2015

WESTERN AUSTRALIA

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

on the operation of the *Industrial Relations Act 1979*

1 July 2014 to 30 June 2015

Minister Responsible for the Administration of the Act

The Hon. M. Mischin, MLC in his capacity as

Minister for Commerce

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Membership and Principal Officers

Western Australian Industrial Relations Commission

During the year to 30 June 2015, the Western Australian Industrial Relations Commission (WAIRC) was constituted by the following members:

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

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

Public Service Arbitrators

Senior Commissioner P E Scott (*Acting*) continued her appointment as a Public Service Arbitrator throughout the period. This appointment is due to expire on 21 June 2017.

Commissioner S J Kenner continued his appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 25 June 2016.

Commissioner J L Harrison continued her appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 30 April 2016.

Commissioner S M Mayman continued her appointment as an additional Public Service Arbitrator. This appointment is due to expire on 9 November 2015.

Railways Classification Board

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

Occupational Safety and Health Tribunal

Commissioner S M Mayman continued as Chairperson of the Occupational Safety and Health Tribunal. This appointment operates for the purposes of s 51H of the *Occupational Safety and Health Act 1984* and s 16(2D) of the *Industrial Relations Act 1979* (the Act).

Registry

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

Ms S Bastian	**Registrar**
Ms S Hutchinson	**Deputy Registrar**
Ms S Anderson	**Deputy Registrar** (*Acting – 1 September to 3 October 2014 and 11 May to 30 June 2015)*

The Western Australian Industrial Appeal Court

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

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

Industrial Magistrates Court

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

Magistrate G Cicchini

Matters Before the Commission

1. Full Bench Matters

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

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

The Honourable J H Smith *(Acting)* 14

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

Chief Commissioner A R Beech 11
Senior Commissioner P E Scott *(Acting)* 6
Commissioner S J Kenner 4
Commissioner J L Harrison 3
Commissioner S M Mayman 4

Appeals

Heard and determined from decisions of the:

Commission – s 49 8
Industrial Magistrate – s 84 0
Coal Industry Tribunal 0
Public Service Arbitrator 0
Railways Classification Board 0
Occupational Safety and Health Tribunal 0
Road Freight Transport Industry Tribunal 1

Organisations – Applications by or Pertaining to

Applications to register an organisation pursuant to s 53(1) 1
Applications to amend the rules of a registered organisation pursuant to s 62 0
Applications relating to State branches of federal organisations pursuant to s 71 0
Applications to adopt rules of federal organisations pursuant to s 71A 0
Applications for registration of a new organisation pursuant to s 72 0
Applications seeking coverage of employee organisations pursuant to s 72A 0
Applications for cancellation/suspension of registration of organisations pursuant to s 73 4

Other

Proceedings for enforcement pursuant to s 84A brought by the Minister; the Registrar or a deputy registrar; an industrial inspector; or any organisation, association or employer 0
Questions of law referred to the Full Bench 0
Matters remitted by the Industrial Appeal Court 0
Number of Full Bench matters heard but not determined in 2013/2014 2

Orders

Orders issued by the Full Bench 13

2. President

Matters before the President sitting alone

Applications for an order that the operation of a decision appealed against be stayed pursuant to s 49(11) 1
Applications for an order, declaration or direction pursuant to s 66 1

Summary of s.66 Applications

Applications finalised in 2014/2015 0
Directions hearings 0
Applications part heard 1
Applications withdrawn by order 0
Applications discontinued by order 0

Orders issued by the President

Orders issued by the President from 1 July 2013 to 30 June 2014 inclusive:

Orders pursuant to s 49 (11) 1
Orders pursuant to s 66 2
References of rules by Full Bench under s 72A(6) 0
Applications pursuant to s 92 0
Remitted from the Industrial Appeal Court 0

Consultations

Consultations with the Registrar pursuant to s 62 of the Act 5

3. Commission in Court Session

The Commission in Court Session is constituted each time by three Commissioners with the exception of the 2015 State Wage order which was constituted by four 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 4
Senior Commissioner P E Scott (*Acting*)..... 3
Commissioner S J Kenner..... 4
Commissioner J L Harrison 3
Commissioner S M Mayman..... 3

