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2013  
WESTERN AUSTRALIA



Report of the Chief Commissioner of the  
Western Australian Industrial Relations Commission  
On the operation of the *Industrial Relations Act 1979*  
1 July 2012 to 30 June 2013

Minister Responsible for the Administration of the Act  
The Hon. M. Mischin, MLC  
In his capacity as Minister for Commerce

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## Membership and Principal Officers

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### Western Australian Industrial Relations Commission

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During the year to 30 June 2013, the Western Australian Industrial Relations Commission (WAIRC) was constituted by the following members:

<b>President</b>	The Honourable J H Smith ( <i>Acting</i> )
<b>Chief Commissioner</b>	A R Beech
<b>Senior Commissioner</b>	P E Scott ( <i>Acting</i> )
<b>Commissioners</b>	S J Kenner J L Harrison S M Mayman

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

#### Public Service Arbitrators

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Senior Commissioner P E Scott (*Acting*) continued her appointment as a Public Service Arbitrator throughout the period. This appointment is due to expire on 21 June 2015.

Commissioner S J Kenner continued his appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 25 June 2014.

Commissioner J L Harrison continued her appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 30 April 2014.

Commissioner S M Mayman continued her appointment as an additional Public Service Arbitrator. This appointment is due to expire on 9 November 2013.

#### Railways Classification Board

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Commissioner S J Kenner continued his appointment until 10 February 2013. Appointments will be made if and when an application is made to the Railway Classifications Board.

#### Occupational Safety and Health Tribunal

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Commissioner S M Mayman 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 *Industrial Relations Act 1979* (the Act).

## Registry

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

Ms S Bastian	<b>Registrar</b> ( <i>Acting</i> )
Ms S Hutchinson	<b>Deputy Registrar</b>

## The Western Australian Industrial Appeal Court

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

The Honourable Justice C J L Pullin	<b>Presiding Judge</b>
The Honourable Justice R L Le Miere	<b>Ordinary Member</b>
The Honourable Justice K J Martin	<b>Ordinary Member</b>

## Industrial Magistrates Court

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During the reporting period the following Magistrates exercised jurisdiction as Industrial Magistrates:

Magistrate G Cicchini  
Magistrate D Scaddan  
Magistrate G Calder

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## Matters Before the Commission

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### 1. Full Bench Matters

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

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

The Honourable J H Smith (*Acting*) ..... 15

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

Chief Commissioner A R Beech ..... 10  
 Senior Commissioner P E Scott (*Acting*) ..... 6  
 Commissioner S J Kenner ..... 5  
 Commissioner J L Harrison ..... 3  
 Commissioner S M Mayman ..... 6

The following summarises Full Bench matters:

#### Appeals

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Heard and determined from decisions of the:

Commission – s 49 ..... 5  
 Industrial Magistrate – s 4 ..... 1  
 Coal Industry Tribunal ..... 0  
 Public Service Arbitrator ..... 1  
 Railways Classification Board ..... 0  
 Occupational Safety and Health Tribunal ..... 0  
 Road Freight Transport Industry Tribunal ..... 1

#### Organisations – Applications by or Pertaining to

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Applications to register an organisation pursuant to s 53(1) ..... 2  
 Applications to amend the rules of a registered organisation pursuant to s 62 ..... 2  
 Applications relating to State branches of federal organisations pursuant to s 71 ..... 2  
 Applications to adopt rules of federal organisations pursuant to s 71A ..... 0  
 Applications for registration of a new organisation pursuant to s 72 ..... 0  
 Applications seeking coverage of employee organisations pursuant to s 72A ..... 0  
 Applications for cancellation/suspension of registration  
 of organisations pursuant to s 73 ..... 0



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## Other

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Proceedings for enforcement pursuant to s 84A brought by the Minister; the Registrar or a deputy registrar; an industrial inspector; or any organisation, association or employer.....	1
Questions of law referred to the Full Bench .....	0
Matters remitted by the Industrial Appeal Court .....	0
Number of Full Bench matters heard but not determined in 2012/2013 .....	0

## Orders

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Orders issued by the Full Bench.....	21
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## 2. President

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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.....	7
Summary of s.66 Applications	
Applications finalised in 2012/2013.....	7
Directions hearings .....	1
Applications part heard .....	0
Applications withdrawn by order .....	1
Applications discontinued by order .....	2

## Orders issued by the President

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Orders issued by the President from 1 July 2012 to 30 June 2013 inclusive:	
Orders pursuant to s 49 (11) .....	1
Orders pursuant to s 66 .....	7
References of rules by Full Bench under s 72A(6) .....	0
Applications pursuant to s 92.....	0
Remitted from the Industrial Appeal Court.....	0

## Consultations

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Consultations with the Registrar pursuant to s 62 of the Act.....	10
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### 3. Commission in Court Session

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The Commission in Court Session is constituted each time by three Commissioners with the exception of the 2013 State Wage order which was constituted by five 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 A R Beech .....	2
Senior Commissioner P E Scott ( <i>Acting</i> ) .....	2
Commissioner S J Kenner .....	2
Commissioner J L Harrison.....	2
Commissioner S M Mayman.....	3

These Commission in Court Session matters comprised of the following:

State Wage Order Case – s 50A Determine rates of pay for purposes of <i>Minimum Conditions of Employment Act 1993</i> and Awards.....	1
General Order – s 50 .....	2
New Award.....	0
New Agreement .....	0
Variation of an Award – s 40B .....	0
Cancellation of an Award – s 47 .....	0
Conference pursuant to s 44.....	0
Joinder to an Award .....	0

### 4. Federal Matters

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Federal matters dealt with by WAIRC Commissioners ..... 0

(This is a reference to matters in the jurisdiction of the Commonwealth industrial relations system dealt with by WAIRC Commissioners who hold dual appointments in the Commonwealth tribunal. There are no dual appointments in the period of this Report).

### 5. Rule Variations by Registrar

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Variation of Organisation Rules by the Deputy Registrar..... 9

## 6. Boards of Reference

Long Service Leave - Standard Provisions .....	2
Long Service Leave - <i>Construction Industry Portable Paid Long Service Leave Act 1985</i> .....	1

## 7. Industrial Agents Registered by Registrar

Number of new agents registered during the period.....	2
Total number of agents registered as corporate body .....	23
Total number of agents registered as Individuals .....	19
Total number of agents registered as at 30 June 2013 .....	42

## Awards and Agreements in Force under the Industrial Relations Act 1979

Year	Number at 30 June
2009	2791
2010	2666
2011	2613
2012	2587
<b>2013</b>	<b>2577</b>

## Industrial Organisations Registered as at 30 June 2013

	Employee Organisations	Employer Organisations
No. of organisations	45	18
<b>Aggregate membership</b>	<b>193,014</b>	<b>5,147</b>

