and illness.

During the period under review, members of the Commission held the following appointments:

2.2 Public Service Arbitrators

Acting Senior Commissioner Kenner continued his appointment as the Public Service Arbitrator. This is due to expire on 26 June 2018.

Commissioner Emmanuel continued her appointment as an additional Public Service Arbitrator. This is due to expire on 7 March 2018.

Commissioner Matthews continued his appointment as an additional Public Service Arbitrator. This is due to expire on 20 March 2018.

2.3 Railways Classification Board

There are no appointments to this Board. Appointments will be made if and when an application is made to the Board.

2.4 Occupational Safety and Health Tribunal

Acting Senior Commissioner Kenner continued as Chairperson of the Occupational Safety and Health Tribunal. This appointment operates for the purposes of s 51H of the *Occupational Safety and Health Act 1984* and s 16(2D) of the Act and will expire on 31 December 2017.

2.5 Road Freight Transport Industry Tribunal

During this year, the following Commissioners constituted the Road Freight Transport Industry Tribunal:

Chief Commissioner Scott
Acting Senior Commissioner Kenner
Commissioner Matthews

2.6 Public Service Appeal Board

In addition to members of the Commission as the Public Service Arbitrator, the following people have served as members of Public Service Appeal Boards on the nomination of a party pursuant to s 80H of the Act:

Mr Kenneth Brown, Ms Georgina Camarda, Mr Nick Cinquina, Mr Lee Clissa, Ms Bethany Conway, Mr Keith Dodd, Mr Dean Ellis, Mr Richard Farrell, Mr Hayden Falconer, Mr Cory Fogliani, Ms Lyn Genoni, Mr Steve Gregory, Ms Lesley Heath, Mr Dan Hill, Dr Ian Jenkins, Ms Lois Kennewell, Mr Andrew Lee, Mr Greg Lee, Ms Christine Porter, Mr Neil Purdy, Ms Yvonne Prout, Mr Gavin Richards, Mr Bruce Roberts, Ms Cynthia Seenikatty, Mr David Shaw, Mr Damien Spivey, Mr Grant Sutherland, Mr Mark Taylor, Ms Val Tomlin and Mr Marshall Warner.

2.7 Industrial Magistrates Court

During the reporting period Magistrate G Cicchini, Magistrate M Flynn, and Magistrate M Pontifex exercised jurisdiction as Industrial Magistrate.

2.8 Registry

During the reporting period the Principal Officers of the Registry were:

Registrar	Ms S Bastian
Deputy Registrar	Ms S Hutchinson
Deputy Registrar	Ms S Mason (*Acting* - 8 September to 16 September 2016; 13 February to 10 March 2017; 19 April to 21 June 2017)

2.9 The Western Australian Industrial Appeal Court

The Western Australian Industrial Appeal Court was constituted by the following members during the reporting period:

Presiding Judge	The Honourable Justice M J Buss
President	The Honourable Justice G H Murphy
President	The Honourable Justice K J Martin

3 Summary of main statistics

3.1 Western Australian Industrial Relations Commission

	MATTERS CONCLUDED			
	2013-2014	**2014-2015**	**2015-2016**	**2016-2017**
Industrial Appeal Court:				
Appeals	2	3	5	2
Full Bench:				
Appeals	19	9	18	15
Other matters	14	5	2	3
President sitting alone:				
Section 66 matters (finalised)	2	0	2	6
Section 66 Orders issued	3	2	3	6
Section 49(11) matters	2	1	0	1
Other matters	0	0	0	0
Section 72A(6)	0	0	0	0
Consultations under s 62	10	5	3	6
Commission in Court Session:				
General Orders	3	2	1	2
Other matters	5	3	1	6
Commissioners sitting alone:				
Conferences[1]	279	104	88	60
New Agreements	30	46	56	41
New Awards	1	1	0	1
Variation of Agreements	0	0	0	0
Variation of Awards	24	41	36	11
Other matters[2]	50	159	130	77
Unfair Dismissal Matters Concluded:				
Unfair Dismissal claims	159	146	118	101
Contractual Benefits claims	104	113	121	89
Public Service Arbitrator (PSA):				
Award/Agreement variations	4	10	11	0
New Agreements	8	20	3	4
Orders pursuant to s 80E	1	1	0	1
Reclassification appeals	57	61	86	12
Public Service Appeal Board:				
Appeals to Public Service Appeal Board	28	18	12	21
TOTALS:	**803**	**747**	**634**	**463**

3.1.1 Notes

[1] CONFERENCE applications include the following:	2013-2014	2014-2015	2015-2016	2016-2017
Conference applications (s 44)	232	48	40	34
Conferences referred for arbitration (s 44(9))	11	12	12	4
Public Service Arbitrator conference applications	33	42	34	18
Public Service Arbitrator conferences referred	3	2	2	4
TOTALS	**279**	**104**	**88**	**60**

(Note: For each conference application, the Commission may convene a number of conferences as the issues are identified, conciliated and resolved.)

[2] OTHER MATTERS include the following:	2013-2014	2014-2015	2015-2016	2016-2017
Apprenticeship appeals	4	5	7	7
Award applications other than for variation	NR	99	0	0
Occupational Safety & Health Tribunal#	4	5	2	2
Public Service applications	5	12	12	2
Requests for mediation	NR	15	15	26
Road Freight Transport Industry Tribunal##	NR	31	31	17
TOTALS	**13**	**167**	**65**	**54**

Table 1 - Matters dealt with 2014 – 2017

#The Tribunal operates under the Occupational Safety and Health Act 1984. This figure records the number of applications to the Tribunal which have been finalised. A further note on the operation of the Tribunal is at Part ***Error! Reference source not found.*** *of this Report.*

##The Tribunal operates under the Owner-Drivers (Contracts and Disputes) Act 2007. This figure records the number of applications to the Tribunal which have been finalised. A further note on the operation of the Tribunal is at Part ***Error! Reference source not found.*** *of this Report.*

NR = not reported

3.2 Awards and Agreements in force under the Act - totals

Year	Number at 30 June
2013	2577
2014	2570
2015	2458
2016	1505
2017	**1395**

Table 2 - Awards and Agreements in force

See also [7.1.1] regarding the updating of the Commission's records of industrial agreements.

3.3 Award and Agreement changes

Some of the award and industrial agreement matters dealt with this year were:

Nature of Application	Number of Awards/ Agreements affected
State Wage Case General Order	218
Location Allowance General Order	81
New industrial agreements (general)	38
New industrial agreements (public sector)	6
Agreements – retirements from	48
Agreements - cancelled	51

Table 3 - Number of Awards and Agreements affected by some applications

4 Matters arising under the Act – further detail and commentary

4.1 The Western Australian Industrial Appeal Court

See Part 1.5 of this Report.

Decisions issued by the Industrial Appeal Court during this period 2
Orders issued by the Industrial Appeal Court during this period 5

4.2 Full Bench Matters

4.2.1 Constitution of the Full Bench

The Full Bench has been constituted on each occasion by the President and two Commissioners.

The number of matters in which the President presided over the Full Bench is as follows:

The Honourable J H Smith *(Acting)* 18

The number of matters each Commissioner has been a member of the Full Bench is as follows:

Chief Commissioner P E Scott 12
Senior Commissioner S J Kenner *(Acting)* 8
Commissioner T Emmanuel 9
Commissioner D J Matthews 7

4.2.2 Appeals

Heard and determined from decisions of the:

Commission – s 49 12
Industrial Magistrate – s 84 2

4.2.3 Organisations – Applications by or pertaining to

Cancellation/suspension of registration of organisations pursuant to s 73 0

4.2.4 Orders

Orders issued by the Full Bench 22

4.3 President

4.3.1 Matters before the President sitting alone

Applications for an order that the operation of a decision appealed against be stayed pursuant to s 49(11) 1

Applications for an order, declaration or direction pursuant to s 66 4

4.3.2 Summary of s 66 applications

Section 66 allows the President to deal with matters relating to union rules and their operation.

Applications finalised in 2016/17 6

Applications discontinued by order 1

4.3.3 Orders issued by the President

Orders issued by the President from 1 July 2016 to 30 June 2017 inclusive:

Orders pursuant to s 49 (11) 1

Orders pursuant to s 66 6

References of rules by Full Bench under s 72A(6) 0

Applications pursuant to s 92 0

Remitted from the Industrial Appeal Court 1

4.3.4 Consultations

Consultations with the Registrar pursuant to s 62 of the Act 6

4.4 Commission in Court Session

The Commission in Court Session is constituted by three Commissioners with the exception of the 2017 State Wage Case which was constituted by all four available Commissioners. The extent to which each Commissioner has been a member of the Commission in Court Session is indicated by the following figures:

Chief Commissioner P E Scott 1

Senior Commissioner S J Kenner *(Acting)* 2

Commissioner T Emmanuel 2

Commissioner D J Matthews 2

These Commission in Court Session matters comprised of the following:

State Wage Order Case – s 50A Determine rates of pay for purposes of *Minimum Conditions of Employment Act 1993* and Awards 1
General Order – s 50 Location Allowances 1

4.4.1 Appeals against decisions to take removal action

These appeals are dealt with by three Commissioners sitting together.