These Commission in Court Session matters comprised of the following:

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

4. Federal Matters

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

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

5. Rule Variations by Registrar

Variation of Organisation Rules by the Deputy Registrar 4

6. Boards of Reference

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

7. Industrial Agents Registered by Registrar

Number of new agents registered during the period..... 2
Total number of agents registered as corporate body 20
Total number of agents registered as Individuals..... 17
Total number of agents registered as at 30 June 2015 37

Awards and Agreements in Force under the Industrial Relations Act 1979

Year	Number at 30 June
2011	2613
2012	2587
2013	2577
2014	2570
2015	**2458**

Industrial Organisations Registered as at 30 June 2015

	Employee Organisations	**Employer Organisations**
No. of organisations	43	18
Aggregate membership	**195,072**	**5,588**

Summary of Main Statistics

Western Australian Industrial Relations Commission

	MATTERS DEALT WITH			
	2011-2012	2012-2013	2013-2014	2014-2015
Full Bench:				
Appeals	8	8	19	9
Other Matters	9	7	14	5
President sitting alone:				
S 66 Matters (finalised)	0	7	2	0
S 66 Orders issued	21	7	3	2
S 49(11) Matters	1	1	2	1
Other Matters	0	0	0	0
S 72A(6)	1	0	0	0
Consultations under s 62	9	10	10	5
Commission in Court Session:				
General Orders	1	3	3	2
Other Matters	6	0	5	3
Public Service Appeal Board:				
Appeals to Public Service Appeal Board	40	19	28	18
Commissioners sitting alone:				
Conferences[1]	87	111	279	104
New Agreements	58	32	30	46
New Awards	0	0	1	1
Variation of Agreements	0	0	0	0
Variation of Awards	42	56	24	41
Other Matters[2]	58	44	50	159
Federal Matters	0	0	0	0
Boards Of Reference - Other Awards (Chaired by a Commissioner)	0	0	0	0
Boards of Reference – Long Service Leave	0	1	0	0
Unfair Dismissal Matters Concluded:				
Unfair Dismissal claims	188	176	159	146
Contractual Benefits claims	97	94	104	113
Unfair Dismissal & Contractual Benefits claims together	0	0	0	0
Public Service Arbitrator (PSA):				
Award/Agreement Variations	19	16	4	10
New Agreements	13	0	8	20
Orders Pursuant to s 80E	0	0	1	1
Reclassification Appeals	47	34	57	61
TOTALS:	**705**	**624**	**803**	**747**