## Summary of Main Statistics

### Western Australian Industrial Relations Commission

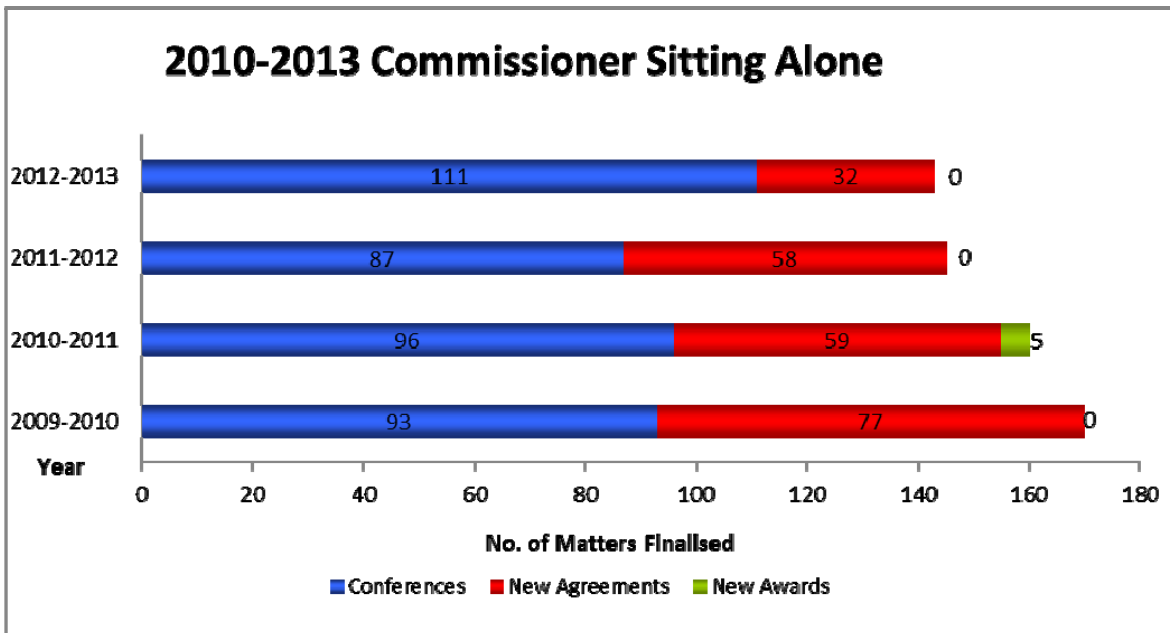
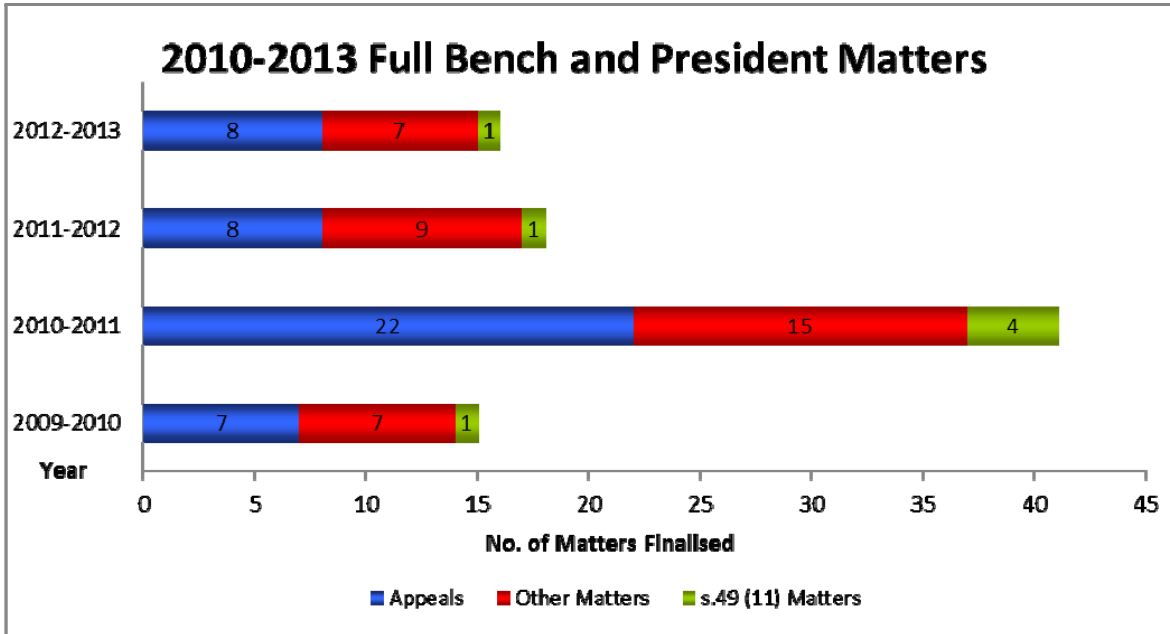
	MATTERS DEALT WITH			
	2009-2010	2010-2011	2011-2012	2012-2013
<b>Full Bench:</b>				
Appeals	7	22	8	8
Other Matters	7	15	9	7
<b>President sitting alone:</b>				
S 66 Matters (finalised)	0	0	0	7
S 66 Orders issued	7	4	21	7
S 49(11) Matters	1	4	1	1
Other Matters	0	0	0	0
S 72A(6)	0	0	1	0
Consultations under s 62	10	8	9	10
<b>Commission in Court Session:</b>				
General Orders	1	1	1	3
Other Matters	7	4	6	0
<b>Public Service Appeal Board:</b>				
Appeals to Public Service Appeal Board	16	26	40	19
<b>Commissioners sitting alone:</b>				
Conferences <sup>1</sup>	93	96	87	111
New Agreements	77	59	58	32
New Awards	0	5	0	0
Variation of Agreements	0	1	0	0
Variation of Awards	59	78	42	56
Other Matters <sup>2</sup>	192	213	58	44
Federal Matters	0	0	0	0
Boards Of Reference - Other Awards (Chaired by a Commissioner)	0	0	0	0
Boards of Reference – Long Service Leave	0	1	0	1
<b>Unfair Dismissal Matters Concluded:</b>				
Unfair Dismissal claims	180	135	188	176
Contractual Benefits claims	55	81	97	94
Unfair Dismissal & Contractual Benefits claims together	4	0	0	0
<b>Public Service Arbitrator (PSA):</b>				
Award/Agreement Variations	23	39	19	16
New Agreements	11	18	13	0
Orders Pursuant to s 80E	0	0	0	0
Reclassification Appeals	49	69	47	34
<b>TOTALS:</b>	<b>799</b>	<b>879</b>	<b>705</b>	<b>624</b>

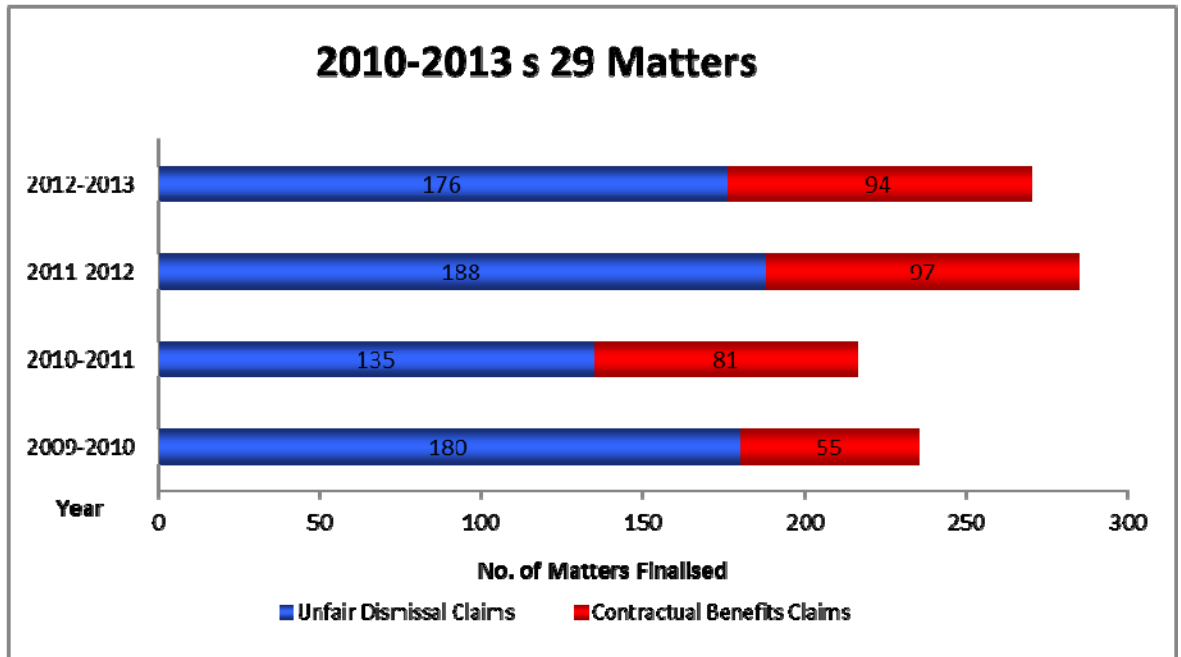
### **Notes**

<sup>1</sup> <b>CONFERENCES include the following:</b>				
Conferences (s 44)	45	58	58	59
Conferences referred for arbitration (s 44(9))	8	8	5	12
Conferences divided	0	1	1	0
Conferences referred and divided	0	0	1	2
PSA conferences	39	27	18	34
PSA conferences referred	1	2	4	4
PSA conferences divided	0	0	0	0
<b>TOTALS</b>	<b>93</b>	<b>96</b>	<b>87</b>	<b>111</b>

