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 2015-16

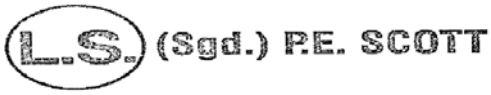
Annual Report

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

THE HONOURABLE MICHAEL MISCHIN
MINISTER FOR COMMERCE

ANNUAL REPORT 2015/16

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 2016.



Pamela Scott
Chief Commissioner

15 September 2016

1 The Western Australian Industrial Relations Commission 1
1.1 The Structure of the System 1
1.1.1 The Western Australian Industrial Appeal Court 1
1.1.2 The Full Bench 1
1.1.3 The Commission in Court Session 1
1.1.4 The President 2
1.1.5 Commissioners sitting alone 2
1.2 The Constitution of the Commission 2
1.3 The State of the Economy 3
1.4 Compulsory Conferences 3
1.5 Time taken for applications 3
1.6 Assistance to unrepresented parties 4
1.7 Public Service Appeal Board 4
1.7.1 Impediments to dealing with matters expeditiously and efficiently 5
1.7.2 Cost 5
1.7.3 Decision-making 5
1.7.4 Limitations of the Board's jurisdiction 5
1.7.5 Future of the Board 6
1.8 Conclusion 6
2 Membership and Principal Officers 6
2.1 Public Service Arbitrators 7
2.2 Railways Classification Board 7
2.3 Occupational Safety and Health Tribunal 7
2.4 The Western Australian Industrial Appeal Court 7
2.5 Industrial Magistrates Court 7
2.6 Public Service Appeal Board 7
2.7 Registry 8
3 Matters Before the Commission 8
3.1 Full Bench Matters 8
3.1.1 Constitution of the Full Bench 8
3.1.2 Appeals 8
3.1.3 Organisations – Applications by or Pertaining to 8
3.1.4 Other 8
3.1.5 Orders 8
3.2 President 9
3.2.1 Matters before the President sitting alone 9
3.2.2 Summary of s 66 Applications 9
3.2.3 Orders issued by the President 9
3.2.4 Consultations 9
3.3 Commission in Court Session 9
3.3.1 Appeals against decisions to take removal action 10
3.4 Rule Variations by Registrar 10

3.5 Boards of Reference 10
3.6 Industrial Agents Registered by Registrar 10
3.7 Awards and Agreements in Force under the Act 11
3.8 Industrial Organisations Registered as at 30 June 2016 11
4 Summary of Main Statistics 12
4.1 Western Australian Industrial Relations Commission 12
4.1.1 Notes 13
4.2 The Western Australian Industrial Appeal Court 15
4.3 Industrial Magistrates Court 15
4.3.1 General Jurisdiction 15
4.3.2 Prosecution Jurisdiction 15
5 Commentary 16
5.1 Legislation 16
5.1.1 Industrial Relations Act 1979 16
5.1.2 Industrial Relations Commission Regulations 2005 17
5.1.3 Industrial Relations (General) Regulations 1997 17
5.1.4 Industrial Relations Commission (Government School Teachers Tribunal [Elections]) Regulations 1985 17
5.2 Commission in Court Session 17
5.2.1 State Wage Case 17
5.2.2 Minimum Rate for Award Apprentices 21 years of age and over under the Minimum Conditions of Employment Act 1993 18
5.2.3 Minimum Weekly Wage Rates for Apprentices and Trainees under the Minimum Conditions of Employment Act 1993 18
5.2.4 Location Allowance General Order 18
5.3 Award Review Process 18
5.4 Right of Entry Permits Issued 19
5.5 Claims by Individuals – Section 29 21
5.5.1 Applications Lodged 21
5.5.2 Applications Finalised 21
5.5.3 Applications Lodged Compared with All Matters[1] Lodged 21
5.5.4 Applications Finalised Compared with All Matters Finalised 21
5.5.5 Matters – Method of Settlement 22
5.5.6 Demographic Data for Section 29 Applications 22
5.6 Employer-Employee Agreements 25
5.6.1 Applications to Lodge EEAs for Registration 26
5.6.2 EEAs Lodged for Registration and Finalised 26
5.7 Appeals Pursuant to Section 33P of the Police Act 1892 26
5.8 Mediation Applications pursuant to the Employment Dispute Resolution Act 2008 26
6 Matters of Interest 27
6.1 Industrial Appeal Court 27
6.1.1 Appeal against Full Bench order to register Principals' Federation of Western Australia as an organisation dismissed 27
6.1.2 Application for an order to pay costs dismissed 27

6.1.3 Full Bench found to have the power to extend time in which to institute an appeal 28

6.2 Full Bench 28

6.2.1 Appeals 28

6.2.2 Organisations that have ceased to function 31

6.3 Commission 31

6.3.1 Not for Profit Organisation held not to be a trading corporation 31

6.3.2 Former director of a company not an employee 32

6.3.3 Implied terms considered by the Commission 32

6.3.4 Bonus policy found not to be a term and condition of the employment contract 32

6.3.5 Effect of Temporary Work (Skilled) visa (subclass 457) sponsorship on the terms of the contract 33

6.4 Public Sector 33

6.4.1 General 33

6.4.2 Prisons 34

6.4.3 Public Transport 34

6.4.4 Education 34

6.4.5 Health 36

6.4.6 Reclassification claims 36

6.4.7 Public Service Appeal Board 36

6.5 Review of Decisions of the Construction Industry Portable Paid Long Service Leave Board 37

6.5.1 Employer required to make long service leave contributions for employee in receipt of workers compensation 37

6.5.2 Work on off-shore ships is not in the 'construction industry' 37

6.6 Referral of Disputes pursuant to the Owner-Drivers (Contracts and Disputes) Act 2007 37

6.6.1 Tribunal found referrals validly made and has jurisdiction to hear and determine them 38

6.6.2 Unconscionable conduct or contravention of the obligation to negotiate in good faith 38

6.7 Occupational Safety and Health Tribunal 39

1 The Western Australian Industrial Relations Commission

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.

1.1 The Structure of the System

The system of dispute resolution provided by the Act is set out below:

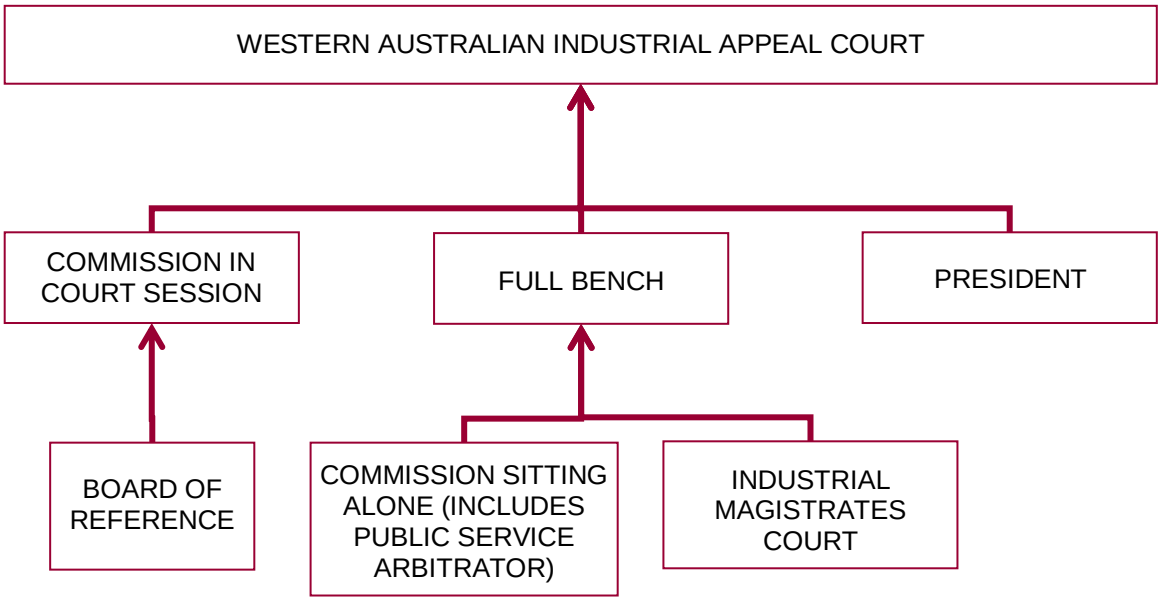


Figure 1 – Structure of the System

1.1.1 The Western Australian Industrial Appeal Court

The Western Australian Industrial Appeal Court is constituted by a Presiding Judge and two other 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.

1.1.2 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 Magistrate. 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.

1.1.3 The Commission in Court Session

The Commission in Court Session is constituted by at least three Commissioners, and deals with matters of particular importance, such as the annual State Wage Case and other important matters referred by a Commissioner, subject to the Chief Commissioner's determination.

1.1.4 The President

The President presides over the Full Bench and also sits alone to determine matters which fall within the President's jurisdiction, including applications for a stay of the operation of a decision of the Commission pending hearing and determination of the appeal by the Full Bench, applications made by the Registrar and others relating to alleged non-observance of an organisation's rules.

1.1.5 Commissioners sitting alone

The Chief Commissioner, Senior Commissioner and single Commissioners all constitute the Commission when sitting alone. They deal with a broad range of matters pursuant to the Act. The Commission is obliged to conciliate matters unless satisfied that it is unlikely to be of assistance.

The Chief Commissioner appoints Commissioners as Public Service Arbitrators to deal with matters relating to government officers. The Public Service Arbitrator also presides over the Public Service Appeal Board, which is constituted by the Arbitrator and an employer and employee representative.

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

- *Public Sector Management Act 1994*
- *Occupational Safety and Health Act 1984*
- *Mines Safety and Inspection Act 1994*
- *Employment Disputes 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*

1.2 The Constitution of the Commission

The last year has seen considerable change in the makeup of the Commission. Chief Commissioner Anthony Richard Beech retired on 26 June 2016 after serving as Chief Commissioner for 12 years and as a member of the Commission for nearly 28 years. He had a distinguished career in industrial relations and has made a significant contribution to industrial relations in this State. His stewardship of the Commission has been over a period of significant change, and he leaves the Commission in good shape. I thank him for his advice and generous support for me as I moved towards taking on his former role.

Commissioner Jennifer Harrison went on leave, pending her resignation, on 4 January 2016. She served as a member of the Commission since her appointment on 5 March 2002 and undertook conciliation and arbitration in almost all areas of the jurisdiction. She was a very effective conciliator, reflecting her belief in the benefits of parties in the workplace reaching solutions that are workable and effective for them. She was highly regarded for her sense of fairness.

Commissioner Stephanie Mayman resigned on 31 December 2015; Apart from her work in the general jurisdiction of the Commission, during the whole of her appointment, she was the Commissioner designated to exercise the jurisdiction of the Occupational Safety and Health Tribunal under section 51G of the *Occupational Safety and Health Act 1984*, meeting the requirements under s 8(3A) of the *Industrial Relations Act*. In 2008-09, Commissioner Mayman participated in a panel which undertook a national review into model occupational health and safety laws.

I express my appreciation to each of them for their work, as well as for their collegiate spirit.

Following the departures of Commissioners Harrison and Mayman, Commissioner Toni Emmanuel and Commissioner Damian Matthews were appointed to the Commission on 8 and 21 March 2016 respectively.

Commissioner Emmanuel brings to the role her significant employment law experience, as Principal Solicitor with the Employment Law Centre, and prior to that with a major law firm.