Notes

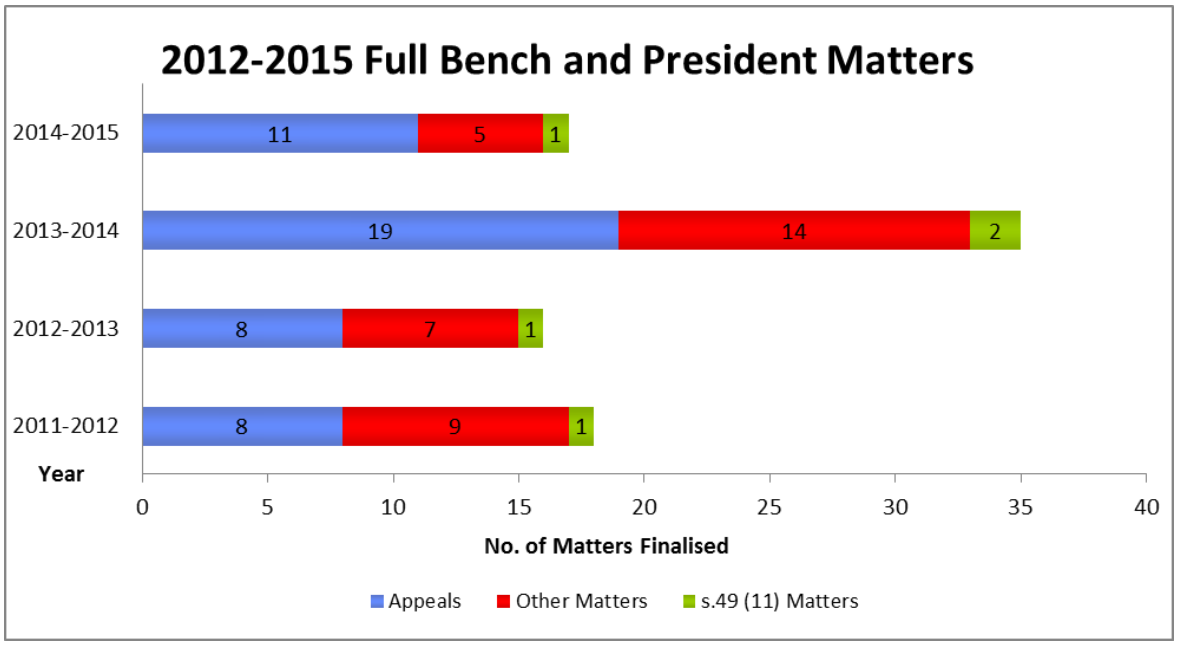
[1] **CONFERENCES include the following:**				
Conferences (s 44)	58	59	232	48
Conferences referred for arbitration (s 44(9))	5	12	11	12
Conferences divided	1	0	0	0
Conferences referred and divided	1	2	2	0
PSA conferences	18	34	33	42
PSA conferences referred	4	4	3	2
PSA conferences divided	0	0	0	0
TOTALS	**87**	**111**	**279**	**104**

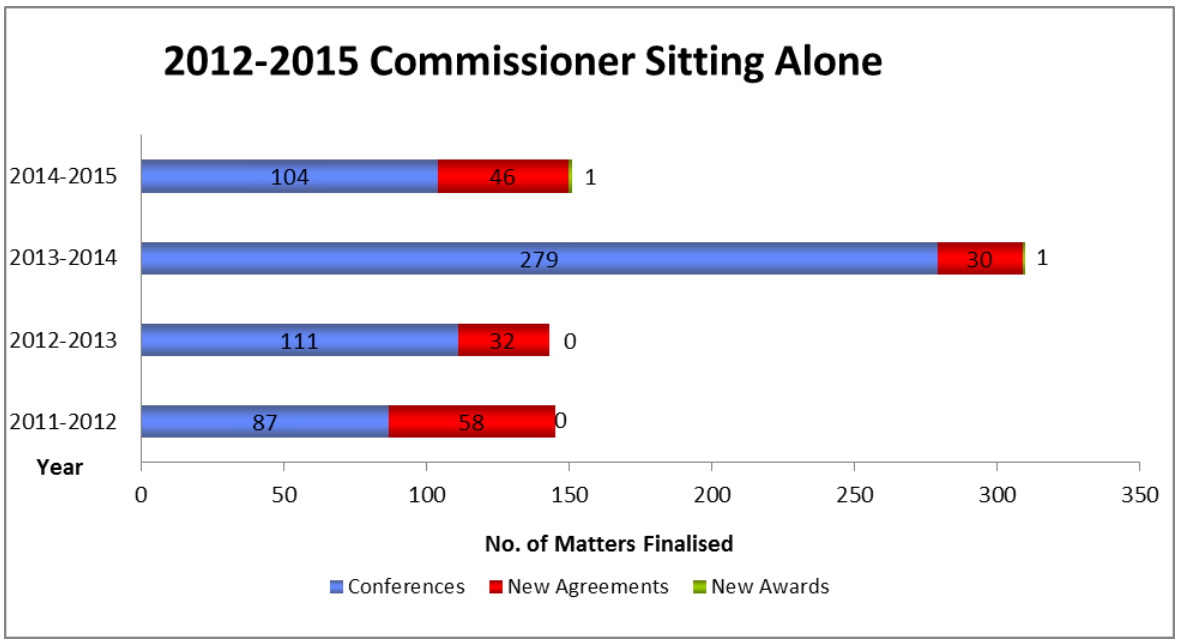
[2] **OTHER MATTERS include the following:**				
Apprenticeship Appeals	1	0	4	5
Award applications other than for variation	NR	NR	NR	99
Occupational Safety & Health Tribunal[#]	0	0	4	5
Public Service Applications	23	17	5	12
Requests for mediation	NR	NR	NR	15
Road Freight Transport Industry Tribunal[##]	NR	NR	NR	31
TOTALS	**24**	**17**	**13**	**167**