<sup>2</sup> <b>OTHER MATTERS include the following:</b>				
Applications	0	0	0	0
Apprenticeship Appeals	0	0	1	0
Occupational Safety & Health Tribunal <sup>#</sup>	0	0	0	0
Public Service Applications	30	41	23	17
<b>TOTALS</b>	<b>30</b>	<b>41</b>	<b>24</b>	<b>17</b>

*#The Tribunal operates under the Occupational Safety and Health Act 1984 and thus its operation is outside the scope of this Report. 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 14 of this Report.*





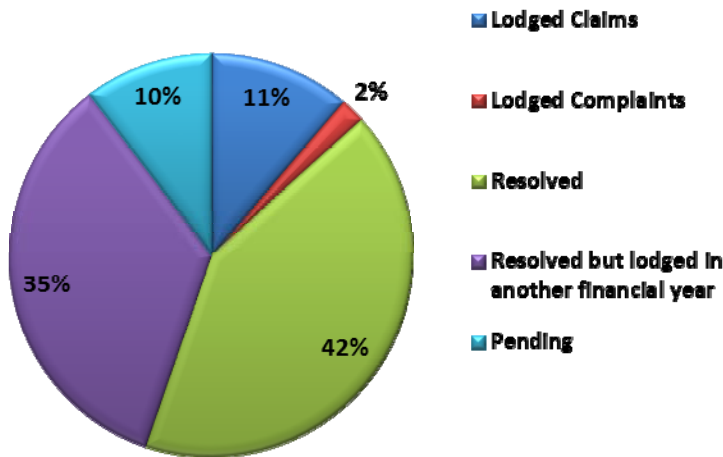
### The Western Australian Industrial Appeal Court

Decisions issued by the Industrial Appeal Court during this period .....	1
Orders issued by the Industrial Appeal Court during this period .....	5

### Industrial Magistrates Court

The following summarises the Court for the period under review:

Lodged Claims .....	209
Lodged Complaints .....	16
Resolved (total) .....	178
Resolved (lodged in the period under review) .....	156
Resolved but lodged in another financial period .....	26
Pending .....	69
Total number of resolved applications with penalties imposed.....	35
Total value of penalties imposed .....	\$61,150
Total number of claims/complaints resulting in disbursements .....	4
Total value of disbursements awarded .....	\$180
Claims/Complaints resulting in awarding wages.....	9
Total value of wages of Magistrate matters resolved during the period .....	\$102,661



Industrial Magistrates exercise general jurisdiction powers under the *Industrial Relations Act 1979* (WA) and the *Fair Work Act 2009* (Cth). The regulations applicable to the Industrial Magistrates Court are the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005*.

In addition, Industrial Magistrates exercise powers under the Industrial Magistrates Court's prosecution jurisdiction in accordance with the *Criminal Procedure Act 2004*, constituted as a court of summary jurisdiction.



During this reporting period, there was a significant increase in the volume of claims dealt with under the Industrial Magistrates Court's general jurisdiction. This occurred primarily as a result of amendments to the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA). Those amendments were enacted in April 2012.

## Commentary

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### 1. Legislation

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#### INDUSTRIAL RELATIONS ACT 1979

Short title	Number and year	Assent	Commencement
Reprint 14: The <i>Industrial Relations Act 1979</i> as at 24 Aug 2012			

During the period under review, there were no amendments made to the *Industrial Relations Act 1979*.

#### INDUSTRIAL RELATIONS COMMISSION REGULATIONS 2005

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

#### INDUSTRIAL RELATIONS (GENERAL) REGULATIONS 1997

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

### 2. State Wage Order Case

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On 11 June 2013 the Commission in Court Session delivered its decision in the 2013 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.

The application for the 2013 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 (the Minister), UnionsWA, the Chamber of Commerce and Industry of Western Australia Inc (CCIWA), the Australian Hotels Association Western Australian Branch, Western Australian Council of Social Services Inc, and Mannkal Economic Education Foundation. The Minister, UnionsWA and CCIWA appeared in the proceedings and also made oral submissions.

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After hearing submissions and considering the evidence, the Commission issued a General Order that adjusted the current minimum wage and rates of wages paid under awards by an increase of \$18.20 per week from the first pay period on or after 1 July 2013.

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

Following the delivery of the 2013 State Wage Order, the new pay rates, where applicable, were amended accordingly and made available to the public as well as published on the Commission's website on the effective date of 1 July 2013. The Department of the Registrar provided support to the Commission by calculating and applying these increases. As at 30 June 2013, there were 254 awards in force and 238 of these were affected by the 2013 State Wage Order. Most of the rates adjustments are now fully automated.

### **3. Statutory Minimum Wage under the Minimum Conditions of Employment Act 1993**

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On 14 June 2013, the Commission in Court Session, on its own motion, issued a State Wage order pursuant to s 50A of the Act increasing the minimum weekly rate of pay prescribed for the purpose of the MCE Act to \$645.90 on and from the commencement of the first pay period on or after 1 July 2013.

### **4. Minimum Rate for Award Apprentices 21 Years of Age and Over under the Minimum Conditions of Employment Act 1993**

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The State Wage order referred to above 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 \$557.20 per week on and from the commencement of the first pay period on or after 1 July 2013.

### **5. Minimum Weekly Wage Rates for Apprentices and Trainees under the Minimum Conditions of Employment Act 1993**

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

Apprentices under the MCE Act refer to the class of apprentice 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 date of operation is the commencement of the first pay period on or after 1 July 2013.

Trainees under the MCE Act refer to the class of trainee 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. 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 is the commencement of the first pay period on or after 1 July 2013.

## **6. Public Service Arbitrator and Public Service Appeal Board**

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### **Public Sector – General**

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The following is an overview of some of the public sector industrial matters dealt with during the reporting period.

#### **Public Service Arbitrator**

##### *Union Representative's Role in Disciplinary Matters*

The Civil Service Association of Western Australia Incorporated (CSA) filed a claim with the Commission that its representation rights on behalf of its members were being denied by various public sector agencies in the course of the investigation process relating to disciplinary matters. Employers and their investigating officers were said to be refusing to allow union members to have a representative present during the interviews, asserting that they may act only as a support person and not to speak on behalf of the officer, nor to raise procedural issues including questions of procedural fairness.

The issue has been the subject of a number of conciliation conferences before the Public Service Arbitrator and has involved a number of public sector agencies. It is likely to proceed to hearing and determination due to its impact on a number of agencies and unions. (*The Civil Service Association of Western Australia Incorporated v. Director General, Department of Housing* (PSAC 1 of 2013)).

##### *Work Value Considerations*

In 2007, the CSA and Government agencies reached agreement on the reclassification of the specified callings in the *Public Service Award 1992* and the *Government Officers Salaries, Allowances and Conditions Award 1989*, and this agreement was reflected in a Memorandum of Understanding (MOU).

The parties now disagree whether the awards should now be amended to reflect the changes arising from MOU.

The CSA says that the specified callings have demonstrated a significant net addition to work value and the awards need to be amended to ensure that the safety net is maintained.

The employers say that the matter was resolved by the MOU, the salary rates have been reflected in subsequent industrial agreements, and the matter was resolved by a settlement which specifically did not include amendment to the awards.

The Public Service Arbitrator is to hear and determine the issue on the basis of considerations of the status of the awards, the parties' intentions, the status of the settlement between them, and whether it is appropriate to amend the awards in the context of the agreement reached.

### *Disputes Regarding Lack of Consultation*

In the 2011/12 Report, it was noted that the Public Service Arbitrator was continuing to deal with a number of disputes arising from Government agencies failing to consult with employees and the respective unions regarding significant changes affecting employees.