4.4.1.1 Police Act 1892

These are appeals pursuant to s 33P of the *Police Act 1892* and are filed by police officers who have been removed from the WA Police under s 8 of that Act. They are heard by three Commissioners, one of whom must be either the Chief Commissioner or the Senior Commissioner.

Chief Commissioner P E Scott 4
Senior Commissioner S J Kenner *(Acting)* 3
Commissioner T Emmanuel 2
Commissioner D J Matthews 3

During the reporting period, there were three appeals filed, one of which was dismissed after conciliation and hearing; the other two had preliminary Orders issued in the reporting year, but are adjourned to be dealt with in the following year. An appeal that was filed in 2015 was heard in this reporting year and was upheld, pending an Order in relation to the remedy, after the parties' conferral and Commission's consideration.

4.4.1.2 Prisons Act 1981

There were two appeals during this reporting period, both of which were dismissed. For the first, the parties agreed to conciliation in the Commission's general jurisdiction, and for the second, the appellant discontinued his appeal prior to any proceedings.

Chief Commissioner P E Scott 1
Senior Commissioner S J Kenner *(Acting)* 1
Commissioner T Emmanuel 0
Commissioner D J Matthews 1

4.4.1.3 Young Offenders Act 1994

There were no appeals during this reporting period.

4.5 Compulsory conferences

During the reporting period, the Commission received 27 applications requesting conciliation, 16 of which were urgent. It is the Commission's practice to convene such conferences within 24 hours of a request. In a number of cases, the Commission issued summons to parties requiring their attendance, so as to assist in resolving the dispute.

4.6 Claims by individuals – section 29

Applications under s 29 relate to claims alleging unfair dismissal and claims alleging a denied contractual benefit made by individual employees.

4.6.1 Applications lodged

	2013-2014	2014-2015	2015-16	2016-17
Unfair Dismissal	168	116	114	113
Denial of Contractual Benefits	111	121	110	103
TOTAL	**279**	**237**	**224**	**216**

Table 4 - Section 29 Applications lodged

4.6.2 Applications finalised

	2013-2014	2014-2015	2015-16	2016-17
Unfair Dismissal	159	144	118	101
Denial of Contractual Benefits	104	110	121	89
TOTAL	**263**	**254**	**239**	**190**

Table 5 - Section 29 Applications finalised

4.6.3 Applications lodged compared with all matters[1] lodged

Section 29 applications represent 21% of all the matters lodged in the Commission.

	2013-2014	2014-2015	2015-16	2016-17
All matters lodged	810	1632	1075	1046
Section 29 applications lodged	279	237	224	216
Section 29 as (%) of all matters lodged	**34%**	**15%**	**21%**	**21%**

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

[1]*All matters means the full range of matters that can be initiated under the Act for reference to the Commission.*

4.6.4 Matters – method of resolution

The following table shows that 77% of s 29 matters were resolved without recourse to formal arbitration.

	Unfair Dismissal	Contractual Benefits	Total	%
Arbitrated claims in which order issued	15	28	43	23.4
Settled after proceedings before the Commission	46	31	77	41.8
Matters referred for investigation resulting in settlement	0	0	0	0
Matters discontinued/dismissed before proceedings commenced in the Commission	12	14	26	14.1
Matters withdrawn/discontinued in Registry	22	16	38	20.7
Total Finalised in 2016/17 Reporting Year	**95**	**89**	**184**	**100**

Table 7 - Section 29 applications method of resolution

4.7 Employer-Employee Agreements

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

There were no such agreements lodged this reporting year.

4.8 Mediation Applications pursuant to the *Employment Dispute Resolution Act 2008*

The *Employment Dispute Resolution Act 2008* (EDR Act) provides that the Commission can be asked to mediate any question, dispute or difficulty that arises out of or in the course of employment. This is wider than an "industrial matter" under the Act.

During the reporting period, 26 mediation applications were lodged, and 17 of those were finalised. In nine of those, a mediation was held, two did not proceed as they concluded before a mediation was held, and six did not proceed due to the other party not consenting to the mediation. Eight mediation applications are pending.

The eight pending mediation applications from the previous reporting period were finalised during this reporting period.

The EDR Act has been utilised by parties to industrial disputes which would not be within the jurisdiction of the Commission pursuant to the Act. This includes disputes in industries of significance to the State's economy, which highlights the importance of the EDR Act.

4.9 Boards of Reference

Long Service Leave - Standard Provisions 2
Long Service Leave - *Construction Industry Portable Paid Long Service Leave Act 1985* 1

4.10 Industrial Agents Registered by Registrar

The Act provides for the registration of industrial agents who carry on business of providing advice and representation, and who are not legal practitioners or industrial organisations (s 112A).

Number of new agents registered during the period 4
Total number of agents registered as corporate body 24
Total number of agents registered as individuals 16
Total number of agents registered as at 30 June 2016 40

4.11 Advice to employees and employers

4.11.1 Employment Law Centre

Last year's annual report noted that assistance had previously been provided to unrepresented parties by the Employment Law Centre (ELC), but that this had been discontinued when, in June 2016, the State government withdrew funding and the ELC advised that it would no longer provide assistance to parties to claims within the State jurisdiction. It is most pleasing to note the re-establishment of State government funding to the ELC as it assists vulnerable employees, in particular, before the Commission to understand the process and prepare for what might otherwise be a daunting process.

4.11.2 Commission's pro bono scheme

The Commission established a pro bono scheme in 2014. That scheme has expanded in the last year and the following law firms and agents provide assistance and advice to particularly vulnerable employees and employers, to deal with matters before the Commission.

Po bono scheme providers:

- Ashurst Australia
- Clayton Utz
- Jackson McDonald
- Kott Gunning Lawyers
- MinterEllison
- Workwise Advisory Services

In addition to being of great assistance to the parties concerned, it is of considerable benefit to the Commission in dealing with those parties who have a better understanding and are better prepared for proceedings brought before the Commission, and do not require the same level of intervention and guidance by the Commission.

	Number of applications
Matters referred to pro bono (PB) scheme	
Matters referred to PB scheme by Commission	6
Matters referred to PB scheme by Registrar	3
Total No. of matters referred to pro bono scheme	9

Nature of Matters:	
Unfair Dismissal (s 29(1)(b)(i))	7
Appeal to Full Bench (s 49)	1
Appeal to PSAB (s 80I)	1

Application for PB assistance	
Employee	9
Employer	0

Provision of PB assistance	
Assistance provided by Pro Bono providers	5

Type of PB assistance provided		
Assistance provided under the scheme:		
(i)	Met with Applicant to be briefed on factual background	5
(ii)	Provided advice on merits of claim	5
(iii)	Provided advice to prepare or prepared written response /submissions	5

(iv)	At provider's discretion, provided assistance and representation to conciliation conference level	2

Reasons PB assistance not provided:		
Of the four applications which did not receive assistance under the PB scheme:		
(i)	Not eligible for access to scheme;	1
(ii)	PB application not proceeded with at request of Applicant; and	2
(iii)	No PB provider available/willing to provide PB assistance	1

4.12 Industrial Organisations

4.12.1 Registered as at 30 June 2017

	Employee Organisations	Employer Organisations
No. of organisations	41	**17**
Aggregate membership	184,881	5,612

Table 8 - Industrial Organisations registered as at 30 June 2017

4.12.2 Rule variations by Registrar

4.12.3 Right of Entry Permits Issued

Under Division 2G of the 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.
- request inspection and copies of relevant documents, and inspect a worksite or equipment, for the purpose of investigating any suspected breaches of:
  - *Industrial Relations Act 1979*;
  - *Long Service Leave Act 1958*;
  - *Minimum Conditions of Employment Act 1993*;
  - *Occupational Safety and Health Act 1984*;
  - *Mines Safety and Inspection Act 1994*;
  - an award;
  - an order of the Commission;
  - an industrial agreement; or
  - an employer-employee agreement that applies to any relevant employee.

The Registrar issues right of entry permits to authorised representatives of registered organisations on the application of the secretary of the organisation. A permit cannot be issued to a person who

has previously had their permit revoked by the Commission in Court Session without the authority of the Commission in Court Session.