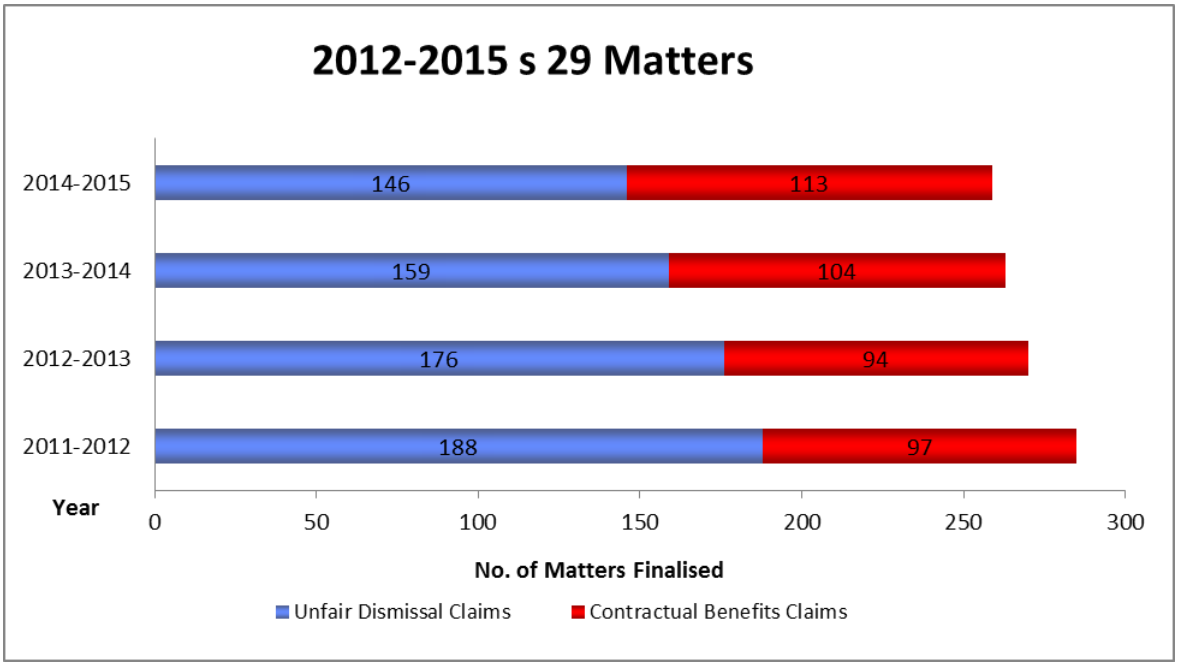
#The Tribunal operates under the Occupational Safety and Health Act 1984 *and thus its operation is outside the scope of this Report. This figure records the number of applications to the Tribunal which have been finalised. A further note on the operation of the Tribunal is at Part 14 of this Report.*

##The 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 13 of this Report.*

NR = not reported


2012-2015 Full Bench and President Matters
2014-2015
2013-2014
2012-2013
2011-2012
11
5
1
19
14
2
8
7
1
8
9
1
Year
0
5
10
15
20
25
30
35
40
No. of Matters Finalised
Appeals
Other Matters
s.49 (11) Matters


2012-2015 Commissioner Sitting Alone
2014-2015
2013-2014
2012-2013
2011-2012
104
46
1
279
30
1
111
32
0
87
58
0
Year
0
50
100
150
200
250
300
350
No. of Matters Finalised
Conferences
New Agreements
New Awards


2012-2015 s 29 Matters
2014-2015
146
113
2013-2014
159
104
2012-2013
176
94
2011-2012
188
97
Year
0
50
100
150
200
250
300
No. of Matters Finalised
Unfair Dismissal Claims
Contractual Benefits Claims