Conferences continued to be convened regarding the abolition of positions of Community Social Trainers and their supervisors employed by the Disability Services Commission. Agreement was reached in early 2013 on all aspects of the process affecting the abolition of the positions and redeployment or redundancy of the employees concerned (*The Civil Service Association of Western Australia Incorporated v. Director General, Disability Services Commission* [2012] WAIRC 00333; (2012) 92 WAIG 670).

The reduction in the number of dog handlers employed at Perth Airport by the Department of Agriculture and Food has been the subject of further conferences which resulted in the parties agreeing to implement a new roster on a trial basis. The hearing is ongoing. (*The Civil Service Association of Western Australia Incorporated v. Department of Agriculture and Food, Government of Western Australia* (PSAC 15 of 2012)).

### *State School Teachers' Union of W.A. (Incorporated) and the Department of Education*

The Commission has convened a number of conferences dealing with issues arising from:-

- The devolution of authority from the Director General of the Department to principals of schools at a local level and the many issues arising from decentralisation of administration including appointments, transfers and similar matters;
- Extension of the Independent Public Schools concept; and
- Movement of Year 7 to the High School system.

The parties are continuing to discuss these issues in conference before the Commission and in their consultative committee, with a number of them being resolved by agreement.

The Commission has also conducted a number of conferences relating to a dispute about the basis upon which teachers are to attend regular performance management meetings with school administrators. The State School Teachers' Union of W.A. (Incorporated) maintains that teachers ought to be provided with classroom relief to enable their attendance, and that schools are funded to allow this to occur. The Department maintains that there are three options available for negotiation at school level, including that teachers attend these meetings during their allocated Duties Other Than Teaching (DOTT) times or outside of normal school hours.

The Commission has provided a recommendation to assist in the resolution of the dispute.

Should it not be resolved, there is the potential for a lengthy arbitration, taking into consideration issues which make up essential elements of the conditions of employment of teachers such as their hours of work, workload, and the purpose and use of DOTT time.

### *Teacher Dismissal*

Following the hearing of a claim of unfair dismissal by a teacher of many years' standing, the Commission found that the Director General of Education had unfairly dismissed the teacher because of significant flaws in the investigation and inaccuracies in reporting to the Director General, leading to the decision to dismiss. The Commission ordered the reinstatement of the teacher ([2012] WAIRC 01063; (2012) 93 WAIG 41).

### *Apprehension of Bias by Enquirer*

In March 2011, the Director General of the Department of Education found a school psychologist guilty of breaches of discipline, and ultimately imposed penalties including a reprimand, transfer to a new school region and a reduction in classification. This arose following complaints by a number of members of staff about the school psychologist's behaviour.

The history of the matter included that an enquiry was conducted in 2006. In 2009, the Full Bench declared the findings of that enquiry to be a nullity ([2009] WAIRC 00041; (2009) 89 WAIG 267), but found that this did not mean that the enquiry "cannot either be reopened or alternatively recommenced".

The Director General decided to reopen the enquiry as a means of rectifying the deficiencies of the previous enquiry and appointed the same enquirer to undertake the reopened enquiry.

However, the Public Service Arbitrator subsequently found that in reopening the enquiry, the enquirer continued to hold the views he had previously expressed in his report and was less open to persuasion than before he had made his original findings, and he did not treat the original findings as a nullity as required by the decision of the Full Bench. Rather, he relied on those findings except to the extent that the school psychologist might be able to convince him to the contrary. This resulted in a finding by the Public Service Arbitrator of apprehended bias on the part of the enquirer. Therefore, the findings of the reopened enquiry and the penalties imposed on the school psychologist were overturned ([2012] WAIRC 00844; (2012) 92 WAIG 1827).

### **Public Service Appeal Board**

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Pursuant to s 80H(3) of the Act a Public Service Appeal Board must be constituted by the President as chairman where an appeal is instituted under s 80I(1)(a) by a public service officer against a decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994* (PSM Act), and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances).

During the reporting period, the President of the Commission was called upon to constitute three Public Service Appeal Boards as chairman.

### *S v. Director General, Department of Racing, Gaming & Liquor [2012] WAIRC 00700; (2012) 92 WAIG 1630*

In this appeal S sought an order by the Public Service Appeal Board to adjust a decision to instigate a disciplinary process by withdrawing a letter setting alleged breaches of discipline and ceasing an investigation. In the appeal grounds it was argued on behalf of S that the employer had no capacity to institute disciplinary proceedings against him under s 80 of the PSM Act, as the conduct which was alleged to constitute breaches of discipline occurred (if it did occur) outside of the workplace and had no relevant connection with the workplace.

The employer made an application to dismiss the appeal. The Board found, when considering whether it should exercise its discretion to dismiss the appeal, regard should first be had to the nature of the 'decision' that is sought to be interpreted. In this appeal, the subject matter did not concern a final determination of a breach of discipline made by an employing authority. All that occurred was the institution of an investigation to determine whether S had committed breaches of

discipline. This was the first step in a sequence of steps that could culminate in a decision that is determinative of the interests of S and result in adverse consequences to S.

The Board applied the reasoning of Anderson J in ***Civil Service Association of Western Australia Inc v. Director General of Department for Community Development*** [2002] WASCA 241; (2002) 82 WAIG 2845 [20] where his Honour observed in respect of a similar application before the Public Service Arbitrator that if an employing authority suspects there may have been an actionable breach of discipline, and there are reasonable grounds for that suspicion, the employer ought to be allowed to carry out its statutory duty to conduct an investigation to see if there was in truth an actionable breach of discipline.

The Board found that, on the face of the allegations put in the notice of suspected breach of discipline when taken at their highest, it could be seen there were reasonable grounds to suspect a breach of discipline may have occurred. Consequently, it found that it should not intervene in the investigation process and it dismissed the appeal.

*R v. Conran, Director General, Dept of Premier & Cabinet [2012] WAIRC 00921; (2012) 92 WAIG 1851*

This appeal was an application by R for an interim order to stay a disciplinary inquiry under the PSM Act pending hearing of an appeal to the Public Service Appeal Board. The Board found there was no jurisdiction to make the order sought as there is no power in the Act which authorises the Board to make such an order.

*R v. Conran, Director General, Dept of Premier & Cabinet [2013] WAIRC 00152; (2013) 93 WAIG 362*

This appeal sought to challenge the appointment of an investigator to investigate a suspected breach of discipline. The disciplinary investigation instituted by the employer was in relation to an alleged act of R engaging in activities unconnected with his employment and without the written permission required under s 102 of the PSM Act.

The employer made an application to dismiss the appeal. After hearing the parties on a number of issues, the Board found that there was no merit in the issues sought to be litigated in the appeal which were matters arising out of the decision to proceed with an investigation under s 81(2), or were matters that relate to an interpretation of any provision of the PSM Act or the regulations made under the PSM Act.

In its reasons for decision the Board made a number of observations about the application of the rules of procedural fairness to disciplinary inquiries and the power to appoint an investigator who is not an employee of a public sector employer.

### *Jurisdiction*

The Commissioner of Main Roads raised issues of jurisdiction in relation to two separate appeals made to the Public Service Appeal Board. In one matter it was found that the person was not an employee of the Commissioner of Main Roads ([2013] WAIRC 00378; (2013) 93 WAIG 629). The second application relates to whether the Board can deal with an appeal against a transfer; a decision is pending (PSAB 8 of 2013).

The following two appeals highlight the importance of an appellant ensuring that, before bringing an appeal to the Appeal Board under s 80I of the Act, arising from disciplinary action under the *Public*

*Sector Management Act 1994* (PSM Act), the decision made by the employer is an appealable decision.

*I v. Director General, Department of Mines and Petroleum [2012] WAIRC 00882; (2012) 92 WAIG 2097*

This matter involved an appeal to the Public Service Appeal Board by a professional engineer specialising in petroleum safety. The appeal was against a decision by the respondent to impose disciplinary proceedings and take disciplinary action, by way of a reduction in classification, under the PSM Act.

A preliminary issue arose as to whether at the time of the commencement of the appellant's appeal under s 78(1)(b)(iv) of the PSM Act, there had been a relevant "decision" from which an appeal could competently brought.