Commissioner Matthews comes to the Commission from the State Solicitor's Office where he advised and represented government in a senior capacity in a wide range of employment matters over 20 years.

With these changes, 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. It is the lowest number of members of the Commission since the Act came into operation in 1979.

With this small number of Commissioners comes the need for added flexibility. This is restricted by the requirement that the Chief Commissioner is not 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. An alternative is the abolition of the constituent authorities of the Commission, in the manner I refer to later in respect of the Public Service Appeal Board, and for those matters to be absorbed into the Commission's general jurisdiction.

1.3 The State of the Economy

As the Commission in Court Session noted in the 2016 State Wage Case decision, the Western Australian economic circumstances have changed significantly over the last two years in particular. This has had an effect on the approach taken by many parties to their negotiations for enterprise agreements. It will also have an effect on employees seeking to challenge their dismissals as employment becomes harder to find. Employees who may previously have moved on quickly from one job to another without challenging a dismissal are likely to find it more difficult to find alternative employment. History also demonstrates that in less robust economic times, where employees believe they are owed award, agreement or contractual entitlements, they are more likely to pursue them than when employment is easier to find. These issues affect both the number of applications about these matters, and the ease with which they might be resolved.

1.4 Compulsory Conferences

One of the Commission's most significant areas of work is in conciliating disputes referred by unions and employers. Applicants often request that a conference be convened as a matter of urgency to deal with issues such as threatened and impending work stoppages or other industrial action, or impending disciplinary action or dismissal. The Commission is able to utilise s 44 of the Act to summons parties as a matter of urgency.

During the reporting period, 20 applications were filed where the applicant requested an urgent conference. It is the Commission's practice to convene such conferences within 24 hours of a request.

1.5 Time taken for applications

The time taken by the Commission in dealing with applications varies depending on a number of variables.

In relation to conciliation, in most cases where the claim is for a denied contractual benefit or unfair dismissal, one conference may be sufficient to either resolve the matter or identify that it will be necessary for it to be arbitrated.

In the case of disputes referred by employers or unions, particularly where there is an ongoing relationship between the parties, there may be a series of issues that need to be addressed, and

the parties need time between conferences to consider and revise their respective positions, and the conference is then reconvened. As this process develops, some issues may be resolved and others arise. In this way, some conference applications may be on foot and subject to multiple conferences over a lengthy period including, in some cases, over a period of years.

Should a matter need to be arbitrated, the length of the hearing and the decision making process will vary depending on the nature of the matter; whether the parties are represented; the complexity of the issue or issues; whether there are jurisdictional challenges; and the number of witnesses a party intends to call.

The Commission uses a case management approach to ensure that matters proceed in an expeditious manner, and does not leave the progress of matters in the hands of the parties alone.

Administrative time for the handling of each application will also vary according to whether there are errors or omissions in the documents filed by the parties; the availability of parties when Commission staff try to contact them; the level of procedural assistance required by the parties; and whether they are represented.

1.6 Assistance to unrepresented parties

More than 75 per cent of all parties to unfair dismissal and denied contractual benefit claims are not represented by a legal practitioner or registered agent.

One of the challenges faced by the Commission staff and members of the Commission is assisting unrepresented parties with the procedural requirements necessary for them to pursue or defend a claim, while remaining neutral.

In the past, unrepresented employers and employees have had assistance to deal with these matters from the Employment Law Centre (ELC). The ELC provided legal assistance and advice to those parties who may be financially or socially disadvantaged and who have no access to a union or professional association to understand the procedural and regulatory requirements to be addressed in preparing a matter for hearing or conference before the Commission.

However, since June 2016 the ELC no longer provides this advice to parties to claims within the state jurisdiction. This fundamental access to preliminary advice has ceased due to the withdrawal of state government funding. This has resulted in the Commission bearing an added burden in dealing with such parties, and as a consequence it is not uncommon for Commissioners to refer unrepresented parties to the Registrar for procedural advice.

Proceedings frequently take longer and are more testing due to the lack of knowledge and familiarity of unrepresented parties with the system in which they need to operate. Resolution of claims is more difficult. Statistics indicate that many unrepresented parties are disadvantaged due to language and literacy difficulties, and while the Commission provides some support and guidance it is inappropriate and not the role of the Commission or the Registry to provide legal advice.

The Commission established a pro bono scheme in 2014. Six firms have generously volunteered to provide some services. However, this is often insufficient to meet the needs of some parties for even the simplest procedural advice. Each firm has indicated the scope of work and areas of expertise they can provide. Only one has indicated a willingness to deal with Public Service Appeal Board matters.

1.7 Public Service Appeal Board

The *Industrial Relations Act 1979* provides for a number of constituent authorities including the Public Service Arbitrator, the Railways Classification Board and the Public Service Appeal Board. Government officers may appeal specified decisions relating to their employment. These are dealt with by a Public Service Appeal Board. In my respectful view, formed over many years as Public Service Arbitrator, for the sake of the Commission acting expeditiously, efficiently and without loss of efficacy, the work of the Board in particular would be best absorbed into the work of the Commission under its general jurisdiction for the following reasons.

1.7.1 Impediments to dealing with matters expeditiously and efficiently

The Board is chaired by either the President or, most frequently, by a Public Service Arbitrator, who is a Commissioner of the Commission. The Board also includes a person nominated by the employer of the appellant and a person nominated by the union of which the appellant is a member, or by the Civil Service Association of Western Australia (Inc.). Each appeal requires the formation of a new Board – there is no standing Board. This means that before the Board can act on any appeal, no matter how urgent, calls for nominations need to be sent to the nominating parties, and they need to find an available and suitable person.

If the nominee has not previously been a member of the Board, it is essential that the Arbitrator provide them with an induction to their role and to the jurisdiction.

For any appeal to be listed for hearing, the availability of not merely the Arbitrator and the parties needs to be ascertained, but also that of the two Board members. Urgent matters are not able to be readily accommodated. Delays occur because of the need to coordinate the availability of all members. One matter which recently had to be listed for further hearing dates, had to be delayed for seven weeks partly due to the unavailability of one of the Board members.

The requirement to form the Board, to coordinate availability for hearings and conferral of all members, mean that listing takes longer and is more administratively time consuming than matters dealt with by the Public Service Arbitrator and Commissioners generally, sitting alone.

1.7.2 Cost

The cost of Board members' time, and any expenses associated with sitting, are usually covered by their own agency or organisation.

Over recent years, at least one organisation has regularly experienced difficulty in finding suitable representatives, and has nominated retired members. This has provided for some greater flexibility. However, these retired representatives are now paid a sitting fee by the Commission, as well as any travel expenses. This year, during the course of a protracted proceeding, one such Board member moved many kilometres away from the metropolitan area. This meant that for this Board member to participate in the proceedings, travel to Perth on quite a number of days was necessary and travel costs of hundreds of dollars, as well as sitting fees, were incurred by the Commission.

1.7.3 Decision-making

In the many Public Service Appeal Board appeals I have dealt with over nearly 20 years, on only three occasions has a Board member written a dissenting decision and, in doing so, formed the minority in the decision. Otherwise, many Board members make little, if any, contribution to the deliberations of the Board. Other Public Service Arbitrators chairing Public Service Appeal Boards confirm this view.

1.7.4 Limitations of the Board's jurisdiction

1.7.4. (a) Appeal rights

Appeals to the Board, unlike almost all matters before the Commission and the Public Service Arbitrator, are not subject to appeal rights within the *Industrial Relations Act*.

A decision of the Commission on a claim of unfair dismissal, by an employee in the private sector, or a teacher or nurse in the public sector, or by a union in respect of one of its members, is able to be appealed to the Full Bench of the Commission. However, a decision of the Public Service Appeal Board in respect of a government officer's dismissal is not.

1.7.4. (b) Conciliation/mediation

The Public Service Appeal Board does not have the conciliation powers vested in the Commission and the Public Service Arbitrator. Until the advent of the mediation process under the *Employment Dispute Resolution Act 2008* (EDR Act), no process was available to assist the parties to resolve

their disputes other than by a hearing and determination. The EDR Act, unlike the *Industrial Relations Act 1979*, requires the agreement of both parties to mediation. Therefore, while the EDR Act provides a valuable aid to the resolution, where a party refuses mediation, the matter must proceed directly to hearing. This is a significant impediment to the prospect of resolution of such claims. It may also be said to be contrary to one of the objects of the Act, 'to encourage and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes' (s 6(b)).

1.7.5 Future of the Board

In my respectful view, the work of the Board can be performed just as well, but more efficiently and with better timeliness, by a member of the Commission sitting alone. The sorts of matters dealt with by the Board are no more contentious or complex than matters generally before the Arbitrator or the Commission.

In his *Review of Western Australian Labour Relations Legislation* to the Hon G D Kierath, MLA, Minister for Labour Relations, in July 1995, Commissioner G L Fielding recommended the abolition of the Board and other constituent authorities, and that their jurisdiction be absorbed into that of the Commission in the same way as applied to the former Government School Teachers Tribunal. Dr Sally Cawley, in her recommendations to Hon J Kobelke, MLA, Minister for Consumer and Employment Protection in May 2003, endorsed Mr Fielding's recommendation "so that public sector employees become subject to the ordinary jurisdiction of the Commission. This reform is long overdue" (p44). There is much to commend this view.

The Chief Commissioner's Annual Reports over a number of years have reported various difficulties associated with the operation of the Public Service Appeal Board, a number of which are reflected in the above concerns.

If the Public Service Appeal Board is to be abolished, it would be sensible to also abolish the other constituent authorities, in particular the Public Service Arbitrator, and vest the Commission with jurisdiction to deal with those areas of jurisdiction directly, as was previously done in respect of the Government School Teachers Tribunal.

1.8 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, and to the court reporting service for their service to the Commission.

2 Membership and Principal Officers

During the year to 30 June 2016, the Western Australian Industrial Relations Commission was constituted by the following members:

President	The Honourable J H Smith (*Acting*)
Chief Commissioner	A R Beech (to 26 June 2016) P E Scott (from 27 June 2016)
Senior Commissioner	P E Scott (*Acting*) (to 26 June 2016) S J Kenner (*Acting*) (from 27 June 2016)
Commissioners	S J Kenner (to 26 June 2016) J L Harrison S M Mayman (to 31 December 2015) T Emmanuel (appointed on 8 March 2016) D J Matthews (appointed on 21 March 2016)

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

2.1 Public Service Arbitrators

Senior Commissioner P E Scott (*Acting*) continued her appointment as the Public Service Arbitrator throughout the period until her appointment as Chief Commissioner on 27 June 2016.

Commissioner S J Kenner continued his appointment as an additional Public Service Arbitrator throughout the period until his appointment as the Public Service Arbitrator on 27 June 2016.

Commissioner J L Harrison continued her appointment as an additional Public Service Arbitrator throughout the period until its expiry date of 30 April 2016.

Commissioner T Emmanuel was appointed an additional Public Service Arbitrator on 8 March 2016 This is due to expire on 7 March 2017.

Commissioner D J Matthews was appointed an additional Public Service Arbitrator on 21 March 2016. This is due to expire on 20 March 2017.

2.2 Railways Classification Board

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

2.3 Occupational Safety and Health Tribunal

Commissioner S M Mayman continued as Chairperson of the Occupational Safety and Health Tribunal until her resignation on 31 December 2015. Commissioner S J Kenner was appointed Chairperson on 1 January 2016. This appointment operates for the purposes of s 51H of the *Occupational Safety and Health Act 1984* and s 16(2D) of the Act.