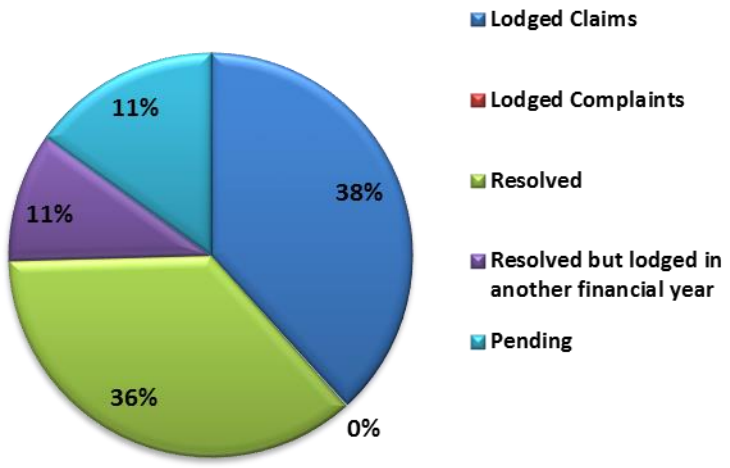
The Western Australian Industrial Appeal Court

Decisions issued by the Industrial Appeal Court during this period..... 3
Orders issued by the Industrial Appeal Court during this period 10

Industrial Magistrates Court

The following summarises the Court for the period under review:

Lodged Claims 197
Lodged Complaints..... 1
Resolved (total) 187
Resolved (lodged in the period under review)..... 133
Resolved but lodged in another financial period 54
Pending..... 83
Total number of resolved applications with penalties imposed 18
Total value of penalties imposed..... $16,250
Total number of claims/complaints resulting in disbursements..... 11
Total value of disbursements awarded $687
Claims/Complaints resulting in awarding wages 15
Total value of wages of Magistrate matters resolved during the period $66,320



General Jurisdiction

The regulations applicable to the Industrial Magistrates Court (IMC), in terms of its general jurisdiction, are the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005*.

Under this jurisdiction, Industrial Magistrates have the power to hear and determine claims lodged in the Court, in which a claimant may allege that his or her employer has breached an industrial

instrument or an Act, to their detriment. An industrial instrument may take the form of a registered award or industrial agreement, irrespective of whether that instrument was registered in accordance with the *Fair Work Act 2009* (Cth) or the *Industrial Relations Act 1979* (WA). Where such a claim is initiated in accordance with the *Fair Work Act 2009*, and the amount claimed is an amount less than $20,000, a person may choose to commence a Small Claim. In Small Claims proceedings, parties are generally unrepresented unless, in specific circumstances, leave of the Court to engage a representative is sought and granted.

In addition, the IMC's general jurisdiction empowers Industrial Magistrates to deal with claims initiated by the Long Service Leave Payments Board which allege one or more contraventions, by an employer, of certain obligations under the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA). In fact, these particular claims amount to the higher proportion of the total number of claims lodged with the Court each year.

The IMC's general jurisdiction also provides the Court with the power to deal with claims which seek to enforce Orders of the WAIRC, in circumstances where those Orders have not been complied with.

Prosecution Jurisdiction

Industrial Magistrates, when exercising powers under the IMC's prosecution jurisdiction, do so in accordance with the *Criminal Procedure Act 2004.* The Court is constituted as a court of summary jurisdiction.

In this respect, the IMC more commonly hears and determines complaints which allege that the accused (the employer) has contravened provisions of the *Children and Community Services Act 2004* (WA), which govern specific requirements and obligations around the employment of children.