The Appeal Board considered the statutory scheme in relation to appeals under s 80I and the provisions in ss 78, 80A and 82A of the PSM Act in relation to dealing with substandard performance and disciplinary matters.

Having set out the statutory provisions, considering the arguments of the parties, and applying relevant principles of statutory interpretation, the Public Service Appeal Board concluded that a letter from the respondent to the appellant referring to "proposed" action, did not constitute the taking of a "decision" for the purposes of taking disciplinary action under ss 78(1)(b)(iv) and 82A(3)(b) of the PSM Act. Accordingly, the appeal was held to be incompetent and it was dismissed.

*S v. Director General, Department of Transport [2012] WAIRC 01093; (2012) 93 WAIG 61*

Following the decision of the Public Service Appeal Board in the appeal above, the Public Service Appeal Board also heard argument from the parties in this appeal as to the applicability of that decision. After hearing submissions from the parties, the Public Service Appeal Board came to the conclusion that the same jurisdictional difficulty arose in the present appeal as it did in that appeal. That is, the appeal had been instituted prematurely, by reason of there being no "decision" from which an appeal to the Public Service Appeal Board could be brought. Accordingly, the appeal was held to be incompetent and it was dismissed.

## **7. Award Review Process**

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During the year, the following award reviews pursuant to s 40B of the Act were completed:

- Hospital Salaried Officers (Dental Therapists) Award, 1980
- Hospital Salaried Officers (Nursing Homes) Award 1976
- The Aboriginal Police Aides Award
- The Police Award 1965



## 8. Right of Entry Permits Issued

Organisation	2009/10	2010/11	2011/12	2012/13
Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees, The	1	1	2	2
Australian Nursing Federation, Industrial Union of Workers Perth, The	19	4	0	14
Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch, The	0	0	2	1
Australian Workers' Union, West Australian Branch, Industrial Union of Workers, The	4	4	4	13
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch, The	6	5	5	6
Civil Service Association of Western Australia Incorporated, The	35	16	20	22
Electrical Trades Union WA (formerly Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch)	3	0	3	11
Construction, Forestry, Mining and Energy Union of Workers, The	7	5	0	5
Health Services Union of Western Australia (Union of Workers)	0	0	4	5
Independent Education Union of Western Australia, Union of Employees, The	2	1	2	1
Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, The	0	0	0	1
Shop, Distributive and Allied Employees' Association of Western Australia, The	3	5	0	5
State School Teachers' Union of W.A. (Incorporated), The	7	5	5	7
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	1	4	4	3
United Voice WA (formerly Liquor, Hospitality and Miscellaneous Union, Western Australian Branch)	31	60	93	38
Western Australian Municipal, Administrative, Clerical and Services Union of Employees (formerly the Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch)	0	16	3	6
<b>TOTAL</b>	<b>121</b>	<b>128</b>	<b>165</b>	<b>140</b>

Number of permits that have been issued since 8 July 2002 (gross total).....	1444
Number of permits issued during the 2012/13 financial year .....	104
Number of people who presently hold a permit .....	402
Number of permits that are current .....	390
Number and names of permit holders who have had their permit removed or suspended by the Commission in the current reporting period .....	0

## 9. Claims by Individuals – Section 29

This Report continues an analysis of applications concerning unfair dismissal and denial of contractual benefit. These applications are made under the following provisions of the Act.

- ❖ Section 29(1)(b)(i) - Claims alleging unfair dismissal
- ❖ Section 29(1)(b)(ii) - Claims alleging a denied contractual benefit

For the purposes of this analysis, the two types of application are referred to in the following tables as “Section 29” applications.

### Section 29 Applications Lodged

Applications alleging unfair dismissal continue to represent the most significant proportion of the types of applications that are lodged under s 29 of the Act.

	2009-2010	2010-2011	2011-2012	2012-2013
Unfair Dismissal	192	128	187	157
Denial of Contractual Benefits	86	82	85	99
<b>TOTAL</b>	<b>278</b>	<b>210</b>	<b>272</b>	<b>256</b>

### Section 29 Applications Finalised

	2009-2010	2010-2011	2011-2012	2012-2013
Unfair Dismissal	180	135	188	176
Denial of Contractual Benefits	55	81	97	94
Both in same application	4	0	0	0
<b>TOTAL</b>	<b>239</b>	<b>216</b>	<b>285</b>	<b>270</b>

### Section 29 Applications Lodged Compared with All Matters<sup>1</sup> Lodged

Section 29 applications represent 24.1% of all the matters lodged in the Commission.

	2009-2010	2010-2011	2011-2012	2012-2013
All Matters Lodged	1056	762	697	1064
Section 29 Applications Lodged	279	208	272	256
<b>Section 29 as (%) of All Matters Lodged</b>	<b>26.4%</b>	<b>27.3%</b>	<b>39%</b>	<b>24.1%</b>

<sup>1</sup> All Matters means the full range of matters that can be initiated under the Act for reference to the Commission.

### Section 29 Applications Finalised Compared with All Matters Finalised

	2009-2010	2010-2011	2011-2012	2012-2013
All Matters Finalised	836	869	884	797
Section 29 Applications Finalised	233	215	285	270
<b>Section 29 as Percentage (%) of All Matters Finalised</b>	<b>27.9%</b>	<b>24.7%</b>	<b>32.2%</b>	<b>33.9</b>

### Section 29 Matters – Method of Settlement

The following table shows that 80.6% of s 29 matters were settled without recourse to formal arbitration.

	Unfair Dismissal	Contractual Benefits	Both	Total	%
Arbitrated claims in which order issued	33	17	0	50	19.3
Settled after proceedings before the Commission	79	42	0	121	46.7
Matters referred for investigation resulting in settlement	3	1	0	4	1.5
Matters discontinued/dismissed before proceedings commenced in the Commission	31	17	0	48	18.5
Matters withdrawn/discontinued in Registry	21	15	0	36	13.9
<b>Total Finalised in 2012/2013 Reporting Year</b>	<b>167</b>	<b>92</b>	<b>0</b>	<b>259</b>	<b>100</b>

### Demographic Data for Section 29 Applications

The Commission began a demographic data collection system during the 2000/2001 reporting year to capture additional information on applications at the time of lodgement. Provision for supplying this information is located in the schedule of particulars attached to the Notice of Application. It is not compulsory for an applicant to provide this information and many applicants choose not to do so. The following information is provided on that basis.

The following tables serve to illustrate a variety of characteristics relating to applicants who have claimed redress under s 29 of the Act.

## Representation

The table following was constructed from the survey of cases over the period and shows that the majority of applicants were prepared to conduct their own case in the Commission whilst the remainder were represented in some form as set out in the table.

	Male	Female	No Data	Total	% Male	% Female	%No Data	%Total
Industrial Agent	6	5	0	11	4.5	4	0	4
Legal Representation	11	11	0	22	8.2	8.9	0	8.1
Personal	108	95	0	203	80.6	76.6	0	74.6
Other	4	8	0	12	3	6.5	0	4.4
No Data Provided	5	5	14	24	3.7	4	100	8.8
<b>TOTAL</b>	<b>134</b>	<b>124</b>	<b>14</b>	<b>272</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

## Age Groups

The following table provides a view of the age ranges and gender distribution of applicants.