2.4 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 R L Le Miere
President	The Honourable Justice G H Murphy

2.5 Industrial Magistrates Court

During the reporting period Magistrate G Cicchini exercised jurisdiction as Industrial Magistrate.

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:

Ms Cindy Barnard, Mr George Brown, Mr Doug Burrows, Ms Georgina Camarda, Mr Tony Clark, Mr Lee Clissa, Ms Bethany Conway, Mr Warren De Prazer, Mr Graham Edwards, Mr Richard Farrell, Ms Lesley Heath, Mrs Lois Kennewell, Mr Andrew Lee, Mr Greg Lee, Mr David Parker, Mr Neil Purdy, Ms Christine Porter, Mr Gavin Richards, Mr David Saunders, Mr Grant Sutherland, Ms Val Tomlin, Ms Bronwyn Trlin and Mr Simon Ward.

2.7 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* - 9-13 November 2015; 3-10 December 2015; 4-29 January 2016; 10-17 March 2016; 18 April - 2 June 2016)

3 Matters Before the Commission

3.1 Full Bench Matters

3.1.1 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)* 20

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

Chief Commissioner A R Beech 14
Senior Commissioner P E Scott *(Acting)* 12
Commissioner S J Kenner 8
Commissioner J L Harrison 4
Commissioner S M Mayman 0
Commissioner T Emmanuel 2
Commissioner D J Matthews 0

3.1.2 Appeals

Heard and determined from decisions of the:

Commission – s 49 15
Industrial Magistrate – s 84 3

3.1.3 Organisations – Applications by or Pertaining to

Cancellation/suspension of registration
of organisations pursuant to s 73 2

3.1.4 Other

Number of Full Bench matters heard but not determined in 2015/2016 3

3.1.5 Orders

Orders issued by the Full Bench 33

3.2 President

3.2.1 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) 0
Applications for an order, declaration or direction pursuant to s 66 2

3.2.2 Summary of s 66 Applications

Applications finalised in 2015/2016 2
Directions hearings 0
Applications part heard 2
Applications withdrawn by order 0
Applications discontinued by order 0

3.2.3 Orders issued by the President

Orders issued by the President from 1 July 2015 to 30 June 2016 inclusive:

Orders pursuant to s 49 (11) 0
Orders pursuant to s 66 3
References of rules by Full Bench under s 72A(6) 0
Applications pursuant to s 92 0
Remitted from the Industrial Appeal Court 0

3.2.4 Consultations

Consultations with the Registrar pursuant to s 62 of the Act 3

3.3 Commission in Court Session

The Commission in Court Session is constituted each time by three Commissioners with the exception of the 2016 State Wage 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 A R Beech 0
Chief Commissioner P E Scott 0
Senior Commissioner P E Scott (*Acting*) 1
Commissioner S J Kenner 2
Senior Commissioner S J Kenner *(Acting)* 0
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 1

3.3.1 Appeals against decisions to take removal action

These appeals are dealt with by three Commissioners sitting together. Part 3.3.1. (b) and 3.3.1. (c) have been added to this Report as a result of the *Custodial Legislation (Officers Discipline) Amendment Act (No. 29 of 2014)* which vests the Commission with a new area of jurisdiction.

3.3.1. (a) Police Act 1892

There was one appeal during this reporting period.

See also Part 5.7.

3.3.1. (b) Prisons Act 1981

There was one appeal during this reporting period.

3.3.1. (c) Young Offenders Act 1994

There were no appeals during this reporting period.

3.4 Rule Variations by Registrar

Variation of Organisation Rules by the Deputy Registrar 2

3.5 Boards of Reference

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

3.6 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 5
Total number of agents registered as corporate body 28
Total number of agents registered as Individuals 14
Total number of agents registered as at 30 June 2016 42

3.7 Awards and Agreements in Force under the Act

Year	Number at 30 June
2012	2587
2013	2577
2014	2570
2015	2458
2016	**1505**

Table 1: Awards and Agreements in Force

3.8 Industrial Organisations Registered as at 30 June 2016

	Employee Organisations	Employer Organisations
No. of organisations	42	17
Aggregate membership	**190,696**	**5,375**

Table 2: Industrial Organisations Registered as at 30 June 2016

4 Summary of Main Statistics

4.1 Western Australian Industrial Relations Commission

	MATTERS DEALT WITH			
	2012-2013	**2013-2014**	**2014-2015**	**2015-2016**
Full Bench:				
Appeals	8	19	9	18
Other Matters	7	14	5	2
President sitting alone:				
Section 66 Matters (finalised)	7	2	0	2
Section 66 Orders issued	7	3	2	3
Section 49(11) Matters	1	2	1	0
Other Matters	0	0	0	0
Section 72A(6)	0	0	0	0
Consultations under s 62	10	10	5	3
Commission in Court Session:				
General Orders	3	3	2	1
Other Matters	0	5	3	1
Public Service Appeal Board:				
Appeals to Public Service Appeal Board	19	28	18	12
Commissioners sitting alone:				
Conferences[1]	111	279	104	88
New Agreements	32	30	46	56
New Awards	0	1	1	0
Variation of Agreements	0	0	0	0
Variation of Awards	56	24	41	36
Other Matters[2]	44	50	159	130
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	1	0	0	0
Unfair Dismissal Matters Concluded:				
Unfair Dismissal claims	176	159	146	118
Contractual Benefits claims	94	104	113	121
Public Service Arbitrator (PSA):				
Award/Agreement Variations	16	4	10	11
New Agreements	0	8	20	3
Orders Pursuant to s 80E	0	1	1	0
Reclassification Appeals	34	57	61	86
TOTALS:	**624**	**803**	**747**	**634**

4.1.1 Notes

[1] CONFERENCE applications include the following:	2012-2013	2013-2014	2014-2015	2015-2016
Conference applications (s 44)	59	232	48	40
Conferences referred for arbitration (s 44(9))	12	11	12	12
PSA conferences	34	33	42	34
PSA conferences referred	4	3	2	2
TOTALS	**111**	**279**	**104**	**88**

(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:	2012-2013	2013-2014	2014-2015	2015-2016
Apprenticeship Appeals	0	4	5	7
Award applications other than for variation	NR	NR	99	0
Occupational Safety & Health Tribunal[#]	0	4	5	2
Public Service Applications	17	5	12	12
Requests for mediation	NR	NR	15	15
Road Freight Transport Industry Tribunal[##]	NR	NR	31	31
TOTALS	**17**	**13**	**167**	**65**

Table 3: Matters dealt with 2012 – 2016

#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 6.7 of this Report.

##The Tribunal operates under the Owner-Drivers (Contracts and Disputes) Act 2007 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 6.6 of this Report.