Commentary

1. Legislation

INDUSTRIAL RELATIONS ACT 1979

Short Title	Number and Year	Assent	Commencement
Workforce Reform Act 2014 Pt. 2	8 of 2014	20 May 2014	1 Jul 2014 (see s. 2(b) and *Gazette* 27 Jun 2014 p. 2301)

INDUSTRIAL RELATIONS COMMISSION REGULATIONS 2005

Citation	Gazettal	Commencement
Industrial Relations Commission Amendment Regulations 2014	4 Jul 2014 p. 2389-417	r. 1 and 2: 4 Jul 2014 (see r. 2(a)); Regulations other than r. 1 and 2: 5 Jul 2014 (see r. 2(b))
Reprint 3: The *Industrial Relations Commission Regulations 2005* as at 12 Sep 2014 (includes amendments listed above)		
Industrial Relations Commission Amendment Regulations (No. 2) 2015	9 Jan 2015 p. 211-12	r. 1 and 2: 9 Jan 2015 (see r. 2(a)); Regulations other than r. 1 and 2: 10 Jan 2015 (see r. 2(b))
Industrial Relations Commission Amendment Regulations 2015	15 May 2015 p. 1721-5	r. 1 and 2: 15 May 2015 (see r. 2(a)); Regulations other than r. 1 and 2: 16 May 2015 (see r. 2(b))

INDUSTRIAL RELATIONS (GENERAL) REGULATIONS 1997

Citation	Gazettal	Commencement
Industrial Relations (General) Amendment Regulations 2014	27 Jun 2014 p. 2332	1 Jul 2014 (see r. 2 and *Gazette* 27 Jun 2014 p. 2301)

2. State Wage Order Case

On 11 June 2015 the Commission in Court Session delivered its decision in the 2015 State Wage order case pursuant to s 50A of the Act. Section 50A requires the Commission before 1 July in each year, to make a General Order setting the minimum weekly rate of pay applicable under the *Minimum Conditions of Employment Act 1993* (MCE Act) to adults, apprentices and trainees, and to adjust rates of wages paid under awards.

The application for the 2015 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 Ms Meri Forrest. 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 $14.00 per week from the first pay period on or after 1 July 2015.

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

Staff within the Registry Services branch provided administrative support and assistance to the Commission by undertaking preparatory work and testing of the Department's automated State Wage case processing system. Each one of the Commission's awards was varied in accordance with the State Wage Order, and updated versions of the awards were made available to members of the public, by way of the Commission's website, on the morning of 1 July 2015.

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

On 16 June 2015, the Commission in Court Session, on its own motion, issued a State Wage order pursuant to s 50A of the Act increasing the minimum weekly rate of pay prescribed for the purpose of the MCE Act to $679.90 on and from the commencement of the first pay period on or after 1 July 2015.

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

The State Wage order referred to above ordered that the minimum weekly rate of pay applicable under s 14 of the MCE Act to an apprentice who has reached 21 years of age shall be $584.20 per week on and from the commencement of the first pay period on or after 1 July 2015.

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

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

Apprentices under the MCE Act refer to the class of apprentice to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into. For this class of apprentice, it was ordered that the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award*. The date of operation was the commencement of the first pay period on or after 1 July 2015.

Trainees under the MCE Act refer to the class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into. The Commission ordered that for this class of trainee, the minimum weekly rate of pay at the relevant Industry/Skill level is based on the *Metal Trades (General) Award.* The date of operation was the commencement of the first pay period on or after 1 July 2015.

6. Public Service Arbitrator and Public Service Appeal Board

Public Sector – General

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

Disputes regarding lack of consultation

In last year's Report, it was noted that the Civil Service Association of Western Australia Incorporated (CSA) referred to the Public Service Arbitrator a number of claims regarding public sector agencies not complying with the obligations to provide information and consult with employees and the union regarding decisions relating to change within those organisations. The matter involving the CSA and the Department of Finance, where a number of positions were to be abolished, has since been resolved. Conferences in that process also involved the Public Sector Commission due to the issue of the registration of employees for redeployment (*CSA v Director General, Department of Finance* PSAC 13 of 2014).

The CSA also referred to the Public Service Arbitrator disputes regarding the failure of a number of government agencies to comply with notification and consultation requirements regarding the announcement by the State government of targeted voluntary severances of approximately 1,500 positions, and in particular with the impending application of the *Workforce Reform Act 2014*. Issues in regard to particular agencies have been the subject of a number of conferences and others are anticipated (*CSA v Department of Commerce and others* PSAC 30 of 2015).