Age Group	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under 16	2	1	0	3	1.5	0.8	0	1.1
17 to 20	3	11	0	14	2.2	8.9	0	5.1
21 to 25	3	17	0	20	2.2	13.7	0	7.4
26 to 40	40	29	0	69	29.9	23.4	0	25.4
41 to 50	32	33	0	65	23.9	26.6	0	23.9
51 to 60	39	24	0	63	29.1	19.4	0	23.2
Over 60	15	8	0	23	11.2	6.5	0	8.5
No Data Provided	0	1	14	15	0	0.8	100	5.5
<b>TOTAL</b>	<b>134</b>	<b>124</b>	<b>14</b>	<b>272</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

### Employment Period

Period of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Under 3 months	28	23	0	51	20.9	18.5	0	18.8
4 to 6 months	7	20	0	27	5.2	16.1	0	9.9
7 to 12 months	20	19	0	39	14.9	15.3	0	14.3
1 to 2 years	27	26	0	53	20.1	21	0	19.5
2 to 4 years	23	20	0	43	17.2	16.1	0	15.8
4 to 6 years	10	2	0	12	7.5	1.6	0	4.4
Over 6 years	14	11	0	25	10.4	8.9	0	9.2
No Data Provided	5	3	14	22	3.7	2.4	100	8.1
<b>TOTAL</b>	<b>134</b>	<b>124</b>	<b>14</b>	<b>272</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

### Salary Range

	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under \$200 P/W	17	16	0	33	12.7	12.9	0	12.1
\$201 to \$600 P/W	6	26	0	32	4.5	21	0	11.8
\$601 to \$1000 P/W	34	38	0	72	25.4	30.6	0	26.5
\$1001 to \$1500 P/W	36	22	0	58	26.9	17.7	0	21.3
\$1501 to \$2000 P/W	21	15	0	36	15.7	12.1	0	13.2
Over \$2001 P/W	20	7	0	27	14.9	5.6	0	9.9
No Data Provided	0	0	14	14	0	0	100	5.1
<b>TOTAL</b>	<b>134</b>	<b>124</b>	<b>14</b>	<b>272</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

### Category of Employment

Over half of all applicants stated that they were Full Time, Permanent or Permanent Full Time employees at the time of their termination.

Period of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Casual	11	6	0	17	8.2	4.8	0	6.2
Casual F/Time	4	10	0	14	3	8.1	0	5.1
Casual P/Time	2	6	0	8	1.5	4.8	0	2.9
Fixed Term	3	3	0	6	2.2	2.4	0	2.2
Full Time	25	19	0	44	18.7	15.3	0	16.2
Permanent	8	7	0	15	6	5.6	0	5.5
Permanent F/Time	62	42	0	104	46.3	33.9	0	38.2
Permanent P/Time	10	19	0	29	7.5	15.3	0	10.7
Probation	2	2	0	4	1.5	1.6	0	1.5
Part Time	5	9	0	14	3.7	7.3	0	5.1
No Data Provided	2	1	14	17	1.5	0.8	100	6.2
<b>TOTAL</b>	<b>134</b>	<b>124</b>	<b>14</b>	<b>272</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

### Reinstatement Sought

This table shows whether applicants sought reinstatement as presented by gender. Almost half of the respondents did not seek reinstatement.

Reinstatement Sought	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Yes	44	24	0	68	32.8	19.4	0	25
No	56	78	0	134	41.8	62.9	0	49.3
No Data Provided	34	22	14	70	25.4	17.7	100	25.7
<b>TOTAL</b>	<b>134</b>	<b>124</b>	<b>14</b>	<b>272</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

### Reinstatement Sought by Age Group

This table illustrates a further view of the answer to the question of reinstatement as presented by age group.

Age Groups	Yes	No	No Data	Total	%Yes	%No	%No Data	%Total
Under 16	0	3	0	3	0	2.2	0	1.1
17 to 20	3	10	1	14	4.4	7.5	1.4	5.1
21 to 25	3	15	2	20	4.4	11.2	2.9	7.4
26 to 40	15	42	12	69	22.1	31.3	17.1	25.4
41 to 50	16	33	16	65	23.5	24.6	22.9	23.9
51 to 60	24	20	19	63	35.3	14.9	27.1	23.2
Over 60	6	11	6	23	8.8	8.2	8.6	8.5
No Data Provided	1	0	14	15	1.5	0	20	5.5
<b>TOTAL</b>	<b>68</b>	<b>134</b>	<b>70</b>	<b>272</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

## 10. Employer-Employee Agreements (EEAs)

Employer Employee Agreements (EEAs) were introduced in September 2002. EEAs allow an employer and employee to negotiate their own employment arrangements, subject to a number of checks, including a requirement that the EEA passes a 'No Disadvantage Test'. The No Disadvantage Test is intended to ensure that the employee is not on balance, disadvantaged in relation to the terms and conditions of employment when compared to the relevant award. EEAs that meet these checks are registered by the Registrar.

The table below identifies statistics in relation to EEAs.

### Applications to Lodge EEAs for Registration

Number of EEAs Lodged	2009-10	2010-11	2011-12	2012-13
Meeting Lodgement Requirements	6	2	5	3
Not Meeting Lodgement Requirements	0	0	1	0
<b>Total</b>	<b>6</b>	<b>2</b>	<b>6</b>	<b>3</b>

### EEAs Lodged for Registration and Finalised

Outcome	2009-10	%	2010-11	%	2011-12	%	2012-13	%
Refused	1	20%	0	0%	1	20%	1	33%
Registered	4	80%	1	50%	3	60%	2	67%
Withdrawn	0	0%	1	50%	1	20%	0	0
<b>Total</b>	<b>5</b>	<b>100</b>	<b>2</b>	<b>100</b>	<b>5</b>	<b>100</b>	<b>3</b>	<b>100</b>



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## **11. Appeals Pursuant to Section 33P of the Police Act 1892**

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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 or the Senior Commissioner.

During the reporting period, one appeal was filed in the Commission. The parties have requested that it not yet be listed, so there have not been any proceedings in this appeal during this reporting period. There were no pending appeals in the Commission from previous reporting periods.

A pending appeal filed in the Industrial Appeal Court was dismissed during the reporting period. Specifically, the Industrial Appeal Court confirmed that although there is a right of appeal provided to the Commissioner of Police from a decision of the Commission upholding an appeal against the Commissioner of Police's decision on the grounds that a police officer's removal was harsh, oppressive or unfair, there is no reciprocal right of appeal to the Industrial Appeal Court provided to the police officer (([2012] WASCA 170; (2012) 92 WAIG 1647).

## **12. Mediation Applications pursuant to the Employment Dispute Resolution Act 2008**

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The *Employment Dispute Resolution Act 2008* (EDR Act) was proclaimed on 1 December 2008. It 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, 17 mediation applications were lodged and dealt with, and 13 of those were finalised. Of those 13, five did not proceed due to non-consent of all parties to the mediation; six were withdrawn or concluded; and two were closed after an agreement was reached. Four mediation applications remain pending, one of which is listed for hearing and determination in the next reporting period.

There were two pending mediation applications from the previous reporting period and these were both finalised during this reporting period, one was discontinued and one was concluded at the mediation meeting.

It is worth noting that the EDR Act has been utilised by parties to industrial disputes which would not be within the jurisdiction of the Commission pursuant to the Industrial Relations Act. This includes disputes in industries and utilities of significance to the State's economy, which highlights the importance of the EDR Act.

### **13. Referral of Disputes pursuant to the Owner-Drivers (Contracts and Disputes) Act 2007**

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In the reporting period there has been a total of 15 applications to the Road Freight Transport Industry Tribunal (the RFT Tribunal). This is generally consistent with the number of applications for the year 2011/12, which was 11.

As with 2011/12, most applications before the RFT Tribunal have involved claims for the recovery of payments as debts. Additionally, there have been a number of claims for damages for breach of contract.

In the commentary for the 2011/12 Report, the passage through the Commonwealth Parliament of the *Road Safety Remuneration Act 2012* (Cth), which established the Road Safety Remuneration Tribunal from 1 July 2012 was noted. Thus far nothing has occurred in the Commonwealth jurisdiction which would alter the preliminary view at that time, that, by s 10 of the federal legislation, it is not intended to exclude or limit the operation of State legislation which is able to concurrently operate with it.

#### ***K v. L* [2013] WAIRC 00355; (2013) 93 WAIG 493**

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This is an appeal from a decision of the RFT Tribunal seeking to raise an issue of the RFT Tribunal's jurisdiction and it is convenient to report it here.

The appeal was made pursuant to s 43(1) of the ODCD Act against an order made by the RFT Tribunal ([2013] WAIRC 00069; (2013) WAIG 293).

The first argument raised in the appeal was that when the established principles of statutory construction are applied to the interpretation of the ODCD Act, it is clear that an owner-driver contract under the ODCD Act means an owner-driver contract in what is traditionally understood as the heavy haulage transport or road freight transport industry, and is not intended to apply to the towing of vehicles by tow trucks.