This year, permits were issued to authorised representatives of the following organisations:

Association of Independent Schools of Western Australia (Inc)	**1**
Australian Nursing Federation, Industrial Union of Workers Perth, The	**8**
Australian Workers' Union, West Australian Branch, Industrial Union of Workers, The	**15**
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch, The	**2**
Civil Service Association of Western Australia Incorporated, The	**7**
Health Services Union of Western Australia (Union of Workers)	**1**
Independent Education Union of Western Australia, Union of Employees, The	**1**
Shop, Distributive and Allied Employees' Association of Western Australia, The	**1**
State School Teachers' Union of W.A. (Incorporated), The	**3**
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	**3**
United Firefighters Union of Australia, West Australian Branch	**1**
United Voice WA	**21**
Western Australian Municipal, Administrative, Clerical and Services Union of Employees	**3**
Western Australian Police Union of Workers	**1**
TOTAL	**64**

Number of permits that have been issued since 8 July 2002 (gross total)..... 1787
Number of permits issued during the 2016/17 financial year..... 74
Number of people who presently hold a permit 375
Number of permits that are current*..... 378
Number and names of permit holders who have had their permit removed or suspended by the Commission in the current reporting period..... 0

* It is to be noted that permits issued in previous years, unless revoked, remain valid.

4.13 Industrial Magistrates Court

The Industrial Magistrates Court (IMC) is constituted by an Industrial Magistrate. Industrial Magistrates are appointed in that capacity by the Governor on the joint recommendation of the President and Western Australia's Chief Magistrate. The IMC exercises both general and prosecution jurisdictions, as defined in s 81CA of the Act.

4.13.1 General jurisdiction

The IMC hears and determines claims alleging the breach of industrial awards and agreements made under the Act and the *Fair Work Act 2009 (Cth).* In addition, the IMC deals with claims concerning the alleged breach of state and federal employment-related legislation and the enforcement of Commission orders.

The Registrar of the Commission is the Clerk of the Court, IMC. The Clerk of the Court is responsible for conducting pre-trial conferences for claims commenced under the court's general jurisdiction, with the exception of those claims seeking to enforce orders of the Commission.

4.13.2 Prosecution jurisdiction

The IMC Registry received and processed a total of 227 claims in the IMC's general jurisdiction, and one complaint under its prosecution jurisdiction during this reporting period. A breakdown of those matters is set out below.

Lodged claims	227
Lodged complaints	1
Resolved (total)	191
Resolved (lodged in the period under review)	135
Resolved but lodged in another financial period	57
Pending	118
Total number of resolved applications with penalties imposed	17
Total value of penalties imposed	$82,065
Total number of claims/complaints resulting in disbursements	11
Total value of disbursements awarded	$8,352
Claims/complaints resulting in awarding wages	25
Total value of wages of Magistrate matters resolved during the period	$337,100

In accordance with the *Criminal Procedure Act 2004*, the IMC exercises prosecution powers while constituted as a court of summary jurisdiction. Predominantly, the proceedings brought before the IMC under this jurisdiction concern the legislative obligations arising out of the *Children and Community Services Act 2004*, relevant to the employment of children.

4.14 Legislation

4.14.1 Industrial Relations Act 1979

During the reporting period, there were various consequential amendments to the Act that included:

1. the *Health Services Act 2016* which resulted in changes to the constitution of the Public Service Appeal Board in respect of particular types of appeals; and

2. the removal, or updating, of references to certain terms as a result of amendments to the first three Acts listed and the repeal of the *Coal Industry Tribunal of Western Australia Act 1992* and the *Labour Relations Reform Act 2002*.

Short Title	Number and Year	Assent	Commencement
Health Services Act 2016 s. 295	11 of 2016	26 May 2016	1 Jul 2016 (see s. 2(b) and *Gazette* 24 Jun 2016 p. 2291)
Local Government Legislation Amendment Act 2016 Pt. 3 Div. 18	26 of 2016	21 Sep 2016	21 Jan 2017 (see s. 2(b) and *Gazette* 20 Jan 2017 p. 648)
Universities Legislation Amendment Act 2016 Pt. 7 Div. 4	32 of 2016	19 Oct 2016	2 Jan 2017 (see s. 2(b) and *Gazette* 9 Dec 2016 p. 5557)
Statutes (Repeals) Act 2016 Pt. 2 Div 3 and Pt. 3 Div. 2	50 of 2016	28 Nov 2016	29 Nov 2016 (see s. 2(b))

4.14.2 Industrial Relations Commission Regulations 2005

There were no amendments to these Regulations during the reporting period.

4.14.3 Industrial Relations (General) Regulations 1997

There were no amendments to these Regulations during the reporting period.

5 State Wage Case

On 14 June 2017 the Commission in Court Session delivered its decision in the 2017 State Wage Order Case pursuant to s 50A of the Act. Section 50A requires the Commission before 1 July in each year, to make a General Order setting the minimum weekly rate of pay applicable under the *Minimum Conditions of Employment Act 1993* (MCE Act) to adults, apprentices and trainees, and to adjust rates of wages paid under awards ([2017] WAIRC 00330; (2017) 97 WAIG 693).

The application for the 2017 State Wage Order was created on the Commission's own motion. The Commission placed public advertisements of the proceedings and received submissions from the Hon Minister for Commerce and Industrial Relations (the Minister), UnionsWA, the Chamber of Commerce and Industry of Western Australia Inc (CCIWA), Western Australian Council of Social Service, the Printing Industries Association of Australia and an individual, Ms Conny Torney. The Minister, UnionsWA, CCIWA and WACOSS appeared in the proceedings and also made oral submissions.

After hearing submissions and considering the evidence, the Commission issued a General Order that increased the minimum wage for award covered employees and award-free employees covered by the MCE Act to $708.90.

The operative date was from the first pay period on or after 1 July 2017.

Apart from the necessary resulting changes to Principle 9 of the Statement of Principles, there were no other changes to the Principles.

As at 30 June 2017, there were 233 awards in force. Of those awards, some 218 were varied as a result of the 2017 State Wage Order Case.

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

5.1 Minimum Rate for Award Apprentices 21 years of age and over under the Minimum Conditions of Employment Act 1993

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 shall be $607.60 per week on and from the commencement of the first pay period on or after 1 July 2017.

5.2 Minimum Weekly Wage Rates for Apprentices and Trainees under the Minimum Conditions of Employment Act 1993

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.

Apprentices and trainees under 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.

For this class of apprentice, it was ordered that the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award*.

The Commission ordered that for this class of trainee, the minimum weekly rate of pay at the relevant industry/skill level is based on the *Metal Trades (General) Award.* The date of operation was the commencement of the first pay period on or after 1 July 2017.

6 Location Allowance General Order

The Location Allowance 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 price 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 81 awards were adjusted from 1 July 2017. ([2017] WAIRC 00338; (2017) 97 WAIG 585)

7 Awards and Agreements – records updated

7.1.1 Industrial agreements

During the year, the Commission has continued to update its records of current industrial agreements by raising with many of the parties to what appear to be defunct agreements, whether they wish those agreements to continue to be registered. As a result, parties have advised the Commission that many agreements currently on the Commission's records are either defunct as there are no employees to whom they apply, or they have been superseded. There have been other agreements from which parties have withdrawn and therefore they cease to have application.

This is part of the necessity for the Commission to bring its records up to date, particularly in respect of the private sector where many of the agreements on the Commission's records relate to constitutional corporations that are no longer within the jurisdiction of the Commission due to the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). During the next year, the Commission will continue to review its records to ensure that they are up to date.

8 Private Sector coverage

It is now just over ten years since the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) led to the exclusion from the Commission's jurisdiction of constitutional corporations (except claims by employees that they have been denied a benefit under their contract of employment (*Triantopoulos v Shell Company of Australia Ltd* [2011] WAIRC 00004; (2011) 91 WAIG 67)). This resulted in the Commission's private sector jurisdiction being limited to sole traders, partnerships, some trusts and not for profit organisations including independent schools, and, as a consequence, unions covering the private sector in Western Australia having very little involvement in the State system. This can be explained largely by the difficulty in enrolling and organising members amongst the employees in small businesses. It is noted though that the same difficulties do not appear to arise in the larger not for profit organisations within the Commission's jurisdiction.

The Western Australian industrial relations system was established, and until 2006, operated largely on the basis of the resolution of disputes between unions and employers. There are two exceptions to this. The first is the period of operation of the *Workplace Agreements Act 1993* (WA), from December 1993 until 2002. This allowed individual employers and employees to enter into agreements which did not involve unions as parties. The second is that with the commencement of the Act in 1979, for the first time, individual employees could bring claims of unfair dismissal and denial of contractual benefits before the Commission. Prior to that time, such claims could only be referred to the Commission by a union. The Commission's, and its predecessor's, jurisdiction was largely based on the private sector, although it also dealt with what were known as "wages employees" (not salaried officers) in the public sector, for example, hospital workers, national park rangers, local government workers. The jurisdiction of the Public Service Arbitrator, Public Service Appeal Board and Government School Teachers Tribunal, amongst others, were brought into the Commission's jurisdiction as constituent authorities in 1984.