NR = not reported

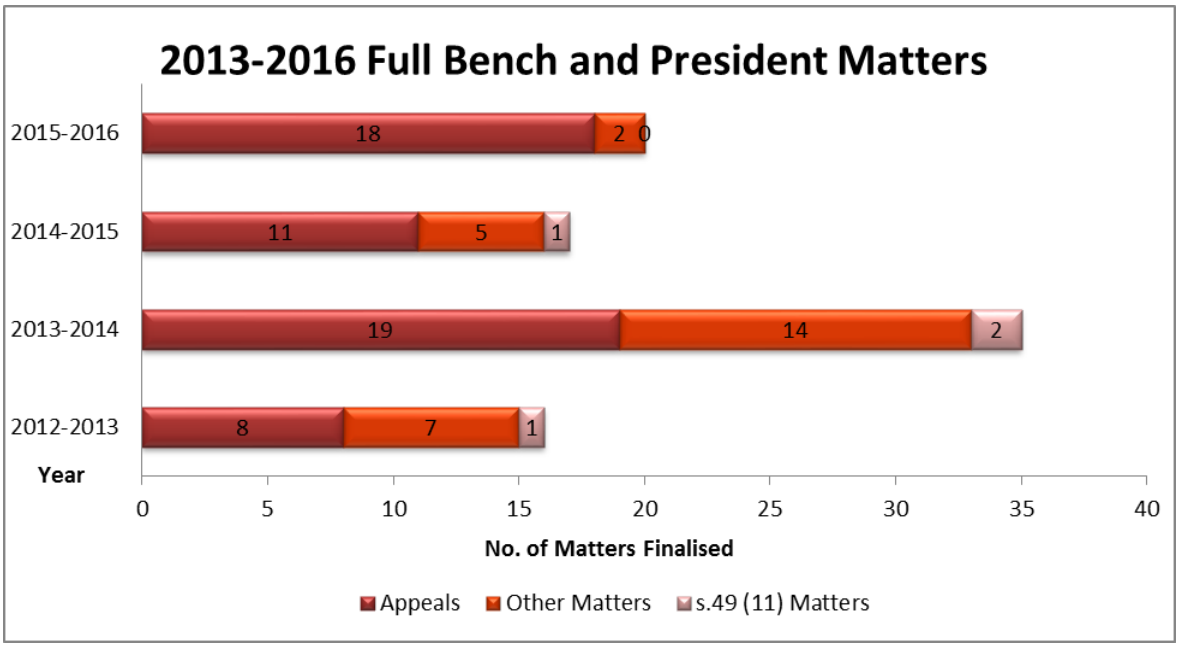


Figure 2: 2013 – 2016 Full Bench and President Matters

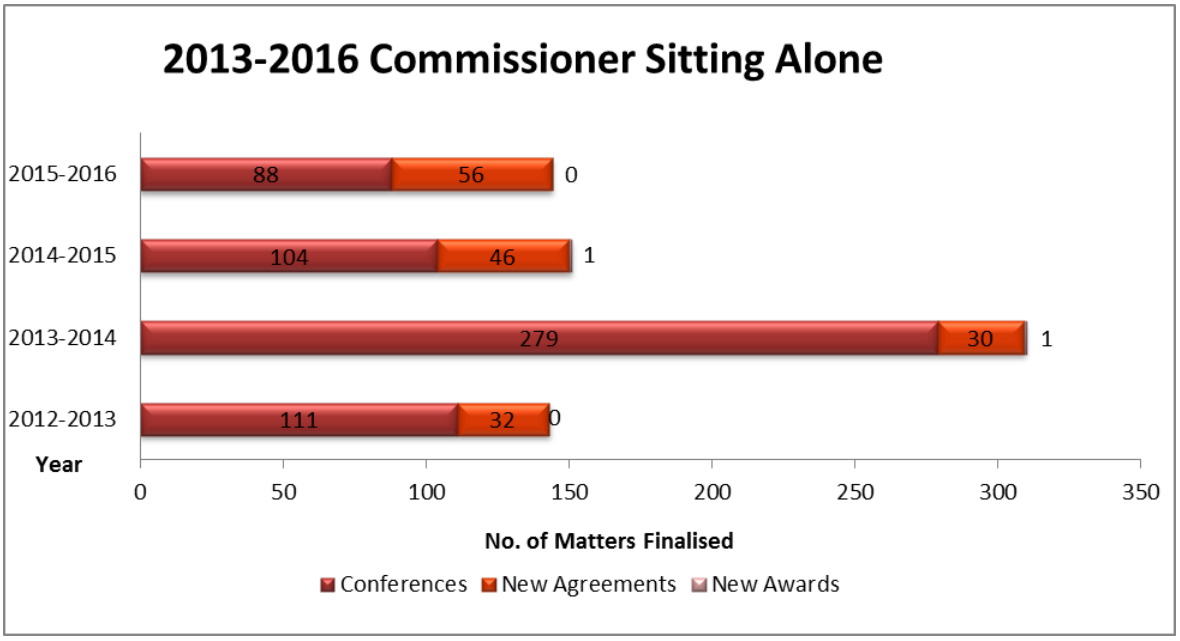


Figure 3: 2013 – 2016 Commissioner Sitting Alone

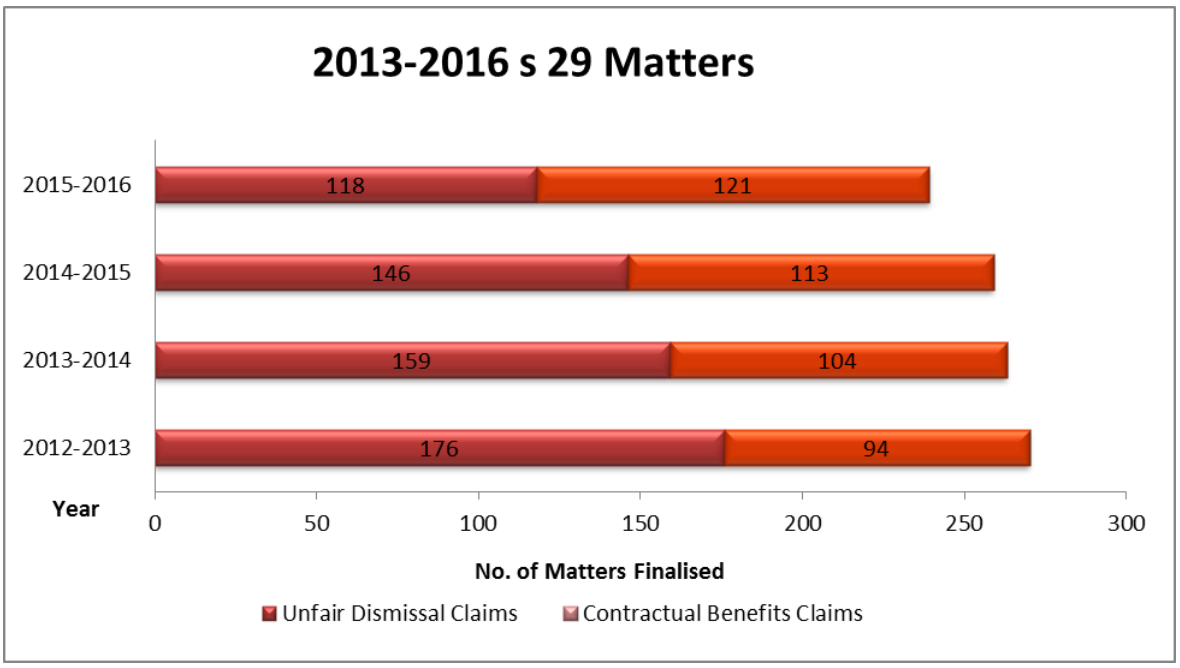


Figure 4: 2013 – 2016 Section 29 Matters

4.2 The Western Australian Industrial Appeal Court

See Part 1.1.1 of this Report.

Decisions issued by the Industrial Appeal Court during this period..... 5
Orders issued by the Industrial Appeal Court during this period 9

4.3 Industrial Magistrates Court

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

4.3.1 General Jurisdiction

The IMC hears 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 orders issued by the Commission.

4.3.2 Prosecution Jurisdiction

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* which relate to the employment of children.

The IMC Registry processed a total of 218 claims this year. The following information provides a breakdown of those matters:

Lodged Claims	218
Lodged Complaints	0
Resolved (total)	209
Resolved (lodged in the period under review)	149
Resolved but lodged in another financial period	60
Pending	79
Total number of resolved applications with penalties imposed	12
Total value of penalties imposed	$26,500
Total number of claims/complaints resulting in disbursements	19
Total value of disbursements awarded	$1,230
Claims/Complaints resulting in awarding wages	31
Total value of wages of Magistrate matters resolved during the period	$391,915

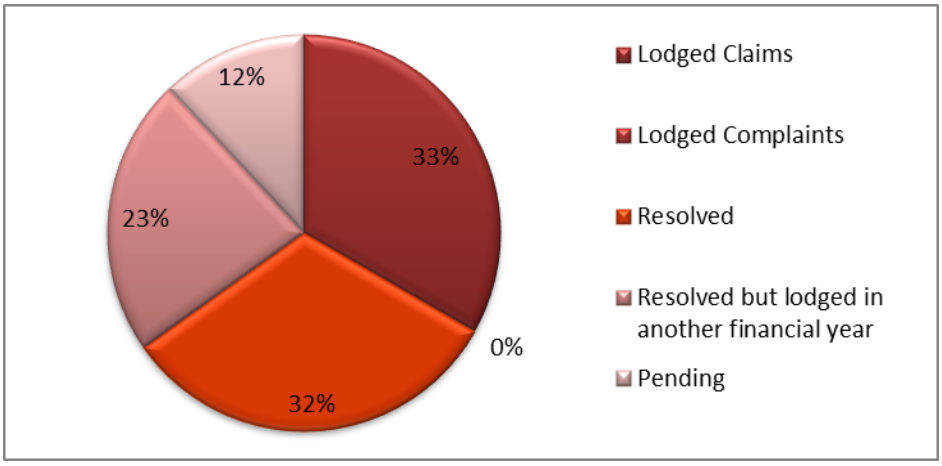


Figure 5: Industrial Magistrate Matters

5 Commentary

5.1 Legislation

5.1.1 Industrial Relations Act 1979

There were no amendments for this Act during the reporting period. However, amendments to the *Prisons Act 1981* and the *Young Offenders Act 1994* effected by the *Custodial Legislation (Officers Discipline) Amendment Act* (No. 29 of 2014) vest the Commission with a new area of jurisdiction. It allows prison officers and youth custodial officers to appeal against a decision dismissing them due to their employer's loss of confidence in them. The Commission dealing with such appeals is made up of three Commissioners, one of whom is to be the Chief Commissioner or the Senior Commissioner.

5.1.2 Industrial Relations Commission Regulations 2005

Citation	Gazettal	Commencement
Industrial Relations Commission Amendment Regulations (No. 3) 2015	21 Aug 2015 p. 3336-46	r. 1 and 2: 21 Aug 2015 (see r. 2(a)); Regulations other than r. 1 and 2: 24 Aug 2015 (see r. 2(b) and *Gazette* 21 Aug 2015 p. 3310)

These amendments included provisions for the process for an appeal by a prison officer or a youth custodial officer who has been removed for loss of confidence.

5.1.3 Industrial Relations (General) Regulations 1997

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

5.1.4 Industrial Relations Commission (Government School Teachers Tribunal [Elections]) Regulations 1985

Citation	Gazettal	Commencement
Industrial Relations Commission (Government School Teachers Tribunal [Elections]) Repeal Regulations 2015	13 Nov 2015 p. 4644-4645	r. 1 and 2: 13 Nov 2015 (see r. 2(a)); Regulations other than r. 1 and 2: 14 Nov 2015 (see r. 2(b) and *Gazette* 21 Aug 2015 p. 4644)

The Government School Teachers Tribunal was a constituent authority created by division 1 of Part IIA of the Act. Division 1 was repealed by s 10 of the *Industrial Legislation Amendment Act 1995* and these Regulations have been redundant since then. It was intended that the repeal of these Regulations could be effected by the *Labour Relations Legislation Amendment and Repeal Bill 2012* however in the absence of that Bill, it was appropriate to repeal them independently.

5.2 Commission in Court Session

5.2.1 State Wage Case

On 10 June 2016 the Commission in Court Session delivered its decision in the 2016 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 ([2015] WAIRC 00435; (2015) 95 WAIG 679).

The application for the 2016 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), Western Australian Council of Social Service, and Mr George Williams. The Minister, UnionsWA and CCIWA appeared in the proceedings and also made oral submissions.

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 $13.00 per week, bringing the minimum wage for award covered employees and award free employees covered by the MCE Act to $692.90.

The operative date was from the first pay period on or after 1 July 2016.

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 2016, there were 233 awards in force. Of those awards, some 218 were varied as a result of the 2016 State Wage Case Order.

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

5.2.2 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 $593.90 per week on and from the commencement of the first pay period on or after 1 July 2016.

5.2.3 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 2016.

5.2.4 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 prices component of the allowances and adjusts them by the Perth Consumer Price Index. Such a review was again undertaken, and the allowances contained in 81 awards were adjusted from 1 July 2016. ([2015] WAIRC 00439; (2015) 95 WAIG 700)

5.3 Award Review Process

The Commission's Registry provides information and assistance to the Commission and members of the public on matters pertaining to state awards and industrial agreements. This includes the maintenance of electronic versions of the awards and industrial agreements which are made available to the general public in consolidated form on the Commission's website at www.wairc.wa.gov.au.

During the reporting period, the number of applications relevant to awards and industrial agreements received in the Registry were:

Type of Application	Number of Applications
Application to vary an award (general)	36
Application to vary an award (public sector)	12
Application for a new industrial agreement (general)	56
Application for a new industrial agreement (public sector)	3

Table 4: Number of Award and Agreement applications

Following determination of these matters by the Commission, the Registry is responsible for ensuring that the relevant documents are accurately updated and available to members of the public in a timely fashion, via the Commission's website. Members of the public may also purchase hard copies of awards and industrial agreements if they so wish.

Of particular significance this year was the cancellation of 952 industrial agreements. These particular industrial agreements had become obsolete, either as a flow-on of the introduction of the Work Choices (Commonwealth) legislation in 2006, or because the respondent employer had ceased to trade at some point in time after the industrial agreement had been registered.

The Registry continues to provide information in terms of historical awards and industrial agreements to the Commission and the public.

5.4 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. The following permits were issued to authorised representatives of organisations:

Organisation	2012/13	2013/14	2014/15	2015/16
Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees, The	2	0	0	**1**
Australian Medical Association (WA) Incorporated	0	3	1	**1**
Australian Nursing Federation, Industrial Union of Workers Perth, The	14	13	5	**5**
Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch, The	1	3	1	**2**
Australian Workers' Union, West Australian Branch, Industrial Union of Workers, The	13	0	2	**1**
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch, The	6	1	0	**1**
Civil Service Association of Western Australia Incorporated, The	22	10	10	**5**
Electrical Trades Union WA	11	1	0	**1**
Construction, Forestry, Mining and Energy Union of Workers, The	5	1	2	**4**
Health Services Union of Western Australia (Union of Workers)	5	3	2	**1**
Independent Education Union of Western Australia, Union of Employees, The	1	3	3	**3**
Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, The	1	1	0	**0**
Shop, Distributive and Allied Employees' Association of Western Australia, The	5	11	0	**0**
State School Teachers' Union of W.A. (Incorporated), The	7	6	5	**4**
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	3	6	3	**7**
United Voice WA	38	39	18	**14**
Western Australian Municipal, Administrative, Clerical and Services Union of Employees	6	6	4	**2**
Western Australian Prison Officers' Union of Workers	0	26	13	**0**
TOTAL	140	**133**	69	**52**

Number of permits that have been issued since 8 July 2002 (gross total)..... 1713
Number of permits issued during the 2015/16 financial year..... 63
Number of people who presently hold a permit 373
Number of permits that are current..... 376
Number and names of permit holders who have had their permit removed or suspended by the Commission in the current reporting period..... 0

NB: This table does not reflect all permits issued in the reporting year

5.5 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.