Representational Rights

This matter first arose in 2013, and the Public Service Arbitrator convened a series of conferences in an attempt to have the parties agree on the scope of representational rights for employees undergoing disciplinary processes. Some government agencies were refusing to allow CSA officials and industrial officers to be present or to speak on behalf of the officer concerned undergoing the disciplinary process. The matter was held in abeyance as the parties thought the issue may be resolved as part of their enterprise bargaining negotiations. However, it was not resolved in that process. The CSA is currently considering whether to pursue the matter through arbitration (*CSA v Director General, Department of Commerce and others* P 2 and P 3 of 2013; *CSA v Director General of Housing* PSAC 1 of 2013).

Use of fixed term contract

The use of fixed term contracts within the public sector continues to be an issue causing dispute. The Public Service Arbitrator convened conciliation conferences regarding industrial action being taken by members of the CSA regarding the restructure of staffing arrangements and the use of fixed term contracts at Customer Contact Centres and Vehicle Licencing Centres. Following a number of conferences and recommendations by the Commission as part of conciliation, this matter was resolved (*CSA v. Director General, Department of Transport* PSAC 3 of 2015).

Registered agreements

The Public Service Arbitrator registered a number of agreements between public sector agencies and the CSA and other unions. The *Public Service and Government Officers General Agreement 2014* (PSAAG 7 of 2014) covers 39,000 public sector employees employed in more than 100 agencies. Agency specific agreements for a number of particular agencies were also registered.

Classification Matters

Conferences were convened regarding a dispute about the calculation of commuted allowances for Disability Services Commission staff working in hostels providing care to disabled people. The matter was resolved by conciliation and the parties agreed a new formula for the calculation in some circumstances (*CSA v Disability Services Commission*, PSAC 17 of 2014).

Public Sector – Health

Restructuring

The restructuring of public health facilities and consequential effects upon the workforce due to the opening of Fiona Stanley Hospital and the closure of the emergency department and other services at Fremantle Hospital have resulted in a number of disputes.

(a) A series of conferences regarding both workforce wide and individual matters associated with the location of particular services have been held. In respect of medical practitioners represented by the Australian Medical Association (WA) Incorporated (AMA), there have been conferences regarding the gastroenterology services at Royal Perth Hospital being reduced and moved to Fiona Stanley Hospital (C 29 of 2014); and contractual arrangements for doctors moved from Royal Perth Hospital and Fremantle Hospital to Fiona Stanley Hospital (PSAC 13 of 2015).

(b) In respect of support staff, United Voice WA referred matters to the Commission in respect of the uncertainty of staffing arrangements and the filling of vacancies causing disputation within the public health system (*United Voice WA v. The Minister for Health* C 25 of 2014).

(c) The Health Services Union of Western Australia (Union of Workers) (HSU) referred a number of matters relating to the transfer of Social Workers (*HSU v. The Director General of Health* PSAC 8 of 2014; *HSU v. The Director General of Health* PSAC 1 of 2015); Security Officers' roster at Fremantle Hospital as a consequence of the closure of the Emergency Department at that hospital (PSAC 5 of 2015); and transfers and skill levels (*HSU v. The Director General of Health* PSAC 10 of 2015).

Health Services Union Enterprise Agreement

(a) Negotiations

The Commission convened a series of conciliation conferences of its own motion to deal with ongoing disputation between the HSU on behalf of its professional, administrative, clerical, technical and scientific (PACTS) staff members within the public health system relating to the failure of the parties to reach a new enterprise bargaining agreement. The parties had been able to reach agreement on almost all matters, however, the significant issue of the level of salary increase was not able to be resolved. The parties accepted the Commission's recommendation on the operative date for the rate of increase, and agreed that the Commission determine the rate of salary increase pursuant to s 42G of the Act.

This particular dispute illustrates the benefits to the parties, the State, and in this case to the public health system, of the Commission's use of its powers under s 44 to call parties together, either of its own motion or at the instigation of one of the parties, to settle industrial disputes.