8.1 Union activity in the State private sector

In the last year, unions in the private sector in the State system have had negligible involvement with matters before the Commission. Unions:

1 Made no applications for new awards;

2 Made no applications to vary awards to improve wages or conditions of employment;

3 Brought two applications for conciliation and arbitration on behalf of individual members or groups of members at particular workplaces. Both of these matters related to not for profit organisations. This constituted 3.3% of applications for conference pursuant to section 44 of the Act.

4 Made 53 applications for registration of industrial agreements. 33 of these relate to independent schools, and the remainder relate to not for profit organisations including political parties and community and legal centres. Three relate to one particular unincorporated private hospital.

8.2 Enforcement of industrial rights

In respect of enforcement matters in the State jurisdiction brought to the Industrial Magistrate's Court against private sector employers this year, of the 29 matters referred, only one was brought by a union, 69 were brought by individuals and four were brought by the industrial inspectors of the Department of Commerce (now the Department of Mines, Industry Regulation and Safety).

8.3 Sources of minimum conditions in the private sector

Private sector conditions of employment in the State system arise from:

1 The *Minimum Conditions of Employment Act 1993* (WA) which sets out –

- maximum working hours;
- the minimum wage, which is reviewed by the Commission as part of the State Wage Case each year;
- requirements about payment of wages;
- minimum leave conditions for illness, injury, family or carer's leave, annual leave, bereavement leave and public holidays; and
- minimum conditions relating to employment changes such as redundancy.

This Act has been amended a number of times since 1993, but there have been no amendments to provisions relating to conditions of employment for at least five years. Amendments which have occurred include the renaming of Western Australia Day, Standardisation of Formatting Acts, and consequential amendments arising from other legislation. However, there has been nothing of substance for over 10 years.

2 State Wage Case

Updating of private sector employees' rates of pay and conditions of employment is on the Commission's own initiative through the State Wage Case and the review of the Location Allowances General Order.

3 Awards

The Commission has no power to review awards generally of its own initiative. Section 40B of the Act enabled the Commission to review its awards to ensure that they were up to date however this was a once only process. It occurred some years ago and many of the review processes initiated by the Commission were ultimately abandoned because of the lack of participation by unions and employers in the private sector. This was due to the difficulty in those unions organising private sector

employees and a lack of resources by employer organisations to represent small businesses.

4 Employer-Employee Agreements

This system was made available in 2002, for employer-employee agreements to be registered under part VID of the Act. In this reporting year, no such agreements were lodged, and only 13 in total were lodged in the preceding three years.

In these circumstances, the statistics show that by 2017, employees in the private sector covered by the State industrial system, other than those in larger not for profit organisations, have extremely limited opportunities to bring to an independent body for resolution issues relating to their employment and they are largely unrepresented in the system. This is in stark contrast with national system employees who may refer a broad range of claims that their employer has taken adverse action against them. Adverse action includes dismissal, refusal to employ, alterations to their position to their detriment, discrimination, and many others (see *Fair Work Act 2009* (Cth) s 342). Public sector employees in Western Australia may refer a broader range of matters to the Commission in its Public Service Arbitrator and Public Service Appeal Board jurisdiction than may private sector employees.

Private sector employees' rates of pay and conditions of employment, apart from those covered by the *Minimum Conditions of Employment Act 1993*, are set out in the safety net provided by awards which have not been reviewed for many years and do not reflect current circumstances. Otherwise it is those matters brought on at the Commission's own initiative which provide for private sector employees to have their minimum rates of pay and location allowances kept up to date.

9 Impediments to effective and efficient operation

Last year's annual report noted 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 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.

2. The difficulties associated with the Public Service Appeal Board's jurisdiction. Those difficulties remain. A means of overcoming both of these difficulties would be the abolition of the constituent authorities of the Commission, such as the Public Service Arbitrator and the Public Service Appeal Board, and for those jurisdictions to be absorbed into the Commission's general jurisdiction as occurred in respect of the Government School Teachers' Tribunal. This has been recommended by a number of reviews of the Commission over many years.

10 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 service to the Commission and to those who give their time and resources to assisting vulnerable parties before the Commission through the Commission's pro bono scheme.

11 Decisions of interest

11.1 Industrial Appeal Court

11.1.1 Appeal against Full Bench decision relating to the Commission – impracticability of reinstatement

The Industrial Appeal Court unanimously dismissed an appeal against a decision of the Full Bench regarding whether it was 'impracticable' for an employee who was unfairly dismissed to be reinstated or re-employed.

The Full Bench held that for it to be not impracticable for a person who was unfairly dismissed to be reinstated or re-employed, there must be a level of trust and confidence between the parties to make the employment 'viable and productive'. The majority of the Full Bench (Smith AP and Scott ASC) went on to find that the relationship between Ms Vimpany and the Public Transport Authority had deteriorated, that the position required a relatively high level of trust, and that trust had evaporated. Notably, the Full Bench was satisfied that Ms Vimpany held the belief that her supervisor perjured himself and conspired against her. In those circumstances, the Full Bench was satisfied that reinstatement was impracticable and ordered compensation.

The majority of the Industrial Appeal Court (Buss and Murphy JJ) held that the Full Bench made no error of 'construction or interpretation' of s 23A of the Act, and therefore the Court dismissed the appeal.

Following a detailed analysis of the arguments, Kenneth Martin J came to the same conclusion. His Honour observed that ***Commonwealth Bank of Australia v Barker*** [2014] HCA 32; (2014) 253 CLR 169 did not disturb the need for trust and confidence to exist between employer and employee if reinstatement is to be the appropriate remedy for unfair dismissal.

([2017] WASCA 86; (2017) 97 WAIG 431)

11.1.2 Appeal against Full Bench decision relating to Industrial Magistrates Court – Long Service Leave

The Industrial Appeal Court upheld an appeal against a decision of the Full Bench in ***The Public Transport Authority of Western Australia v Yoon*** [2015] WAIRC 00918; (2015) 95 WAIG 1620 and found the Industrial Magistrate erred in his construction of the *Long Service Leave Act 1958* (WA) (LSL Act). The Industrial Appeal Court held that if an employee is covered by an instrument that provides for long service leave, such as in an award, the employee cannot drop in and out of the default scheme created by the LSL Act when that scheme is more beneficial at any point in time. The Court also clarified how to determine which scheme applies.

The Court noted that if an instrument scheme is 'at least equivalent to' the LSL Act scheme, the instrument scheme applies. To determine whether an instrument scheme is 'at least equivalent to' the LSL Act scheme, a prospective comparison must be made between the entitlements of a class of employees under the terms of each scheme, not a retrospective comparison of the circumstances of an individual employee claiming long service leave. The comparison is of the accumulating entitlement to long service leave under each scheme, 'irrespective of whether it has been accrued or not', and the comparison is broad and evaluative, 'involving the overall weighing of the benefits provided under the two' schemes.

When an employee is covered by an instrument scheme which is not 'at least equivalent to' the LSL Act scheme, the LSL Act scheme prevails. In that case, rather than merely supplementing the instrument scheme, the LSL Act scheme applies to the exclusion of the entire instrument scheme.

([2017] WASCA 25; (2017) 97 WAIG 249)

11.2 Full Bench – appeals

11.2.1 Procedural fairness in offering a further fixed term contract

The Australian Medical Association claimed that a doctor employed under a fixed term contract of employment at Royal Perth Hospital was entitled to procedural fairness by the respondent prior to making a decision not to offer the doctor further employment at the expiration of the fixed term. At first instance, the matter was dismissed.

The Full Bench dismissed the appeal. It found that power conferred upon the respondent by operation of the *Hospital and Health Services Act 1927* (WA) to engage employees was a bare power which did not confer any public right so as to attract the administrative law principles conferring a right to be heard.

The Full Bench also observed that the scope of the Public Service Arbitrator's jurisdiction conferred by s 80E of the Act does not depend upon nor is it defined by the law and principles of judicial review of administrative action.

([2016] WAIRC 00699; (2016) 96 WAIG 1255)

11.2.2 Use of translator

The appellant used an interpreter to assist him in giving evidence and presenting his case at first instance. He claimed the Commission erred in dismissing his application, that his evidence was mistranslated and the respondent's evidence was not translated to him.

The Acting President (Scott CC and Matthews C agreed) observed that at common law there is no general right to an interpreter: ***Becirbasic v Building West Pty Ltd*** [2015] WAIRC 01118; (2015) 96 WAIG 22 [112]. The Full Bench found, however, that if a party whose proficiency in English is insufficient to understand proceedings, to properly understand questions being asked, or evidence given by a witness, or is unable to properly articulate answers to questions, then a hearing without allowing that party an adequate use of an interpreter may constitute a breach of the rules of procedural fairness. Unless a person is able to understand the proceedings and able to adequately put forward their case for consideration and to adequately understand the case put against them, a hearing cannot be said to be fair.