5.5.1 Applications Lodged

	2012-2013	2013-2014	2014-2015	2015-16
Unfair Dismissal	157	168	116	114
Denial of Contractual Benefits	99	111	121	110
TOTAL	**256**	**279**	**237**	**224**

Table 6: Section 29 Applications Lodged

5.5.2 Applications Finalised

	2012-2013	2013-2014	2014-2015	2015-16
Unfair Dismissal	176	159	144	118
Denial of Contractual Benefits	94	104	110	121
TOTAL	**270**	**263**	**254**	**239**

Table 7: Section 29 Applications Finalised

5.5.3 Applications Lodged Compared with All Matters[1] Lodged

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

	2012-2013	2013-2014	2014-2015	2015-16
All Matters Lodged	1064	810	1632	1075
Section 29 Applications Lodged	256	279	237	224
Section 29 as (%) of All Matters Lodged	**24%**	**34%**	**15%**	**21%**

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

Table 8: Section 29 Applications lodged compared with all matters lodged

5.5.4 Applications Finalised Compared with All Matters Finalised

	2012-2013	2013-2014	2014-2015	2015-16
All Matters Finalised	797	975	1163	994
Section 29 Applications Finalised	270	263	254	239
Section 29 as Percentage (%) of All Matters Finalised	**33.9%**	**27%**	**21.8%**	**24%**

Table 9: Section 29 Applications finalised compared with all matters finalised

5.5.5 Matters – Method of Settlement

The following table shows that 73% of s 29 matters were settled without recourse to formal arbitration.

	Unfair Dismissal	Contractual Benefits	Total	%
Arbitrated claims in which order issued	26	36	62	26.7
Settled after proceedings before the Commission	45	43	88	37.9
Matters referred for investigation resulting in settlement	9	1	10	4.3
Matters discontinued/dismissed before proceedings commenced in the Commission	14	22	36	15.5
Matters withdrawn/discontinued in Registry	18	18	36	15.5
Total Finalised in 2015/16 Reporting Year	**112**	**120**	**232**	**100**

Table 10: Section 29 Applications Method of Settlement

5.5.6 Demographic Data for Section 29 Applications

The Commission began to collect demographic data 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 tables illustrate a variety of characteristics relating to applicants who have claimed redress under s 29 of the Act.

5.5.6. (a) Representation

The table following was constructed from the survey of cases over the reporting 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.

	Male	Female	No Data	Total	% Male	% Female	%No Data	%Total
Industrial Agent	11	12	0	**23**	9.1	12.4	0	**10.3**
Legal Representation	19	8	1	**28**	15.7	8.2	16.7	**12.5**
Personal	74	57	0	**131**	61.2	58.8	0	**58.5**
Other	17	20	0	**37**	14	20.6	0	**16.5**
No Data Provided	0	0	5	**5**	0	0	63.3	**2.2**
TOTAL	**121**	**97**	**6**	**224**	**100**	**100**	**100**	**100**

Table 11: Section 29 Applications – Representation

5.5.6. (b) Age and Gender Groups

Age Group	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under 16	1	1	0	**2**	0.8	1	0	**0.9**
17 to 20	1	3	0	**4**	0.8	3.1	0	**1.8**
21 to 25	7	3	0	**10**	5.8	3.1	0	**4.5**
26 to 40	49	34	0	**83**	40.5	35.1	0	**37.1**
41 to 50	27	20	1	**48**	22.3	20.6	16.7	**21.4**
51 to 60	22	23	0	**45**	18.2	23.7	0	**20.1**
Over 60	12	8	0	**20**	9.9	8.2	0	**8.9**
No Data Provided	2	5	5	**12**	1.7	5.2	63.3	**5.4**
TOTAL	**121**	**97**	**6**	**224**	**100**	**100**	**100**	**100**

Table 12: Section 29 Applications – Age Groups

5.5.6. (c) Employment Period

Period of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Under 3 months	21	8	1	**30**	17.4	8.2	16.7	**13.4**
4 to 6 months	11	7	0	**18**	9.1	7.2	0	**8**
7 to 12 months	8	12	0	**20**	6.6	12.4	0	**8.9**
1 to 2 years	9	18	0	**27**	7.4	16.6	0	**12.1**
2 to 4 years	24	17	0	**41**	19.8	17.5	0	**18.3**
4 to 6 years	16	9	0	**25**	13.2	9.3	0	**11.2**
Over 6 years	20	20	0	**40**	16.5	20.6	0	**17.9**
No Data Provided	12	6	5	**23**	9.9	6.2	83.3	**10.3**
TOTAL	**121**	**97**	**6**	**224**	**100**	**100**	**100**	**100**

Table 13: Section 29 Applications – Employment Period

5.5.6. (d) Salary Range

	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under $200 P/W	12	8	0	**20**	9.9	8.2	0	**8.9**
$201 to $600 P/W	4	16	0	**20**	3.3	16.5	0	**8.9**
$601 to $1000 P/W	21	28	0	**49**	17.4	28.9	0	**21.9**
$1001 to $1500 P/W	34	24	1	**59**	28.1	24.7	16.7	**26.3**
$1501 to $2000 P/W	19	14	0	**33**	15.7	14.4	0	**14.7**
Over $2001 P/W	31	7	0	**38**	25.6	7.2	0	**17**
No Data Provided	0	0	5	**5**	0	0	83.3	**2.2**
TOTAL	**121**	**97**	**6**	**224**	**100**	**100**	**100**	**100**

Table 14: Section 29 Applications – Salary Range

5.5.6. (e) Category of Employment

Nature of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Casual	7	16	0	**23**	5.6	16.5	0	**10.3**
Casual F/Time	4	0	0	**4**	3.3	0	0	**1.3**
Casual P/Time	0	0	0	**0**	0	0	0	**0**
Fixed Term	4	5	1	**10**	3.3	5.2	16.7	**4.5**
Full Time	27	21	0	**48**	22.3	21.6	0	**21.4**
Permanent	15	4	0	**19**	12.4	4.1	0	**8.5**
Permanent F/Time	58	33	0	**91**	47.9	34	0	**40.6**
Permanent P/Time	2	8	0	**10**	1.7	8.2	0	**4.5**
Probation	1	2	0	**3**	0.8	2.1	0	**1.3**
Part Time	3	5	0	**6**	2.5	5.2	0	**3.6**
No Data Provided	0	3	5	**8**	0	3.1	63.3	**3.6**
TOTAL	**121**	**97**	**6**	**224**	**100**	**100**	**100**	**100**

Table 15: Section 29 Applications – Category of Employment

5.5.6. (f) Reinstatement Sought by Gender

Reinstatement Sought	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Yes	23	28	0	**51**	19	28.9	0	**22.8**
No	29	38	0	**67**	24	39.2	0	**29.9**
No Data Provided	69	31	6	**106**	57	32	100	**47.3**
TOTAL	**121**	**97**	**6**	**224**	**100**	**100**	**100**	**100**

Table 16: Section 29 Applications – Reinstatement Sought by Gender

5.5.6. (g) Reinstatement Sought by Age Group

Age Groups	Yes	No	No Data	Total	%Yes	%No	%No Data	%Total
Under 16	0	1	1	**2**	0	1.5	0.9	**0.9**
17 to 20	1	3	0	**4**	2	4.5	0	**1.8**
21 to 25	2	2	6	**10**	3.9	3	5.7	**4.5**
26 to 40	15	31	37	**63**	29.4	46.3	34.9	**37.1**
41 to 50	10	17	21	**48**	19.6	25.4	19.8	**21.4**
51 to 60	16	5	24	**45**	31.4	7.5	22.6	**20.1**
Over 60	4	7	9	**20**	7.8	10.4	8.5	**8.9**
No Data Provided	3	1	8	**12**	5.9	1.5	7.5	**5.4**
TOTAL	**51**	**67**	**106**	**224**	**100**	**100**	**100**	**100**

Table 17: Section 29 Applications – Reinstatement Sought by Age Group

5.6 Employer-Employee Agreements

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

Applications which seek to register an EEA are made to the Registrar of the Commission. The legislative provisions around the lodgement and registration of EEAs are set out in the Act, within Part VID. An EEA will not be accepted for lodgement, nor will it be registered, where certain requirements of the Act have not been met.

Among those requirements is the need to conduct a comparison between the EEA and the relevant or comparable award to ensure that, on balance, the employee is not disadvantaged by the terms and conditions that would otherwise ordinarily apply to the employee.

In this financial year, the Registry received five EEAs for lodgement. Four of those EEAs were registered and one was withdrawn as a result of the resignation of the employee party.

The table below identifies statistics in relation to EEAs.

5.6.1 Applications to Lodge EEAs for Registration

Number of EEAs Lodged	2012-13	2013-14	2014-15	2015-16
Meeting Lodgement Requirements	3	4	4	5
Not Meeting Lodgement Requirements	0	0	1	0
Total	**3**	**4**	**5**	**5**

Table 18: Applications to Lodge EEAs for Registration

5.6.2 EEAs Lodged for Registration and Finalised

Outcome	2012-13	%	2013-14	%	2014-15	%	2015-16	%
Refused	1	33%	0	0	0	0	0	0
Registered	2	67%	3	100	4	80	4	80
Withdrawn	0	0	0	0	1	20	1	20
Total	**3**	**100**	**3**	**100**	**5**	**100**	**5**	**100**

Table 19: EEAs lodged for Registration and Finalised

5.7 Appeals Pursuant to Section 33P of the 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.

During the reporting period, there was one appeal filed in the Commission, which has been adjourned to later this year pending the outcome of the appellant's trial in the District Court.

5.8 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 Industrial Relations Act.

During the reporting period, 15 mediation applications were lodged, and 10 of those were finalised. Nine of those 10 had a mediation held, but one did not proceed as it settled before a mediation was held.

Two pending mediation applications from the previous reporting period were finalised during this reporting period. Of those, one did not proceed at the applicant's request. For the other, the Commission issued a report finding.

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 of significance to the State's economy, which highlights the importance of the EDR Act.

6 Matters of Interest

6.1 Industrial Appeal Court

6.1.1 Appeal against Full Bench order to register Principals' Federation of Western Australia as an organisation dismissed

The State School Teachers' Union of WA (Incorporated) appealed against an order made by the majority of the Full Bench pursuant to s 53(1) of the Act authorising the Registrar to register the Principals' Federation of Western Australia as an organisation. The central issues raised in the proceedings before the Full Bench arose out of 'overlapping coverage' of persons eligible to be members of each organisation. The Industrial Appeal Court dismissed the appeal.