The second argument was that it was not proven by L that the maximum loaded mass of the vehicle in question was as defined in s 3 of the ODCD Act and s 111AB(4) of the *Road Traffic Act 1974* (WA).

Importantly, neither argument had been raised before the RFT Tribunal at first instance.

The first argument turned solely on the construction of the provisions of the ODCD Act and whether the provisions of that Act could apply to a contract requiring the use of a tilt tray tow truck. In the Full Bench's reasons for decision, the Full Bench found that the ODCD Act regulates heavy vehicles; how goods are transported is immaterial; and methods of transport in a heavy vehicle are not specified in the ODCD Act.

The second issue argument raised the issue whether a jurisdictional argument could be raised when the determination of the issues of jurisdiction turned on not only the interpretation of the ODCD Act, but also on an analysis of L's evidence at the hearing at first instance. In these circumstances, the Full Bench held it would not allow the argument to be raised.

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## 14. Occupational Safety and Health Tribunal

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At the conclusion of the reporting year, two applications had been filed. One of the applications was discontinued and the other was dismissed.

## 15. Other Matters

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Some examples of the matters dealt with in the various industries are:

### Health

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The Commission heard and determined three interrelated unfair dismissal applications involving midwives employed by the Department of Health. The three midwives were involved in an incident in relation to a homebirth. It was found that all three were unfairly dismissed given the process used to investigate allegations made against them, however only two of the applicants were reinstated; the other applicant received compensation.

During the reporting period, the Commission convened conciliation conferences in relation to a dispute between the Minister for Health and The Australian Nursing Federation, Industrial Union of Workers Perth to finalise a new industrial agreement to cover registered nurses and enrolled mental health nurses. The dispute was lodged in the Commission because of industrial action being undertaken by the union and an order issued on 22 February 2013 for industrial action to cease. After wage increases were agreed, the parties continued to have discussions, with the assistance of the Commission, about other provisions to be included in a new agreement. Any provisions not agreed will be arbitrated under s 42G of the Act.

The Commission assisted with a number of disputes in the health sector lodged by The Australian Nursing Federation, Industrial Union of Workers Perth and United Voice WA involving changes to employees' hours of work and rostering; workload issues; a dispute involving a union member undertaking professional development; and consultation relating to changes in the health sector due to the opening of the new Fiona Stanley and Midland hospitals. Most of these disputes are ongoing.

The Commission has also assisted the Minister for Health and United Voice WA with negotiations for a new agreement to cover support workers. On 9 January 2013 all terms for a new agreement for support workers were finalised except the second and third wage increases. The parties agreed to those wage increases being arbitrated pursuant to s 42G of the Act. The arbitration has occurred and a decision is pending.

### Local Government

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#### *Board of Reference*

The Commission was specifically appointed to be the chair of a Board of Reference under the *Local Government (Long Service Leave) Regulations* to deal with a dispute between a former employee and a local government authority about long service leave entitlements due to him under these regulations

### *Jurisdiction*

The status of many local government authorities as national system employers under the *Fair Work Act 2009* (Cth) is unclear. In most matters involving local government authorities which have come before the Commission, the issue of jurisdiction has not been raised. On one occasion, the Commission was required to make a determination whether a local government authority is a constitutional corporation, and found that it was not.

### **Social and Community Services**

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The Commission convened a number of conferences to deal with two applications by the Western Australian Municipal, Administrative, Clerical and Services Union of Employees to vary two awards to provide for equal remuneration. These applications were referred to a Commission in Court Session under Principle 10 of the 2013 State Wage order and dealt with outside this reporting period.

### **Transport**

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The Commission has been assisting in a dispute between the Public Transport Authority of Western Australia and the Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch in relation to the bargaining for a replacement industrial agreement. Presently the parties are bound by an enterprise order made by the Commission which expired in March 2013, but by the terms of the Act, will continue in place until such time as a replacement industrial instrument is made by the Commission. This matter has involved extensive conciliation between the parties by the Commission, with those negotiations ongoing.

### *Department of Transport v. the Civil Service Association of Western Australia Incorporated (Application PSAC 16 of 2013)*

This matter involved prior industrial action and impending industrial action by motor vehicle assessors engaged in heavy vehicle assessments who are employed by the Department of Transport at assessment centres throughout the State. The issue in dispute was the proposed implementation of a trial arrangement whereby heavy vehicle assessments can be conducted by external service providers in the Bunbury region. The Union's concern was job security.

The employer sought orders to restrain the Union and its members from taking industrial action that threatened to substantially disrupt vehicle assessments throughout the State. Having considered the issues, including urgency, the impact on the operations of the employer and the community interest, orders preventing any industrial action were made. No industrial action was taken.

The substantive issues in dispute are the subject of ongoing dialogue between the parties.

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## **16. Decisions of Interest**

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### ***Unfair Dismissal – Jurisdiction [2013] WAIRC 00240; (2013) 93 WAIG 418***

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The Commission continues to deal with issues relating to jurisdiction which require determination of whether the employer is a trading corporation. In a claim of unfair dismissal made by a general practitioner employed by a mobile clinic which provided services mainly to homeless and disadvantaged people, the Commission found that the employer was a trading corporation. The employer bulk-billed Medicare for the fee for medical services, which it recouped by way of patients assigning to the employer the Medicare rebate to which the patient would otherwise be entitled. This constituted the substantial activity of the organisation and was trading. Therefore the employer was a trading corporation and the Commission did not have jurisdiction to deal with the claim.

The decision is the subject of an appeal to the Full Bench of the Commission to be heard in the next reporting period (Application FBA 3 of 2013).

### ***Importance of Correctly Identifying the Former Employer for Unfair Dismissal Claims [2013] WAIRC 00112; (2013) 93 WAIG 229***

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It is important to bring a claim of unfair dismissal against the former employer and to accurately identify the former employer. The Commission cannot deal with a claim of unfair dismissal if the former employer is a trading corporation, therefore correctly identifying the former employer before making the claim may assist an intending claimant to know whether the Commission will be able to deal with their claim. In this matter, the claim named as the former employer the manager of the HR section of a large corporation. The claim initially raised an issue of whether the former employer has been correctly named. If the former employer is a natural person, the Commission will have the jurisdiction to enquire into and deal with the claim; if the former employer was the corporation, the Commission will not have the jurisdiction. In this case, the Commission determined that the correct identity of the former employer was the corporation.

### ***Employee Access to Commission Limited [2012] WAIRC 00380; (2012) 92 WAIG 913***

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The Commission has confirmed that while employers, the Minister and organisations such as unions have the right to refer any type of industrial matter to the Commission, individual employees are limited to referring only particular types of industrial matters, which include claims of unfair dismissal and denied contractual benefits. A claim against an employer's refusal to employ an employee is not a claim of unfair dismissal, and the employee has no standing to bring a claim in those circumstances.

### ***United Voice WA v. The Director General, the Department of Education, Country High Schools Hostels Authority and Department for Child Protection [2013] WAIRC 01056; (2013) 93 WAIG 429***

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This matter involved a dispute between the parties in relation to negotiations for replacement industrial agreements for Education Assistants and Education Support Workers throughout the State. The parties commenced bargaining for replacement industrial agreements and the Union commenced proceedings in the Commission seeking orders and directions that the respondent employers bargain in good faith in accordance with s 42B of the Act. The proceedings were

substantial and protracted. The Commission convened 13 compulsory conferences under s 44 of the Act in the period between 13 November 2012 and 30 January 2013.

The Commission conciliated a very large number of matters arising under the claims advanced by the Union against the employers. The proceedings were complicated by reason of claims made by the Union against employers in the public health system, which were proceeding before the Commission, otherwise constituted, at the same time. The Union at various points during the dispute commenced industrial action in support of its demands. The dispute received significant publicity in the media, and ultimately was resolved through conciliation.

A significant issue in the dispute was job security, in terms of a commitment by the State Government to not contract out work undertaken by education support employees in public schools. This issue was ultimately resolved, through written undertakings given by the Premier, in the course of the resolution of the issues in dispute before the Commission.