The Acting President concluded that any errors in misinterpretation identified by the appellant were inconsequential. She also found that the appellant was not denied a fair hearing as it was clear the appellant had no difficulty reading documents in English and although the evidence given by the respondent's witness was not translated to him, he appeared to have no difficulty cross-examining her about the content of documents that he regarded as material.

([2016] WAIRC 00703; (2016) 96 WAIG 1279)

11.2.3 Occupational Safety and Health Tribunal – application outside Australia

The Full Bench unanimously dismissed an appeal by a South African employee who worked in Malawi for a Western Australian uranium miner. The appeal was against a decision of the Occupational Safety and Health Tribunal, which dismissed the employee's application because Western Australia's mine safety and Occupational Safety and Health (OSH) legislation does not apply in Malawi. The Full Bench affirmed that decision.

In dismissing those grounds, Acting President Smith held that the legislation which gives the OSH Tribunal jurisdiction does not apply outside Western Australia. Western Australian legislation only applies outside of Western Australia's borders if the legislation in question expressly provides for it to extend that far. Jurisdiction of a tribunal cannot be extended by the parties' agreement.

Her Honour went on to say that even if Western Australia's mine safety legislation applied to the employee, it would not assist him. That is because there must be a connection between the alleged discrimination and the safety representative's performance of their role. There was no connection in this case.

The Acting President also noted that employees who work overseas cannot access the general jurisdiction of the Commission through the OSH Tribunal.

([2016] WAIRC 00715; (2016) 96 WAIG 1337)

11.2.4 Continuous service – 'one and the same employer'

The Full Bench held that an employee's service with related corporate entities is not continuous service with 'one and the same employer' for the purpose of calculating long service leave under the *Long Service Leave Act 1958*. Until 2006, long service leave was governed by a General Order of the Commission or the *Long Service Leave Act*. The General Order included service with related corporate entities to calculate long service leave. In 2006, the LSL Act was amended. The 2006 amendments abolished the General Order and left a gap in relation to the issue of continuous service with related corporate entities.

The Full Bench found that the gap in the 2006 amendments could not be filled through statutory construction because the express purpose of the 2006 amendments included making substantive changes to long service leave, so the words Parliament would have used to fill the gap could not be determined with certainty.

([2016] WAIRC 00843; (2016) 96 WAIG 1488)

11.2.5 Unfair dismissal – compensation

The Full Bench unanimously dismissed an appeal against the amount of compensation the Commission awarded in a claim of unfair dismissal. The appellants argued that when the Commissioner was weighing competing considerations to determine the amount of compensation to award, he placed too much weight on the employer's interests.

The Full Bench noted that the Commission's decision regarding how much compensation to award in an unfair dismissal is a discretionary one. The Full Bench can only interfere with a discretionary decision if, among other things:

(a) the Commission's decision was based on mistaken facts; or

(b) in the circumstances, it was unreasonable or plainly unjust to give so much weight to a particular consideration.

The Full Bench noted that the appellants did not argue that the decision was based on mistaken facts, nor did the Commissioner place unreasonable or unjust weight on the employer's interests because the matters considered by the Commissioner were relevant and the conclusions drawn were reasonable.

([2016] WAIRC 00862; (2016) 96 WAIG 1475)

11.2.6 Implying term of reasonable notice into contract, and compensation

(1) By majority, the Full Bench held that a term of reasonable notice could not be implied into a particular contract of employment because it is not 'necessary'. Chief Commissioner Scott and Acting Senior Commissioner Kenner said it is not necessary to imply a term into a contract of employment where an award or statute already fills the gap.

Acting President Smith, dissenting, held that awards and statutes set out minimum conditions of employment: a floor, not a prescription.

(2) The Full Bench also reiterated that an assessment of compensation in an unfair dismissal must include consideration of whether the employer's manner of terminating the employment caused injury to the employee; if so, the 'gravity' of the behaviour, and the impact of the behaviour on the employee and whether the impact is more than that which is ordinarily expected 'by almost all employer initiated terminations of employment'. In this case, all members of the Full Bench found that the Commission at first instance acted on a wrong principle by arriving at the sum of $1,000 because regard was had to previous awards of

compensation rather than the circumstances of the termination of employment, and increased the compensation to $6,000.

([2016] WAIRC 00941; (2016) 97 WAIG 117)

11.2.7 Entitlement to commissions on sales

The Full Bench unanimously dismissed an appeal by a real estate agent who claimed that he was entitled to $42,700 in commission payments from his former employer. The Full Bench found real estate agents are only entitled to listing commissions if they are 'in fact the effective cause' of the firm winning the listing.

The only reliable evidence did not satisfy the Commission at first instance that the appellant caused the listing, and the Full Bench unanimously agreed. Therefore, the Full Bench found the claim was correctly dismissed.

([2016] WAIRC 00962; (2016) 97 WAIG 107)

11.2.8 Calculation of redundancy payment

A former government officer whose employment ended when he took voluntary redundancy, had for some time received an 'attraction and retention' allowance. He said this should have been included in the calculation of his severance package. He referred the matter to the Commission pursuant to s 95 and s 96A of the *Public Sector Management Act 1994* (WA) (the PSM Act), claiming that the *Public Sector (Redeployment and Redundancy) Regulations 2014* (WA) were unfairly applied and that he was not allowed a benefit to which he was entitled (the allowance). In the alternative, the government officer claimed in the Commission's general jurisdiction that the allowance was a contractual benefit.

The appeal was dismissed. The Acting President observed that s 95(5) of the PSM Act prevents government officers from referring redundancy and redeployment-related industrial matters 'if the employment of the employee concerned is terminated'. The appellant argued that the word 'terminated' means that the employment is 'terminated' at the employer's initiative and that his employment was not 'terminated' by the employer as he tendered his resignation as part of a severance agreement. Therefore, he claimed he could still refer the matter to the Commission. Her Honour held that when the words of s 95(5) are read in context with s 101 of the PSM Act, as they should be, there is no relevant distinction between resignation and termination. The word 'terminated' simply means that the employment ended. Because the appellant's employment was terminated, albeit by resignation, he could not refer the matter to the Commission after his employment in the public sector ceased.

The appellant also argued that the attraction and retention allowance was a contractual entitlement he could claim by referring an industrial matter pursuant to s 29(1)(b)(ii) of the IR Act. He said he could make a claim in the Commission's general jurisdiction because he was no longer a government officer. The Full Bench also dismissed this ground, finding that all industrial matters relating to government officers come within the exclusive jurisdiction of the Public Service Arbitrator. However, the Public Service Arbitrator has no jurisdiction to deal with a claim referred under s 95 or s 96A of the PSM Act or a claim for denied contractual entitlements.

The Acting President went on to find the appellant was prohibited from using the general jurisdiction of the Commission to circumvent the restrictions created by s 95 and s 96A of the PSM Act. Those provisions create a specific scheme to regulate redeployment and redundancy disputes in the public sector. As the appellant was prevented from referring a matter under the specific scheme in the PSM Act, he could not refer the same subject matter to the general jurisdiction of the Commission.

([2017] WAIRC 00262; (2017) 97 WAIG 454)

11.2.9 Obligation to provide training

The Full Bench dismissed an appeal by an employee who alleged that his employer denied him a benefit under his contract of employment by failing to provide adequate training, causing him to fail an examination to become a licensed surveyor.

The Acting President and the Chief Commissioner held that the Commission at first instance erred by finding that the professional training agreement was not part of the appellant's contract of employment.

The majority went on to find that even though the professional training agreement required the employer to provide training to the appellant, it did not require the employer to train the employee to the point where there was a guarantee that he would be a licensed surveyor. Therefore, the original decision to dismiss the employee's application was ultimately correct.

([2017] WAIRC 00301; (2017) 97 WAIG 589)

11.2.10 Redundancy pay applies National Employment Standard

The Full Bench upheld an appeal by an employer against a decision of the Commission which found that an employee had a contractual entitlement to a redundancy payment of 11 weeks' pay. The contract of employment provided that if the employee is made redundant, the redundancy payment would be determined by the employer's redundancy policy. However, the employer did not have a redundancy policy.

The Full Bench found that the redundancy clause was uncertain. The clause could be saved from being of no effect by applying the relevant National Employment Standard in the *Fair Work Act*, including the exceptions, because this is the minimum standard that the employer's redundancy policy could provide if it existed. As both parties agreed that the employment ended due to the ordinary and customary turnover of labour, which is one of the exceptions to employers having to make redundancy payments under the National Employment Standard, the employee had no contractual entitlement to a redundancy payment.

([2017] WAIRC 00323; (2017) 97 WAIG 610)

11.3 Full Bench – registered organisation matters

11.3.1 Amalgamation of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and The Food Preservers' Union of Western Australia Union of Workers

The Full Bench unanimously approved an application to amalgamate by The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (AWU) and The Food Preservers' Union of Western Australia Union of Workers (FPU).

Before considering the application, the Full Bench dealt with an application to intervene by the National Union of Workers (NUW). Several purported members of the FPU also lodged an objection to the amalgamation. Each of those applications was dismissed.