Justice Buss distilled a number of principles in the decided cases in respect of the obligation placed on the Full Bench by s 55(5):

1. The Full Bench must refuse an application if there is an existing registered organisation able it to enrol as a member some or all of the persons eligible to be members of the applicant organisation, 'unless the Full Bench is satisfied that there is good reason, consistent with the objects prescribed in s 6, to permit registration'.
2. The prohibition in s 55(5) is not absolute because the Full Bench is entitled to grant an application under s 55(5), even though it would result in total or partial dual coverage, if it is satisfied that 'there is good reason, consistent with the objects prescribed in s 6, to permit registration'.
3. Section 55(5) expressly refers to *all* of the objects prescribed in s 6, not merely some of them
4. The second object in s 6(e) 'to discourage, so far as practicable, overlapping of eligibility for membership of [representative organisations of employers and employees]', is only one of the matters to be taken into account by the Full Bench. The words 'consistent with' do not mean 'advance', and the Full Bench may have regard to matters which do not advance the objects prescribed in s 6, provided those matters are consistent with those objects.
5. Section 6(e) is not intended to prohibit total or partial dual coverage. The phrase 'and to discourage, so far as practicable, overlapping' indicates that the second object in s 6(e) may yield to other legitimate objects from time to time and as the occasion demands. '[D]iscourage' does not mean 'prevent' nor does it prevent total dual coverage.
6. It is for the Full Bench to decide upon the weight to be given to the factors it is to take into account.

([2016] WASCA 3; (2016) 96 WAIG 1)

6.1.2 Application for an order to pay costs dismissed

Following the dismissal of an appeal, The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch sought an order that the Public Transport Authority of Western Australia pay its costs of the appeal. The application for an order was dismissed. In dismissing the application for costs, Le Miere J (with whom Buss and Murphy JJ agreed) made some salient observations about the discretion to make an award of costs. (It is notable that the power of the court to make an award is cast in the same terms as the power of the Commission to make such an award). His Honour observed [5]:

1. The court has no power to order the unsuccessful party to pay the costs of any other party for the services of any legal practitioner of that party unless, in the opinion of the court, 'the proceedings have been frivolously or vexatiously instituted or defended, as the case requires' by the unsuccessful party.
2. The test for enlivening the court's power to order the payment of legal costs is whether the proceedings have been frivolously or vexatiously instituted or defended, as the case may be, and not whether the proceedings are in fact frivolous or vexatious.
3. If the court is of the opinion that the proceedings were frivolously or vexatiously instituted or defended, it does not necessarily follow that where this test has been satisfied, that an order for

the payment of those costs will be made. Where the test is satisfied, the court may, nevertheless, having regard to the general policy of s 86(2) and all the circumstances of the case, decide, in the exercise of its discretion, to make no order as to costs.

4. The ordinary meaning of 'frivolously', in relation to a claim, is having no reasonable grounds for the claim. The ordinary meaning of 'vexatious' is instituting the claim without sufficient grounds for success purely to cause trouble or annoyance to the other party.

5. Something substantially more than either a lack of success, or the prospect of a lack of success, must be established before an unsuccessful party can be held to have frivolously or vexatiously instituted or defended an appeal under s 90. Not every appeal which is determined to be without merit will necessarily have been instituted frivolously or vexatiously.

([2015] WASCA 150; (2015) 95 WAIG 1593;
[2015] WASCA 150 (S); (2015) 95 WAIG 1597)

6.1.3 Full Bench found to have the power to extend time in which to institute an appeal

The Industrial Appeal Court dismissed an appeal against a decision of the majority of the Full Bench that found it has power pursuant to s 27(1)(n) of the Act to extend the time in which a party may institute an appeal.

([2015] WASCA 195; (2015) 95 WAIG 1600)

6.2 Full Bench

6.2.1 Appeals

6.2.1. (a) Interim Reinstatement Orders

Section 44(6)(bb)(ii) of the Act provides the Commission with the power to make interim orders in certain matters. In this case, the union sought an interim order that the employer continue to pay a dismissed employee pending the hearing and determination of his claim of unfair dismissal. The Commission refused to make the order and the union appealed this decision to the Full Bench. The Full Bench determined the principles to apply when considering an application for an interim reinstatement order.

The Full Bench rejected the submission that the principles that apply to the granting of an application for an interlocutory injunction should be applied when determining an application for an interim order of reinstatement where a person claims they have been harshly, oppressively or unfairly dismissed. The Full Bench also rejected a submission that s 44(6)(bb)(ii) creates a rebuttable presumption in favour of making an order unless a finding is made in the circumstances that it is inappropriate to grant the relief claimed.

The Full Bench found that the power to make an interim order of reinstatement pursuant to s 44(6)(bb)(ii) is confined only by the requirement that the order be interim and the Commission must form the requisite opinion that the order must be appropriate in the circumstances pending resolution of the claim. Further, that when considering whether an interim order would be appropriate, the Commission is bound to act in accordance with s 26(1) of the Act.

([2016] WAIRC 00125; (2016) 96 WAIG 230)

6.2.1. (b) Full Bench strikes out appeals on grounds of want of jurisdiction

The Full Bench struck out appeals against two decisions by the Industrial Magistrate dismissing claims for accrued annual leave on grounds of want of jurisdiction.

The appellants were sales consultants who were paid commission. They each claimed they were entitled to be paid annual leave accrued under the *Minimum Conditions of Employment Act 1993* (WA), the terms of which became a notional agreement preserving state award (NAPSA) pursuant to the *Workplace Relations Act 1996* (Cth) and later a transitional instrument pursuant to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

The Full Bench, after considering the jurisdiction of the Commission to determine matters and the defining characteristics of a court found the Commission is a 'court' within the meaning of s 78B of the *Judiciary Act*.

The Full Bench found it did not have jurisdiction to hear the appeals because:

(a) the claims were instituted under s 90(2) of the *Fair Work Act 2009* (Cth) for enforcement of a transitional instrument. Pursuant to s 565 of the *Fair Work Act* an appeal against a decision of the Industrial Magistrates Court (being an eligible state court exercising jurisdiction under the *Fair Work Act*) only lie to the Federal Court; and

(b) by operation of s 109 of the Constitution, s 565 of the *Fair Work Act* raised a direct inconsistency, so as to exclude the operation of s 84 of the IR Act which confers jurisdiction on the Full Bench to hear and determine an appeal against a decision of an Industrial Magistrate.

([2015] WAIRC 00862; (2015) 95 WAIG 1513)

6.2.1. (c) The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia

This matter was an industrial matter referred for hearing and determination pursuant to s 44(9) of the Act by the union. The parties were in dispute about the termination of employment of a member of the union, following a secondary disciplinary process being instituted against her.

The grounds of termination were that she had knowingly given false accounts and made a false allegation in relation to events that had occurred in an altercation she had with a station coordinator on 27 April 2013.

In earlier proceedings, Kenner C had made specific findings of fact about the incident in question. In particular he:

(a) rejected her version of events and found that the station coordinator had not conducted himself in an intimidating, threatening and aggressive behaviour as alleged by her; and

(b) found she shouted at the station coordinator and engaged with him in an inappropriate manner, pointing her finger at him and at his face while leaning towards him.

In proceedings following the termination of employment, Mayman C found the misconduct alleged by the PTA had been made out and dismissed the union's application for reinstatement. On appeal, the Full Bench found Mayman C erred.

The Full Bench found that in the absence of any direct evidence that she had deliberately concocted her version of events of the incident in question, the Commission was required to answer the question whether standing in the shoes of the employer the most probable inference that could be drawn was that she had intended to give a false account, that is she intended to conduct herself dishonestly prior to giving her first account of events.

When regard was had to the evidence and findings made at first instance, the Full Bench found that Mayman C had erred by not properly analysing the evidence and material by applying the high standard of proof referred to in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336.

The PTA unsuccessfully sought a writ of certiorari to quash this decision of the Full Bench in *V [No 2]*: *Public Transport Authority of Western Australia v Western Australian Industrial Relations Commission* [2016] WASC 135.

([2015] WAIRC 00936; (2015) 95 WAIG 1605)

6.2.1. (d) Public Transport Authority of Western Australia v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch

In *V [No 2]*, referred to above, the Full Bench remitted the matter for further hearing and determination at first instance as to whether the union member should be reinstated or alternatively be paid compensation.

After hearing the parties, Harrison C made an order of reinstatement. On appeal, the majority of the Full Bench upheld the appeal and varied the decision by making an order of compensation for loss caused by the dismissal.

In determining the appeal, the Full Bench set out principles to apply to an exercise of discretion when considering whether to order reinstatement of a claimant where a relevant circumstance is a claim by the employer that there has been a loss of trust and confidence in the claimant. These include, in summary, that the onus is on the employer to establish credible reasons why reinstatement is impracticable, and that the question to be determined by the Commission is whether there can be, in the circumstances, a sufficient level of trust and confidence restored to make the employment relationship between the employer and the claimant viable and productive.

([2016] WAIRC 00236; (2016) 96 WAIG 408)

6.2.1. (e) Entitlement to payment for pro-rata long service leave

At first instance, the Industrial Magistrate found that the employee was entitled to payment for pro-rata long service leave under the *Long Service Leave Act 1958* (WA) (the LSL Act) on grounds that she was not entitled to, or eligible to become entitled to, long service leave under an industrial agreement that was at least equivalent to the entitlement under the LSL Act.

The employee was employed as a passenger ticketing assistant for more than seven years, but less than 10 years. Her employment was covered by the terms of an industrial agreement which provides for pro-rata long service leave in limited circumstances. However, none of the circumstances set out in the industrial agreement were applicable to her.

The Industrial Magistrate found that to ascertain whether the terms of the industrial agreement were at least equivalent to the LSL Act required an analysis of the circumstances of the person applying for long service leave at the time they apply. The Full Bench found the Industrial Magistrate did not err in his approach to the interpretation of the LSL Act.

([2015] WAIRC 00918; (2015) 95 WAIG 1620)

6.2.1. (f) ANF – WA Health industrial agreement

These were two appeals that arose out of limited leave being granted to allow the Minister for Health and the Minister for Commerce representation by legal practitioners in a substantive application by the Minister for Health and the Australian Nursing Federation pursuant to s 42G of the Act to include provisions when registering an industrial agreement. The agreement containing arbitrated terms was registered by the Commission by order on 16 October 2014.

The appeals did not proceed in 2014 as the Minister for Health sought judicial review of a term of the agreement that prescribed parking fees. In *Re Harrison; Ex parte Hames* [2015] WASC 247 Beech J found that although the subject matter of parking fees to be paid by employees whose terms and conditions of employment were covered by the agreement related to an industrial matter, the term was invalid as it set fees charged by a third party which was not an employer.

After the decision in *Re Harrison*, the Full Bench listed the two appeals for cause to show why the appeals should not be dismissed.

Pursuant to s 42G(6) of the Act, no appeal lies from an order that an agreement include provisions specified by the Commission. No ground in either appeal sought to 'appeal' the decision to include provisions in the agreement. However, the appellants sought the making of an order quashing the order to include provisions in the agreement on grounds that if it is found that either appellant had been unfairly or inappropriately denied representation, this would mean the decisions were void and no decision had been made under s 42G(2) of the Act. Further, they argued that the power to quash the decision arises from the incidental power implied in s 49(5) of the Act, as the Full Bench has jurisdiction to make orders reasonably required or legally ancillary to its statutory powers.

Alternatively, it was argued that even if the questions raised in the appeals were moot, the determination of the questions would be in the public interest.

After determining it was not necessary to reconsider the question whether the powers in s 49(5) of the Act are disjunctive, the Full Bench found that it is well established that a power cannot be implied into a statutory provision that is contrary to an express provision. Thus, in the circumstances where s 42G(6) prohibits review by the Full Bench of an order made under

s 42G(2), it could not be said the order sought by the Ministers, to be reasonably required or legally ancillary, to imply a power into s 49 of the Act.

The Full Bench then went on to find the appeal by the Minister for Health was moot, and struck out the appeal. The reason for doing so was that the appeal by the Minister for Health was only against an interlocutory decision. Consequently, in this appeal no review could be made of the decision that finally disposed of the application; that is the order to register the agreement and to include specified provisions in the agreement.