On 11 February 2013, the *Education Assistants' (Government) General Agreement 2013* and the *Government Services (Miscellaneous) General Agreement 2013* were registered by order of the Commission: (2013) 93 WAIG 278.

### ***Minister for Corrective Services v. The Western Australian Prison Officers' Union of Workers (Application C 194 of 2013)***

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This matter relates to enterprise bargaining negotiations between the parties for a replacement industrial agreement. On 1 March 2013 an urgent application was made for a compulsory conference under s 44 of the Act, in response to the taking of industrial action by the Union involving prison officers withdrawing their labour across the State commencing 1 March 2013. The industrial action taken by prison officers related to a breakdown in enterprise bargaining negotiations between the parties and a recent in-principle wages agreement reached between the State Government and The Australian Nursing Federation, Industrial Union of Workers Perth, concerning public health sector nursing staff. The Union sought a similar wages outcome for its members.

In proceedings before the Commission on Friday, 1 March 2013 various issues were dealt with through conciliation. As a result, the Commission issued a recommendation that day that all industrial action cease by no later than Saturday, 2 March 2013 and the parties resume bargaining for a replacement industrial agreement in good faith in accordance with the terms of the Act. The Commission's recommendation was complied with and prison officers returned to duty on Saturday, 2 March 2013 in accordance with the recommendation.

Thereafter, the parties have continued bargaining in good faith with the assistance of the Commission. It is anticipated that a final agreement will be reached in the relatively near future.

This matter is of note in that the industrial action taken by prison officers is the first industrial action to take place within the State's prison system for about 10 years. This is also at a time of record high musters in prisons throughout the State, which have led to other matters coming before the Commission from time to time in response to disputes between the parties.

### ***Applications for Enforcement of Rules of an Organisation – M v. Construction, Forestry, Mining and Energy Union of Workers [2012] WAIRC 00935; (2012) 92 WAIG 1889***

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An application was made by a member of The Construction, Forestry, Mining and Energy Union of Workers (CFMEUW) for orders to be made under s 66(2) of the Act, claiming that the CFMEUW

had not observed its rules. The CFMEUW made an application to summarily dismiss the substantive application.

The Commission dismissed the application and in reasons for decision made observations about:

- (a) the scope of the powers of the President to enforce the rules of an organisation registered under the Act;
- (b) the interpretation of object clauses; and
- (c) standing to bring an application under s 66.

## Full Bench Appeals

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Below are three decisions of interest issued by the Full Bench of the Commission.

### *The State School Teachers' Union of W.A. (Incorporated) v. D [2012] 92 WAIRC 00966; (2012) 92 WAIG 1870*

In this appeal D had been employed under a four year fixed term contract. He brought an application before the Commission under s 29(1)(b)(ii) of the Act claiming that he had been denied a contractual entitlement. His claim was that he should have been re-appointed for a further four year fixed term pursuant to the terms of an agreed process. One important issue in the appeal was whether D's contract of employment could be varied. The State School Teachers' Union of W.A. (Inc) argued that the fundamental nature of a fixed term contract was that the term and the terms of the contract could not be varied. The Full Bench rejected this argument and found:

- (a) All contracts are by their very nature agreements and, as such, all contracts can be varied.
- (b) Where a change in conditions of employment is to be applied that is not contemplated by the terms of the existing contract, then change can only be implemented by consent which in law can constitute a contract to vary the first contract.
- (c) In the appeal, no issue of rescission of the earlier contract arose.
- (d) A variation to the terms of a contract of employment cannot be lawful unless a variation is by consent and it must satisfy four elements:
  - (i) The parties must have the capacity to make a contract.
  - (ii) The parties must intend their agreement to be legally binding.
  - (iii) The dealings between the parties must objectively show a concluded bargain (whether in person or through their agents).
  - (iv) There must be consideration. In particular, for the matter promised there must be some right, interest, profit or benefit accruing to one party or forbearance, detriment, loss or responsibility given, suffered or undertaken by the other party.

*M v. Lift Equipt Pty Ltd [2013] WAIRC 0049; (2013) 93 WAIG 73*

This matter was an appeal against a decision of the Commission determining that the venue of the hearing of an application be Karratha. M had sought to have the matter listed for hearing in Perth and the company requested the hearing be held in Karratha which was the place where M had been employed.

The appeal was dismissed. The reasons for decision set out a number of issues which will be of assistance to the parties in future matters if the venue of the hearing is disputed.

*United Voice v. Director General, Department of Education [2013] 00053; (2013) 93 WAIG 73*

This was an appeal against part of a decision of the Industrial Magistrate that found the respondent had not breached a subclause of the *Education Assistants' (Government) General Agreement 2010* regarding inductions for all new employees and redeployees. The Full Bench allowed the appeal. In the reasons for decision, relevant principles of interpretation that apply to legislation and construing contractual agreements were discussed together with principles that apply specifically to industrial instruments.



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## 17. Conclusion

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The Act generally continues to operate efficiently with respect to the general applications made to the Commission. There was a decrease in the number of appeals to the Public Service Appeal Board and in the number of applications by members of organisations in relation to the observance or non-observance of the rules of the organisation. There was an increase in the number of applications for conferences regarding disputed industrial matters, particularly matters in the public sector.

Claims of unfair dismissal and of denied contractual benefit constitute 24% of all matters lodged in the Commission and 34% of all matters finalised in the Commission during the reporting period. The number of claims by employees that they had been denied a benefit under their contract of employment increased marginally, while claims by employees of unfair dismissal remained steady. In relation to both claims, 80% of all matters were settled without recourse to arbitration.

In relation to claims of unfair dismissal, an issue regularly arises about whether the former employer is, or is not, a national system employer for the purposes of the operation in WA of the *Fair Work Act 2009* (Cth). Within this issue it is often apparent that the former employee does not know the correct name of his or her former employer or, in any event, does not correctly name the former employer in the Notice of Application. In some circumstances, the issue of the correct name of the former employer can be determined by the Commission on the papers without the need for formal proceedings; however, if it is not possible to decide the matter on the papers, a hearing usually will be necessary. Similarly, where the issue about whether the former employer is, or is not, a national system employer is not clear on the papers, a hearing usually will be necessary.

The fact that the Act continues to operate efficiently with respect to the general applications made to the Commission should not disguise the urgent need for the Act to be amended, particularly in relation to award modernisation, to which I have drawn attention since 2011. There are many State awards which became redundant either in whole or in part after 2006 and which require their structure, as well as their contents, to be modernised. Structurally, most State awards made before 2006 are expressed to apply to employers which since 2006 have been, and are, constitutional corporations and therefore national system employers. Sections 37 and 40B, which give power to the Commission on its own motion to cancel an award which no longer applies, or to amend an award to ensure that the award does not contain provisions that are obsolete or need updating, do not permit the Commission on its own motion to readily cancel awards or industrial agreements or amend common rule awards to remove their purported application to employers which are constitutional corporations. The Act does not permit the Commission on its own motion to re-issue these awards, and therefore legislative amendment is necessary to enable new awards to be made by the Commission to apply to the employers and employees covered by the Act and which will replace all existing State awards.

The contents of State awards also require modernisation. The parties to those awards are able to apply to the Commission to vary the award to which they are a party, however there is, perhaps understandably, no interest by parties to State awards in undertaking what might prove to be an onerous exercise. Where the employer named as a party to a State award is a constitutional corporation, they will necessarily have no interest in being involved in an award modernisation process for a document which, although they are named as a party to it, has no application to them and has not had any application to them since 2006.

I recommend prescribing in the Act a power for the Commission on its own motion to create a "modern" award to replace an existing State award or awards, and that this be given prompt attention. In addition the Commission also should be given the power on its own motion to cancel industrial agreements which no longer have application by giving public notice of an intention to do so.

I conclude this Report by thanking Ms Sue Bastian for her assistance, and the assistance of the staff of the Department of the Registrar in providing support to the Commission in the proper performance of its functions.



**(Sgd.) A.R. BEECH**

A.R. Beech  
Chief Commissioner  
13 September 2013