The Full Bench held potential disputation in the Fair Work Commission does not give the NUW a sufficient interest to intervene. Potential disputes in other jurisdictions are not relevant to the Full Bench's consideration because it cannot deal with the 'controversy'. The Full Bench's reasons also had regard to the fact that the NUW has no presence in the state industrial relations system.

The Full Bench also dismissed all purported members' objections, finding that some of the persons seeking to object were not eligible to do so because they were no longer members of the FPU. The remaining persons who sought to object were members who had filed their objections out of time. These persons did not satisfy the Full Bench that there was good reason to extend time to file the objections.

([2016] WAIRC 00966; (2016) 97 WAIG 148)

11.3.2 Section 71 certificate for AWU following amalgamation with FPU

Following the amalgamation of the AWU and the FPU, the Full Bench granted an application made by the new amalgamated AWU and issued declarations enabling the offices that exist in the rules of the AWU to be held by persons holding corresponding offices in its counterpart federal body.

([2017] WAIRC 00041; (2017) 97 WAIG 173)

11.3.3 Section 71 certificate for The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch

The Full Bench unanimously granted an application made pursuant to s 71(7) of the Act by The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch to approve an agreement between the applicant and its federal body.

The effect of the Full Bench approving this agreement is that the federal branch of the registered industrial organisation can provide joint services with the state organisation to their members. It also enables the federal organisation to manage the funds and property of the state organisation. This agreement enables the two organisations to operate more efficiently, without the burden of maintaining separate administrative arrangements between state and federal bodies.

([2017] WAIRC 00179; (2017) 97 WAIG 343)

11.4 The Commission

11.4.1 A change in work hours is a 'significant effect'

In interpreting terms of an industrial agreement, the Commission found that any alteration of work hours was a 'significant effect', for the purposes of the requirement on the employer to inform and consult the employees and the union. This was so whether or not the change was significant, and not every change that is likely to have 'significant effects' is a 'major change'. An alteration of work hours did not necessarily mean the employer had changed its policy about hours because the alteration could be contrary to the unchanged policy.

([2016] WAIRC 00747; (2016) 96 WAIG 1400)

11.4.2 Maximum compensation awarded for unfair dismissal

The Commission found that an employee was dismissed without reason and the employer's behaviour was particularly harsh and unfair. Despite the employee's period of faithful service as a high performing senior employee, she received aggressive, authoritarian emails, her mental health and professionalism were questioned without reasonable basis and she was isolated from the workplace before being unfairly dismissed.

The Commission did not accept the employer's argument that the dismissal was a genuine redundancy because the employer did not consult with the employee, or warn the employee about the redundancy and simply told the employee on the day she was dismissed that her position was redundant and there were no alternative positions.

The Commission found that the unfair dismissal caused the employee to lose more than 12 months' pay. Because this exceeded the statutory cap, she was awarded the maximum amount of six months' compensation. Although accepting that the employee suffered injury, there was not enough evidence to make a finding about injury and, in any event, a finding about injury would not have increased the amount of compensation awarded.

([2016] WAIRC 00866; (2016) 96 WAIG 1529)

11.4.3 Contractual benefits that are safety net entitlements may still be contractual benefits

The employer in this matter objected to the Commission's jurisdiction to deal with the employee's claim for denied contractual benefits because the contractual benefits were also safety net entitlements under the National Employment Standards (NES) in the *Fair Work Act 2009* (FW Act) and national system awards.

The Commission found that just because contractual benefits are also safety net entitlements, which can be enforced under the FW Act, they are still contractual benefits. Enforcing safety net entitlements under the FW Act is additional to, and not exclusive of, enforcing contractual benefits under state industrial laws. Even if an employee has other enforcement options, including options under the FW Act, the Commission still has jurisdiction to deal with denied contractual benefits claims.

The Commission did not uphold the employer's objection to jurisdiction and the matter was listed for hearing.

([2017] WAIRC 00115; (2017) 97 WAIG 288)

11.4.4 Industrial agreement conditions not contractual entitlements

An employee of a company engaged in the business of mining and processing coal in the Collie Basin, claimed various entitlements under the *Griffin Coal (Maintenance) Collective Agreement 2012* were expressly incorporated into his contract of employment. The Commission dealt with the question of incorporation as a preliminary issue.

The Commission dismissed the application on the basis that a reasonable bystander, having regard to the mutual knowledge of the situation facing the coal mining industry generally and the employer's economic position specifically, would not have considered it was intended that the terms of the 2012 Agreement be secured contractually, unable to be varied without the agreement of both parties, possibly for years ahead.

([2017] WAIRC 00102; (2017) 97 WAIG 527)

11.4.5 Employment in Sweden sufficiently connected to WA

An employee of a company engaged in the business of mineral exploration claimed loss of salary for the period where his employment was reduced from five to three days per week.

The employer challenged the Commission's jurisdiction to deal with the claim on the basis that the employment did not have a sufficient connection with Western Australia, as the employee was located in and performed all of his work in Sweden.

Whilst the Commission accepted the work performed under the Agreement was solely in Sweden in relation to the Swedish mineral resources operations of the group, and the employee was paid in Swedish currency in Sweden, it found that at all times the employer under the Agreement was resident in the State of Western Australia. Further, it was contemplated that the WA jurisdiction would exclusively apply to the Agreement and any disputes between the parties to the Agreement, to which the Commission accorded considerable weight. Finally, the employee's involvement in the Swedish branch as a Director and as its nominated Deputy Managing Director, was expressly contemplated by the Agreement and formed part of his duties as a senior employee of the Perth based employer. The Commission found the employment did have a real connection with Western Australia, in the sense that that principle was outlined in *Parker v Mark Anthony Tranfield* (2001) 81 WAIG 2505.

([2016] WAIRC 00916; (2017) 97 WAIG 645)

11.4.6 Sponsorship to work in Australia

The Commission dismissed a sales manager's claim for denied contractual entitlements in the sum of $221,081.44. The employee maintained it was an oral term of his employment contract that the company would sponsor him to work in Australia and pay the costs associated with obtaining

permanent residency. The employer accepted it agreed to pay the costs associated with the transfer of the employee's Temporary Business Visa, but did not agree to pay for his permanent residency costs.

The Commission found that in the employee's mind, any "sponsorship" of him in relation to his permanent residency necessarily meant the employer paying all of the costs associated with it. However, there was no direct evidence of an agreement to this effect, or that that was what the employer had in mind too.

([2016] WAIRC 00731; (2016) 96 WAIG 1604)

11.4.7 Dismissal invalid

The Commission has found that the dismissal of a former senior officer by the Shire of Denmark was invalid. This was because the *Local Government Act 1995* requires the decision to dismiss a 'senior employee' to be made by Council, whereas in this case, the decision was made by the Chief Executive Officer. Even though the members of the Council were aware that the officer may be dismissed, this did not satisfy the requirement for it to have made the decision.

This matter is of particular significance because the Commission found that following the termination, the officer took action against the Shire in the Fair Work Commission. An agreement was reached which settled his unfair dismissal claim. The Commission found that this agreement was not an effective bar to the officer recovering remuneration in these proceedings because the subject matter of that agreement, the dismissal, was 'invalid and ineffective' and therefore '[t]here was nothing upon which the agreement could fasten.'

([2017] WAIRC 00001; (2017) 97 WAIG 555)

The Commission later heard from the parties regarding the amount owed to the officer. It ordered the Shire pay the claimant $43,893.71 including salary owed and various allowances.

([2017] WAIRC 00219; (2017) 97 WAIG 562)

11.4.8 Struggling business's dismissal of casual employee not unfair

The Commission dismissed a claim of unfair dismissal, finding that the casual employee was dismissed because the employer's business had fallen on hard times. Therefore, the employer's decision to dismiss was not an abuse of its right to terminate the employment. The reason for the dismissal was not, as the employee alleged, because he was forthright in asserting an alleged workplace entitlement.

The Commission went on to find that even if the employee was dismissed for an unfair reason, the Commission would probably not have made an award of damages. Given the state of the employer's business, the employment would not have continued for much longer in any event.

([2017] WAIRC 00343; (2017) 97 WAIG 637)

11.5 Public sector – general

11.5.1 No reasonable apprehension of bias

A Public Service Arbitrator dismissed an application by the Police Union that he recuse himself. He dismissed the application because a fair minded lay observer would not apprehend bias.

The Union argued that there was a reasonable apprehension of bias because, amongst other things:

(a) For over 20 years, the Commissioner was a solicitor in the State Solicitor's Office. He was an employment law expert and represented State Government employers prior to becoming a Commissioner in March 2016;

(b) In that capacity, he made submissions for another 'emanation' of the State about the interpretation of s 26(2A) and s 26(2C) of the Act, and those provisions have a direct bearing on this case; and

(c) One of the witnesses in that case, who was proofed and led by the Commissioner in giving his evidence, would also give evidence in this case.