The Full Bench did not, however, strike out the Minister for Commerce's appeal as this appeal was instituted against the final order of the Commission. It found that:

(a) the privative provision in s 42G(6) must be construed strictly and that a decision flawed for reasons of a failure to comply with the principles of natural justice is not a privative clause decision; and

(b) if it was satisfied that the order was reached contrary to the rules of procedural fairness that the decision was void and in these circumstances it would be open to the Full Bench to quash the whole of the order.

([2016] WAIRC 00087; (2016) 96 WAIG 210)

6.2.1. (g) Right of an employee to engage in secondary employment

The Full Bench considered the right of an employee to engage in secondary employment. It found that whilst there is no general rule that an employee cannot engage in other employment in their spare time, an employee may be in breach of the implied duty of good faith if their other employment results in an incompatibility, conflict, or the destruction of confidence with their first employer.

([2016] WAIRC 00171; (2016) 96 WAIG 295)

6.2.2 Organisations that have ceased to function

6.2.2. (a) Union of Australian College Academics

The Full Bench granted an application made by the Registrar that registration of this employee organisation be cancelled. The members sought cancellation as the organisation had effectively ceased to function as an industrial organisation and its functions had been taken over by the national body of the National Tertiary Education Union.

([2016] WAIRC 00103; (2016) 96 WAIG 261)

6.2.2. (b) Construction Contractors Association of Western Australia

The Full Bench also cancelled the registration of the Construction Contractors Association of Western Australia on application by the Registrar on similar grounds. The members of this employer organisation sought that it be deregistered as the organisation does not deal with industrial matters and is able to represent the interests of its members through a simple incorporated association.

([2016] WAIRC 00282; (2016) 96 WAIG 432)

6.3 Commission

6.3.1 Not for Profit Organisation held not to be a trading corporation

The issue whether a respondent to a claim of unfair dismissal is or is not a trading corporation regularly arises because the *Fair Work Act 2009* (Cth), with some exceptions, overrides the Act in relation to trading corporations. On some occasions, when an employer, which almost certainly is a trading corporation, is named as a respondent to the claim due to a lack of awareness by the applicant of this issue; the Registry staff will raise the issue with the applicant, and may refer the applicant for legal advice under the Commission's pro bono scheme, and the claim may be withdrawn.

Where the employer is in the not-for-profit social welfare sector, it may not be clear whether it is a trading corporation, and a preliminary hearing to decide the issue may be necessary. That was the case here where the Commission determined that a not for profit organisation is not a trading corporation. The organisation provides assistance for persons with a disability seeking employment who have been referred to them by government. The case is a useful example of how the principles to identify a trading corporation are applied to the facts.

In this case, the organisation was a party to a certified agreement registered in the Fair Work Commission, and the result of this case is that the agreement has no effect. The Commission commented that whether an employer is covered by the *Fair Work Act* is not a matter of choice by the employer, and it is an illustration of an employer assuming they are covered by the Fair Work Act without actually investigating whether in law they are covered by it.

([2016] WAIRC 00165; (2016) 96 WAIG 361)

6.3.2 Former director of a company not an employee

The distinction between a director of a company and an employee of a company was illustrated in this case where a former director was found not to have been an employee of the company.

The Commission applied the tests to determine whether a person is an employee at common law, and considered the totality of the relationship between the parties. The director was responsible for the construction side of the business as the registered builder, and the other directors were responsible for sales and administration.

The Commission considered the lack of control over the director, the "job description", the ability for the director to perform work for others, the provision of tools, the director's integration into the business, the taxation arrangements, the non-provision of employment entitlements such as annual leave, and the nature of the payments made to the director. Importantly, there was an absence of any written record noting an employment relationship.

The Commission held there was no employment relationship between the parties. As such, the director's claim for denied contractual benefits did not fall within the Commission's jurisdiction.

([2015] WAIRC 00768; (2015) 95 WAIG 1545)

6.3.3 Implied terms considered by the Commission

The Commission often is asked to imply into the contract of employment a term which is not expressly there. In this case, the applicant, a restricted legal practitioner at the time, entered into a detailed written contract of employment with a law firm that had an office in Northam. The applicant was employed for less than one month as a resident solicitor.

Despite the express terms of the written contract, the applicant argued there were a number of implied terms in the contract, and claimed six months' salary, relocation and leasing costs, travel costs, membership fees and practising certificate costs.

On the basis of the terms of the written contract and the factual matrix leading up to the applicant's employment, none of the applicant's claim was made out.

([2015] WAIRC 00466; (2015) 95 WAIG 1455)

6.3.4 Bonus policy found not to be a term and condition of the employment contract

The applicant claimed a contractual entitlement by way of payment of bonuses said to be denied to him by the employer. The applicant maintained that a bonus policy became a term and condition of his employment from shortly after his commencement. The employer contended that the policy introduced for sales staff was discretionary and not contractually binding.

The Commission was required to consider whether, by a variation to the applicant's contract of employment, the bonus became contractually binding on the respondent. In considering the relevant legal principles, in particular whether the applicant furnished any consideration for the variation. Having regard to the parties' presumed intentions from all of the circumstances, the Commission concluded that the bonus policy was not contractually binding. Furthermore, from its terms, the policy was to be applied at the sole discretion of the respondent. Accordingly, any purported contractual provision would be illusory.

([2016] WAIRC 00245; (2016) 96 WAIG 485)

6.3.5 Effect of Temporary Work (Skilled) visa (subclass 457) sponsorship on the terms of the contract

These matters involved a contractual benefit claim and unfair dismissal claim brought by the applicant against the respondents who operate a hairdressing salon. The respondents agreed to sponsor the applicant for a Temporary Work (Skilled) visa (subclass 457) (457 Visa). It was a term of the sponsorship that the applicant be paid $53,945 per annum or $27.30 per hour for a 38 hour working week.

The Commission found it was not open to the respondent to pay the applicant less than the threshold of $53,945 per annum. To do so would involve a contravention of the conditions of the respondent's sponsorship of the applicant for the subclass 457 Visa. The Commission was satisfied that the salary rate of $27.30 per hour as part of the scheme under the migration legislation was incorporated into the applicant's contract of employment.

The applicant maintained the respondent made her repay $200 per week, as they were unable to afford to continue to pay her $27.30 per hour, but provided a copy of her pay slips to the Department of Immigration and Border Protection to prove that as her sponsor, they were complying with their obligations. The Commission found that the applicant was underpaid $200 per week from October to March 2014.

The Commission noted there is no clear statement in the *Migration Act 1958* (Cth) or the *Migration Regulations 1994* (Cth) to the effect that a contract of employment formed or varied, contrary to a sponsorship obligation, is to be struck down for illegality. It then considered whether such a contract is prohibited by implication or is void or illegal on the basis of infringing public policy.

Having regard to the objects of the *Migration Act*, and the terms of the *Migration Regulations* and the statutory instruments made under them, the Commission considered that taken together, they operate to impliedly prohibit the payment of a salary to an employee which is not more than that prescribed by the Temporary Skilled Migration Income Threshold or the terms of the relevant Notice of Decision. The Commission regarded the purported variations to the applicant's contract of employment, to pay her below the salary as prescribed by the TSMIT and Notice of Decision, as illegal and unenforceable, on the ground of being contrary to public policy. The applicant's claim for contractual benefits was upheld.

In relation to the unfair dismissal claim, the Commission concluded that the applicant's lack of achievement of at least minimum levels of financial return, and the possible consequences of her ongoing employment, was canvassed with her by the respondent. This, combined with the applicant engaging in other inappropriate conduct, meant that the applicant was not denied a fair go all around.

([2016] WAIRC 00190; (2016) 96 WAIG 517)

6.4 Public Sector

6.4.1 General

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

6.4.1. (a) Disputes regarding lack of consultation

An application was referred to the Public Service Arbitrator by The Civil Service Association of Western Australia Incorporated (CSA) against the Deputy Premier and Minister for Training and Workforce Development, the Director General of that Department and a number of TAFE colleges. The CSA complained that there had been a lack of consultation with employees and the union about a decision to amalgamate 11 TAFE colleges into five TAFE colleges. Following five conferences, many of the matters in dispute have been resolved and the parties have established processes to enable them to resolve any ongoing and future issues. (PSAC 4 of 2016)

Another application was referred to the Arbitrator by the CSA against the Director General of the Department of the Attorney General (DotAG) and the Commissioner for Corrections, Department of Corrective Services (DCS). The dispute concerned a claim of a lack of consultation about the decommissioning process of a shared service arrangement, where DotAG would cease providing certain functions to DCS, and DCS would engage a private company. Following two conferences, the parties have established processes to enable them to resolve any ongoing and future issues. (PSAC 7 of 2016)

6.4.1. (b) Registerable Employee under Public Sector Management (Redeployment and Redundancy) Regulations

The Commission considered a claim by an employee aggrieved by a decision made under the *Public Sector Management Act 1994* (WA) to not make him a registrable employee. Being a registerable employee would have been a step towards voluntary severance attracting redundancy pay. The respondent objected to the application, submitting that it did not make a decision which would give the applicant standing to refer his application to the Commission.

This was the first time the Commission considered the issue of whether a decision had been 'made under' the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA) (PSM Regulations). The Commission concluded that the PSM Regulations set out how an employee may become registrable, rather than how an employee may not become registrable. The PSM Regulations do not require or authorise a decision not to make an employee registrable or the absence of a decision to make an employee registrable.

Accordingly, the respondent did not make a decision under the PSM Regulations about the applicant, and the application was dismissed for want of jurisdiction.

([2016] WAIRC 00233; (2016) 96 WAIG 534)

6.4.2 Prisons

Several disputes have been referred to the Commission by the Western Australian Prison Officers' Union of Workers in relation to staffing levels in State prisons and terms and conditions of employment.

6.4.3 Public Transport

A number of disputes were referred to the Commission by The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch involving its members at the Public Transport Authority. These included the dismissal of various classifications of employees; matters concerning terms and conditions of employment; and disciplinary matters.

6.4.4 Education

6.4.4. (a) Application for reclassification of an untrained teacher dismissed

This matter involved an application brought by United Voice WA on behalf of its member alleging the duties and responsibilities undertaken by her in connection with work she did in relation to her swimming teaching responsibilities, should be classified as that of an "untrained teacher".

The respondent maintained the member performs the duties and responsibilities of an education assistant Level 3. The respondent contended that given the importance of maintaining its numbers of fully qualified teachers at schools, as a matter of policy, it no longer supports the use of untrained teachers as permanent appointees.

The Commission found that an order requiring the respondent to sponsor an application to the Teachers' Registration Board for a Limited Authority to Teach, and an offer of a teaching position in swimming would be industrially unfair. It would impose a significant restriction on the school's capacity to utilise its limited teaching resources in the most efficient manner as it could not deploy such an employee to perform the broader functions of a classroom teacher.

([2016] WAIRC 00385; (2016) 96 WAIG 692)

6.4.4. (b) Primary School Deputy Principal properly demoted

A primary school Deputy Principal was found to have been properly demoted to Teacher after acting aggressively and inappropriately towards a student umpire, other teachers and parents at an interschool sports carnival. She was supposed to be supervising a group of girls in a Year 6 – 7 softball team.