The Arbitrator noted that as a matter of law, he is not obliged to recuse himself simply because he has 'a prior relationship of legal advisor and client' with one of the parties to a case. Given the specialised nature of the Commission's jurisdiction, it is to be expected that people appointed would 'have experience working within government.' If the correctness of the Commissioner's advice as a solicitor was in question, that may be a ground for him to recuse himself. However, that was not the case here.

The Arbitrator also noted that having proofed and led a witness in a matter does not invite a conclusion that the decision maker will give an otherwise than 'neutral evaluation of the merits' of the case. He said it is relevant that the witness in question will be an expert witness, who is under an obligation to be impartial. A fair minded lay observer would understand the need for such a witness to be impartial, and would therefore find it difficult to conclude that the Arbitrator would be swayed by a 'past professional association'.

([2017] WAIRC 00168; unreported)

11.5.2 Voluntary severance rejection decision

A public sector employee referred a matter to the Commission under s 95(2) of the *Public Sector Management Act 1994* (WA), alleging his employer failed to fairly and properly apply the terms of the relevant regulations in relation to his request for a substituted voluntary severance. As a preliminary issue, the Commission was required to determine whether or not there was a relevant "section 94 decision" for the purposes of s 95(1) of the Act.

The Commission found the Director General's deliberation and consideration of the matter and his refusal to accept the employee's proposal constituted a decision to not approve the substituted voluntary severance. It found the non-approval of a request for a substituted voluntary severance is a "section 94 decision" for the purposes of s 95(1) of the Act.

([2017] WAIRC 00181; unreported)

11.6 Public sector – Health

11.6.1 Arbitrator has no power to vary industrial agreement when exercising arbitral jurisdiction

The Health Services Union of Western Australia (Union of Workers) sought orders that clinical psychologists, clinical neuropsychologists and social workers at Fiona Stanley Hospital did not need to wear uniforms when the employer directed them to, contrary to the industrial agreement. It said wearing uniforms was, among other things, risking the employees' health and safety and breached client confidentiality. The respondent disagreed and objected to the orders sought because they vary the industrial agreement and were beyond the Public Service Arbitrator's power.

The Arbitrator found that the orders sought conferred rights and imposed obligations not contained in, and inconsistent with, the industrial agreement. She found that the Arbitrator can only vary an industrial agreement in limited circumstances and she did not have the power to vary an industrial agreement in exercising her jurisdiction in the arbitration of an industrial matter referred under s 44(9) of the Act. The application was dismissed.

([2016] WAIG 00753; (2016) 96 WAIG 1373)

11.6.2 Radiologists inadequately paid during transition to Fiona Stanley Hospital

The Public Service Arbitrator was asked to interpret an agreement between the parties about how radiologists' baseline earnings would be calculated given the transfer of radiological services from several hospitals to Fiona Stanley Hospital in 2014, during a time of transition.

The parties agreed that the Health Service would guarantee a minimum number of radiological services from October 2014 to the 'end of transitioning' in February 2015. The dispute was about what 'end of transitioning' meant.

The Arbitrator held that a reasonable person would have understood 'end of transitioning in February 2015' to include the whole month. Proposed and actual activity levels in the radiological department stabilised in March 2015, not February. It was not fair to include in the annual reconciliation the months when Fiona Stanley Hospital was not functioning as a hospital usually would. By including February 2015 in the annual reconciliation, radiologists were not paid for work they did above the baseline once the hospital was fully functioning.

The Arbitrator adjusted the Health Service's decision to exclude February 2015 from the 2014/2015 annual reconciliation.

([2017] WAIRC 00034; (2017) 97 WAIG 206)

11.7 Public sector – Police

11.7.1 Appeal against removal upheld

The WAIRC unanimously upheld an appeal by a police officer, Mr Ferguson, against the decision by the Commissioner of Police to recommend his removal from the WA Police Service. Mr Ferguson was denied a real opportunity to respond to the evidence before the final decision was made because when the Commissioner gave him an opportunity to comment on his findings and demonstrate contrition, Mr Ferguson was subject to criminal charges arising from the same incident. Mr Ferguson requested that the 'loss of confidence' process be put on hold pending the resolution of the criminal matters, so that his rights to silence and privilege against self-incrimination at trial would not be vulnerable to compromise. The Commissioner refused. Mr Ferguson then responded in a general way to avoid compromising his rights. Mr Ferguson's lack of contrition and explanation weighed heavily in the Commissioner's ultimate decision.

The WAIRC held that it was unfair for the Commissioner of Police to deny Mr Ferguson's request. If Mr Ferguson had commented on the evidence and expressed contrition, he may have severely compromised his rights in relation to the criminal charges. By denying Mr Ferguson's request, the Commissioner denied Mr Ferguson a real opportunity to comment on the evidence and express contrition.

The WAIRC found that there was no cure to this denial of procedural fairness.

((2017) 97 WAIG 502; [2017] WAIRC 00238)

11.7.2 Appeal dismissed

The WAIRC unanimously dismissed an appeal against a decision by the Commissioner of Police to take removal action against a police officer who was convicted of assault occasioning bodily harm. The Magistrate who heard the charge made a number of serious adverse findings against the officer, including that he had not been truthful in his sworn evidence to the court.

The WAIRC found that the Commissioner of Police reached his own view that the officer was untruthful in his evidence to the Perth Magistrates Court. It was clear from the analysis by the Review Officer, relied on by the Commissioner of Police in reaching the decision to lose confidence in the officer, that the officer's dishonesty was established independently of the Magistrate's findings.

The WAIRC also held that the Commissioner can take removal action against an officer for giving false evidence despite there being no charge or conviction for perjury. The Commissioner of Police was entitled to draw his own conclusion about the truthfulness of the officer's testimony independent

of a criminal conviction for the conduct. The WAIRC repeated its recent comments in ***Ferguson v Commissioner of Police*** [2017] WAIRC 00238 in that respect.

((2017) 97 WAIG 627; [2017] WAIRC 00270)

11.8 Public sector – Education

11.8.1 Teacher fairly dismissed following altercation with student

A teacher who pushed a student up against a wall and later grabbed the student by the shirt claimed he was unfairly dismissed. He said the dismissal was a disproportionate penalty. He said he was reacting to the student squirting compressed air at him which, he said, put his life in danger. The teacher also said there are mitigating factors which make the decision to dismiss unfair.

The Commission found that the decision to dismiss was proportionate to the teacher's conduct, taking account of the fact that: in the months leading up to this incident, the teacher was disciplined for similar conduct. He received training and counselling about physical contact with students, and certainly knew that his conduct was in breach of the Department's policy, but his behaviour was repeated.

The teacher cited mitigating factors including his length of service, family stresses, his apology to the student, positive character references and that the dismissal has the effect of 'disbarring' him from teaching. The Commission found that even the most compelling mitigating factors will not necessarily make an employee immune to dismissal. The teacher's apology to the student was more justification than apology, and therefore deserved little weight. The Commission was not persuaded that the teacher will be 'denied the opportunity of making a living' by being 'disbarred' from teaching in the public education system, and in any event, this would not 'override the issue of his conduct'. The other factors were given weight, but did not outweigh the teacher's conduct, which 'struck at the heart' of the employment contract.

This decision is subject to an appeal.

((2017) 97 WAIG 542; [2017] WAIRC 00233)

11.8.2 Substandard teacher properly dismissed

The Commission dismissed an unfair dismissal claim by a teacher. The teacher said her performance was not substandard. She also argued that the process was unfair because, among other things, she was moved to a different school to be assessed against the Australian Institute of Teaching and School Learning Standards and she was assessed against all of the Standards rather than just the areas where the employer alleged she was not 'proficient'.

The Commission found that the dismissal was not unfair because the teacher's performance was properly assessed as being substandard. There were significant deficiencies in her lesson planning and implementation, as well as failures to follow instructions and to properly assess students' work.

The Commission also found that the process was not unfair. At every stage, the teacher had a high level of support available to her and was not required to perform tasks beyond those which any teacher should be able to perform. While her dismissal was based on an alleged failure to be proficient in three of the Standards, and this was the basis of her dismissal, she was not proficient in any of the seven standards. Further, all experienced teachers are expected to be 'proficient' in all Standards, and the Standards are interrelated, so it was not unfair for the employer to assess the teacher in all Standards rather than discrete areas of alleged substandard performance.

This matter was subject to an appeal.

((2017) 97 WAIG 63; [2017] WAIRC 00021)

11.8.3 Substandard teacher appropriately dismissed

A teacher of eight years' experience was dismissed after the Department of Education found her performance was substandard. The teacher challenged the dismissal.

The teacher said that not only was her performance of an appropriate standard, but that the Department's process denied her procedural fairness. She made allegations of bias against her school principal and alleged that those who were to support and assess her had conflicts of interest.