The Commission said that a number of witnesses gave such similar accounts of the behaviour that it was highly likely that she was rude, abusive and aggressive towards a range of people when she was unhappy with the organisational arrangements for the carnival. A number of people made complaints about her behaviour which caused distress to a number of people including a student umpire and a fellow teacher.

The Deputy Principal was also alleged to have failed in her duty of care to the students by leaving the oval. The Commission found that all of the other evidence led to the conclusion that she indicated to those present an intention to leave; she packed up her belongings and stormed off. She returned after being told by the Principal not to leave the students until he got there and that she was gone for more than 5 minutes.

([2015] WAIRC 00517; (2015) 95 WAIG 1461)

6.4.4. (c) Teacher Unfairly Dismissed

A teacher whose employment was terminated for allegedly assisting Year 3 students in a National Assessment Program – Literacy and Numeracy (NAPLAN) test, and who was alleged to have referred to a student as a 'little b-tch', successfully challenged her dismissal. The Commission found that the investigation conducted by the Department of Education, the Investigation Report and conclusions, were so flawed as to be unable to be relied on. Also, the evidence of the Education Assistant who was present in the classroom when the teacher administered the test was unreliable for a number of reasons.

The Commission ordered that the teacher be reinstated.

([2016] WAIRC 0040; (2016) 96 WAIG 180)

6.4.4. (d) Teacher's Dismissal Upheld

A high school teacher in his 60s was dismissed for failing to maintain professional boundaries with a 16 year old female student. The Commission dismissed his claim that he was unfairly dismissed, finding that the teacher had:

- Exchanged personal email addresses and telephone numbers with the student, and engaged in non-school related communications with her;
- Had a close personal relationship with the student, including engaging in personal discussions about his own circumstances, being alone with the student in his classroom, allowed her to regularly hug him and reciprocate, going for coffee with her at local coffee shops on a number of occasions, both alone and with others, and had driven her in his car alone a number of times;

- On one occasion, in his car, when she was particularly upset following an altercation with another person, hugged the student, kissed her on the lips and touched her breast.

Later, when the allegations against him were being investigated, the student lied to protect the teacher and also believed that she was partly responsible because she had not stopped him.

The Commission said that the decision of the Department of Education to dismiss the teacher was appropriate in the circumstances, that a teacher who cannot maintain professional boundaries to the extent that occurred here, and does so to the point where the student lies to protect the teacher, demonstrates that the person ought not be a teacher.

([2015] WAIRC 00986; (2015) 95 WAIG 1723)

6.4.5 Health

6.4.5. (a) Non-renewal of plastic surgeon's contract

The Australian Medical Association (WA) Incorporated (AMA) claimed on behalf of a senior plastic surgeon that he was denied procedural fairness during the process of a decision being made not to renew his contract of employment. The plastic surgeon had earlier been suspended from duty following an allegation that he had been involved in threatened industrial action and had failed to comply with a verbal direction regarding the circumstances surrounding the alleged threatened industrial action. After some time, the plastic surgeon was returned to duty. No formal findings were made against him, however, the AMA said that the employer acted as if findings were made. The decision not to renew his contract was devoid of procedural fairness because, amongst other things, he was not given the opportunity to know what the employer would take into account and was not given the opportunity to be heard.

The employer argued that in a decision as to whether to renew a fixed term contract, there was no obligation on it to provide procedural fairness.

The Public Service Arbitrator concluded that in the particular circumstances the employer was not obliged to provide procedural fairness in making the decision not to renew the fixed term contract. The Arbitrator had regard to the principles that where an employer allows a fixed term contract to expire and does not offer a further contract, it is not a dismissal, and that where an employee accepts employment for a fixed term, the employee must be taken to have consented to the position that the contract comes to an end on a specified day.

([2016] WAIRC 00135; (2016) 96 WAIG 390)

6.4.6 Reclassification claims

There were a number of such matters determined by the Public Service Arbitrator, the most significant being regarding 52 positions of pharmacy assistants and pharmacy technicians employed in Western Australian public hospitals. The applicants relied in part on changes to work value applying to the pharmacy profession and to the devolution of some duties from pharmacists. The Arbitrator found that while there were some duties devolved, those duties were not of a higher level than the rest of the duties performed by pharmacy assistants and technicians.

([2015] WAIRC 00763; (2015) 95 WAIG 1488)

6.4.7 Public Service Appeal Board

An officer appealed against the employer's decision to terminate his employment. The employer claimed that the Board did not have jurisdiction because there was no dismissal but a call on the officer to retire on the grounds of ill health. It said that such a call is self-executing, in that the officer is then obliged to retire, bringing the employment to an end without the need for the employer to terminate. Therefore it said there was no decision of the employer to appeal.

The Board found that on the facts, the employer had not called on the officer to retire but had actually dismissed him.

([2016] WAIRC 00099; (2016) 96 WAIG 281)

6.5 Review of Decisions of the Construction Industry Portable Paid Long Service Leave Board

6.5.1 Employer required to make long service leave contributions for employee in receipt of workers compensation

This matter involved an application under s 50 of the *Construction Industry Portable Paid Long Service Leave Act 1985* for a review of the Board's decision concerning an employees' entitlement to long service leave contribution payments whilst off work and in receipt of workers compensation payments.

The application turned largely on the proper construction of s 34(1) of that Act and the assessment of "ordinary pay". The applicant contended that the employee, suffering a compensable injury and in receipt of workers' compensation, was not entitled to receive "ordinary pay" over the relevant period. He was not in receipt of wages as he was being paid workers' compensation, a statutory entitlement under the *Workers Compensation and Injury Management Act 1981* (WA).

The respondent contended that the statutory scheme contemplates two broad obligations which are independent of each other. The first obligation is on employers to make contributions to the fund administered by the Board. The second obligation relates to payments made by the Board to employees who meet the qualification requirement for long service leave. The respondent submitted that the obligation to pay contributions under s 34(1) is dependent on the existence of a contract of employment, and is not dependent on the actual performance of work pursuant to that contract of employment.

The Commission found that in ss 3 and 34(1) when read together, the reference to "ordinary pay" is not taken to be payments actually made to an employee, but those which are "payable". An employees' period on workers' compensation does not absolve the employer from making contributions to the Board. The application for review was dismissed.

([2015] WAIRC 00984; (2015) 95 WAIG 1709)

6.5.2 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. The Board decided 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] WAIRC 00054; (2016) 96 WAIG 144)

6.6 Referral of Disputes pursuant to the Owner-Drivers (Contracts and Disputes) Act 2007

During the course of 1 July 2015 to 30 June 2016 there have been 31 applications to the Tribunal under the *Owner-Drivers (Contracts and Disputes) Act 2007* (the OD Act). The nature of the applications made to the Tribunal have included in the main, disputes in relation to payment claims and disputes in relation to the negotiation and re-negotiation of owner-driver contracts.

Two more notable matters to come before the Tribunal are as follows.

6.6.1 Tribunal found referrals validly made and has jurisdiction to hear and determine them

The applicants claimed the contracts between the owner-drivers and the respondent were harsh and unconscionable and were terminated unlawfully. The respondent maintained the claims were beyond the jurisdiction of the Tribunal under the OD Act because the matter arose in relation to joint negotiations for an owner-driver contract, and s 47 of the OD Act says the Tribunal has no jurisdiction in such matters.

The respondent further submitted the claims were not validly referred to the Tribunal under s 40 of the OD Act, as a person must be, at the time of the referral, a party to an extant owner-driver contract.

The Tribunal found that it is matters arising from the actual process of negotiations in common, prior to the reaching of an agreement for an owner-driver contract, that are beyond the Tribunal's jurisdiction by s 47(2). Once the parties have reached an agreement arising from the process of common or joint negotiations, and have concluded an owner-driver contract, then the relevant persons are no longer "conducting joint negotiations for an owner-driver contract", because they have reached an agreement.

The Tribunal further found the issues of disengagement of owner-drivers and other matters may be, but are not necessarily, characterised as concerning the proposed variation and/or termination of the relevant owner-driver contracts, and were not matters arising from joint negotiations *for an* owner-driver contract(s).

The Tribunal held that referrals to the Tribunal under s 40(a) of the OD Act must be by persons who are parties to existing owner-driver contracts at the time of the referral to the Tribunal. In this case, the applicants' owner-driver contracts were not terminated until after the Notices of referral were filed in the Registry of the Commission, therefore the referrals were within the Tribunal's jurisdiction.

The effect of this decision limits persons who may refer disputes to the Tribunal. Due to these potential consequences, the issues arising from this decision have been brought to the attention of the State Government.

([2015] WAIRC 00995)

6.6.2 Unconscionable conduct or contravention of the obligation to negotiate in good faith

Five owner-drivers claimed that in relation to a request for a tender for the provision of scrap metal cartage services, the hirer engaged in unconscionable conduct and failed to negotiate in good faith. Damages were sought in the aggregate sum of $642,040.

Following a request by the respondent, the applicants submitted tenders for services which were not successful. Revised further tenders were submitted by the applicants, and following subsequent advice from the respondent to at least one of the applicants, a further revision of the tenders by reducing rates by 10% was submitted. Ultimately, the applicants were not successful in securing ongoing work.

As a result of these events, the applicants contended the respondent acted unconscionably, as it misused its bargaining power in forcing the applicants to reduce their rates.

The Tribunal was not persuaded that the respondent engaged in unconscionable conduct or contravened its obligation to negotiate in good faith.

The Tribunal expanded on its previous decisions in relation to the unconscionable conduct provisions of the OD Act. The Tribunal drew guidance from comparable provisions of the *Competition and Consumer Act 2010 (Cth).* It found the applicants were in no different position to all of the owner-drivers who were seeking contracts through the tender process. In seeking to

reduce the cost of transport services, the hirer was simply seeking to act in accordance with its commercial interests.

Further, the respondent was able to conclude at an advanced stage in the tender process, that the applicants were acting in their own commercial interests. They continued to submit proposals on the basis of what they saw as safe and sustainable rates, and in a competitive tender process, it was open for the respondent to select those bids considered most advantageous from the respondent's perspective. The Tribunal found that in doing so, there could be no suggestion the respondent was seeking to act unfairly or unconscionably, or that it failed to act in good faith.

([2016] WAIRC 00327; (2016) 96 WAIG 598)

6.7 Occupational Safety and Health Tribunal

In the period 1 July 2015 to 30 June 2016 there were two applications to the Occupational Safety and Health Tribunal.

A recent decision of the Tribunal of note is one in which the applicant in the matter originally commenced proceedings for a denied contractual benefit before the Commission. That application was dismissed on jurisdictional grounds on 10 August 2015. He subsequently appealed to the Full Bench. The appeal was dismissed on 10 February 2016.

The applicant then brought the matter before the Tribunal, seeking the recovery of benefits to which he says he should have been entitled to until the expiration of his fixed term contract in January 2016. The matter was listed for show cause why it should not be dismissed on jurisdictional grounds.

The Tribunal considered whether the *Mines Safety and Inspection Act 1994* (MSI Act) and the *Occupational Safety and Health Act 1984* could be regarded as having any extra-territorial effect, given the general presumption that legislation is not to operate extraterritorially. It found that there is nothing in the MSI Act to suggest that it could apply to the applicant's former employment in Malawi, in relation to occupational safety and health matters in the applicant's former workplace in Africa.

The Tribunal found it had no jurisdiction to deal with the matter, and the claim was dismissed.

([2016] WAIRC 00334; (2016) 96 WAIG 594)