The Commission found that these allegations were baseless, that her principal was fair and professional, and that assessed against the standards applicable to all teachers, the applicant's performance was indeed substandard in spite of guidance, support and mentoring over nearly three years.

((2016) 96 WAIG 1419; [2016] WAIRC 00822)

11.8.4 Dismissal because of substandard performance, not a conspiracy

The Commission dismissed a claim by a school cleaner that she was unfairly dismissed. The cleaner was dismissed for substandard performance.

The Commission found that the cleaning inspection reports showed an ongoing problem with the standard of the cleaner's work. There was no evidence that the reports were a concoction by the principal and registrar as part of an alleged personal vendetta against the cleaner. There was clearly bad blood between the cleaner and the registrar giving rise to her suspicion of a conspiracy against her. The principal left the cleaner to speculate as to the reason why her performance was being questioned which, against a background of suspicion, did not help the situation. However, the Commission found that the principal's concerns for the cleaner's work were well founded, and it was a leap too far for the cleaner to suggest that evidence of substandard performance was fabricated.

Once the issue was referred to the Department, the substandard performance investigation was conducted by someone from the Department who was independent of the machinations within the school. The Commissioner found that the cleaner's allegations that the investigator was incompetent were baseless. Based on the information in the report, the Department's decision to terminate the employment was reasonable.

([2017] WAIRC 00345; (2017) 97 WAIG 657)

11.9 Apprenticeship Matters

11.9.1 Apprentice's conduct did not frustrate his training contract

The Commission upheld an appeal by an apprentice against the Apprenticeship Office's decision to terminate his training contract. The Apprenticeship Office had decided that the apprentice's conduct led to the employer standing him down and this frustrated the purpose of the training contract.

The Commission found that 'frustrated' must be given its ordinary meaning. It found that the act of standing the apprentice down frustrated the training contract. The employer, and not the apprentice, did that act. The Apprenticeship Office erred in concluding that the apprentice's conduct frustrated the purpose of the training contract. The Apprenticeship Office could have terminated the training contract for serious misconduct, but the Commission found it did not explore this option. The Commission set aside the Apprenticeship Office's decision to terminate the apprentice's training contract.

Before this appeal was heard, the apprentice entered into a new training contract with another employer. The Apprenticeship Office objected to the Commission hearing the appeal, saying it was not in the public interest because the apprentice could not fulfil two training contracts. The Commission was not persuaded that it should override the apprentice's prima facie right to have his appeal heard. It is not in the public interest to discourage an appellant from seeking new employment or to prejudice an appellant who seeks to mitigate his loss.

Appeal: ([2016] WAIRC 00954; (2016) 97 WAIG 96)

Public interest: ([2016] WAIRC 00765; (2016) 96 WAIG 1460)

11.10 Road Freight Transport Industry Tribunal

11.10.1 Jurisdiction even though contract ended and damages for breach

(1) The Road Freight Transport Industry Tribunal found it has jurisdiction to deal with disputes under or in relation to owner-driver contracts, even when the owner-driver contract is no longer on foot.

The Tribunal noted that the *Owner Driver (Contracts and Disputes) Act 2007* was meant to address the inequity in bargaining positions between owner-driver contractors and their hirers. The Tribunal found that the Act is 'beneficial legislation', and therefore should be given a 'fair, large and liberal' interpretation to give effect to its purpose. A literal interpretation would frustrate Parliament's intention, so the Act should be read in context.

([2016] WAIRC 00718; (2016) 96 WAIG 1652)

(2) The Tribunal went on to uphold the owner-driver's claim for payment of the balance of an owner-driver contract that was terminated by the prime contractor approximately nine months before it was due to expire.

The Tribunal found that the parties entered into a one year contract in June 2011. The arrangement was renewed yearly, for a period of about one year, because the contract provided for renewal and each time a contract ended, the parties continued to deal with each other as before. In the circumstances, that conduct was sufficient to support a finding that the parties intended for the arrangement to run for another year. Therefore, the prime contractor is liable to pay damages for the unexpired portion of the owner-driver contract.

The prime contractor said it did not have to pay the balance of the contract because it gave the owner-driver 'reasonable notice'. However, the Tribunal found that the contract between the parties had no term for reasonable notice. It could only be terminated 'by expiration or by mutual agreement'.

([2017] WAIRC 00069; (2017) 97 WAIG 232)

11.10.2 Jurisdiction when owner-driver contract ended – true meaning and spirit of the Act

The respondent objected to the Tribunal hearing and determining the dispute on the basis that it had no jurisdiction to do so, relying on a previous decision in ***SP & S Scolaro t/as SPS Transport & Ors v Twentieth Superpace Nominees P/L ATF Byrns Smith Unit Trust t/as SCT Logistics*** [2015] WAIRC 00995.

The Tribunal adopted the reasoning in *Steve Burke Transport Pty Ltd v Toll Transport Pty Ltd t/as Toll IPEC* (referred to above in [11.10.1]) and found the Tribunal had jurisdiction to hear and determine the dispute referred to it.

The Tribunal stated that even though the *Owner Driver (Contracts and Disputes) Act 2007* uses the present tense, as the Act is "always speaking", words expressed in the present tense are to be "applied to the circumstances as they arise, so that effect may be given to every part of the law according to its true spirit, intent and meaning". It was entirely within the true spirit, intent and meaning of the Act to allow a person who was an owner-driver, as well as a person who is an owner-driver, to refer a dispute to the Tribunal.

[2017] WAIRC 00144; (2017) 97 WAIG 410

11.11 Occupational Safety and Health Tribunal

11.11.1 Boiler not pressure vessel

The Occupational Safety and Health Tribunal upheld an application to review a decision by WorkSafe to deregister the design for two waste heat recovery units installed at Fiona Stanley Hospital. The units recover heat from exhaust gases of natural gas engines, generating steam for use in the hospital.

The Tribunal concluded that the design alteration in relation to the gas side chambers of the units is consistent with sound engineering practice which achieves a comparable level of safety. It found the requests for exemption from compliance with the Regulations should be granted by WorkSafe. The design is limited to the units at Fiona Stanley Hospital and may not be used for any other fabrication anywhere in Australia.

The parties agreed that the key issue for determination by the Tribunal, was whether the gas side chambers of the units could be properly characterised as "pressure parts", as defined.

The Tribunal concluded that the gas side chambers of the units fall within the extended definition of a "boiler", as being a part of the "boiler setting". Having considered all the Australian Standards relating to pressure vessels, and the definition of "pressure parts "and "vessel", the Tribunal held that the gas side chambers of the units should not be construed as "pressure parts" for the purposes of the relevant Australian Standards.

([2017] WAIRC 00375; (2017) 97 WAIG 1373)

11.12 Review of decisions of the Construction Industry Portable Paid Long Service Leave Board

11.12.1 Work on off-shore ships is not in the ‘construction industry’

The Commission dismissed an application by an employee who sought review of a decision by the Construction Industry Long Service Leave Payments Board, that the employee did not work in the construction industry because he worked as a rigger on a ship. That work came within one of the exclusions to the definition of ‘construction industry’: that ‘the carrying out of any work on ships’ is not work in the ‘construction industry’. The employee argued that the exclusion should only apply to people who do work **to** ships, rather than any worker **on** a ship. The Board argued the exclusion was broader, and applied to any work performed while on a ship.

The Commission affirmed the Board’s decision: the exclusion covers all employees who work ‘while located or positioned on board a ship, not [merely] work performed to a ship.’

((2016) 96 WAIG 144; [2016] WAIRC 00054)

11.12.2 Portable paid long service leave ‘on a site’, not only on building construction sites

The Commission affirmed a decision of the Construction Industry Long Service Leave Payments Board to register an employer who installs air conditioners in established residential houses and apartments. The Commission found that the employees came within the definition of ‘employee’, they performed work in the ‘construction industry’ as defined by the *Construction Industry Portable Paid Long Service Leave Act 1985*, and the work was ‘on a site’. Therefore, the employer is required to be registered by the Board.

The Commission held:

(1) For an employee to be covered by the Construction Industry Portable Paid Long Service Leave scheme, they must be in a classification referred to in a prescribed award. The definition of ‘employee’ does not require the employee or employer to be covered by the area and scope of the award, just the classifications.

(2) The work by the employees must be in the 'construction industry' as defined by the *Construction Industry Portable Paid Long Service Leave Act 1985*. For the work to be in the 'construction industry', it must firstly be 'on a site'. This is a low threshold; it simply means not on the employer's premises. The site does not have to be a building construction site. Secondly, it must be in the kinds of work that are within the 'construction industry'. Relevant to this case, the work carried out was the installation of works for the supply or transmission of electricity, and fixtures or works for use on or for the use of any buildings.

The Commission specifically noted that the definition of 'construction industry' in the Act is broader than many would generally expect.

((2017) 97 WAIG 366; [2017] WAIRC 00164)