Section 42G also has the benefit of enabling the Commission to break deadlocks in respect of enterprise bargaining agreements by determining matters that, if not able to be agreed, would prevent the resolution of a whole agreement.

The HSU sought increases of 4% from 1 July 2014 and 5% from 1 July 2015. The Minister had offered 2.75% and 2.5% respectively.

The HSU claimed that higher increases than those offered were warranted partly because other groups within the WA public health system, in particular registered nurses and medical practitioners, had received more favourable increases. They also claimed that there were efficiencies, improvements and increased complexity in the work of the PACTS, and they had contributed to the unprecedented level of change within the public health system, including new hospitals and funding changes.

The Minister for Health submitted that the offer exceeded the Consumer Price Index for 2014/15 and matched the CPI forecast for 2015/16. The Minister also said that comparisons with other occupational groups are not relevant because each set of negotiations is unique and takes account of different factors. The Minister also argued that the State's financial position made higher increases inappropriate and said that the pay increases ought to be in line with the State government wages policy, which is a necessary strategy for addressing the financial problems being encountered by the State.

This was the first time the Commission has arbitrated salary increases in government employee agreements since the Act was amended to insert the requirement for the Commission to take account of the Government's Public Sector Wages Policy Statement, the financial position and fiscal strategy of the State.

The Commission noted that in deciding on a fair outcome, it is required to balance a range of considerations, including economic factors, the interests of the persons immediately concerned, where appropriate, the interests of the community as a whole, the Public Sector Wages Policy Statement, and the State's financial position and strategy. Each of those considerations is to be given its own weight.

The Commission said that the application of the government wages policy from November 2013 needs to rest upon an equitable basis. The HSU had shown that in its case, the policy did not rest on an equitable basis. The PACTS are part of a health workforce that, in the cases of registered nurses and medical practitioners, received the higher wage or salary increases available under the 2009 government wages policy. The salary increases under the 2014 Agreement are significantly lower. It produced a situation where the PACTS were making a greater contribution to the recovery of the State's financial position and fiscal strategy than the medical practitioners, registered nurses and support staff with whom they closely work. That was inequitable.

The HSU had also shown that since the 2011 Agreement there are changes in productivity and efficiency in the work performed, and in the 2014 Agreement that had occurred or were likely to occur. Although the extent of productivity improvements and the value to be attached to them is controversial, there was a need to facilitate the efficient organisation and performance of work according to the needs of the Department of Health.

Although the government wages policy had been shown to have been exceeded by the government in the case of registered nurses and United Voice WA enrolled nurses, the background of wage agreements reached on the basis of government wages policy in 2014 for police, firefighters, general public servants, teachers, TAFE lecturers and various public transport authority groups is compelling. It demonstrated a recognition of the significantly changed economic circumstances applying now than applied at the time the registered nurses and medical practitioners agreements were made.

The Commission concluded that the HSU has shown that it has not had a fair go and that fairness required a salary increase in excess of projected CPI. While it was clear that there is no historical link or nexus between the salary increases of PACTS and those of registered nurses and medical practitioners, it was unhelpful and not conducive of productive working relationships, for there to be a significant disparity over time.

(b) Arbitration

The Commission then proceeded to decide on salary increases for approximately 16,000 PACTS employed in the WA public health system, of 3.75% from 1 July 2014 and 3.00% from 1 July 2015. (*The Minister for Health v HSU* [2015] WAIRC 00332; (2015) 95 WAIG 526, PSAAG 19 of 2014).

Reclassification matters

The following reclassification claims were dealt with during the year:

(a) Regional Managers, Mental Health at WA Country Health Service
(b) Area Chief Medical Imaging Technologist
(c) Technician (Physics) in the Medical Engineering and Physics Department, Royal Perth Hospital
(d) Senior Medical Scientist at PathWest
(e) Credentialing Coordinator, South Metropolitan Health Service
(f) Pharmacy Assistants at Narrogin Hospital

Plastic surgeon's claim for damages following suspension

The AMA claimed over $200,000 in damages on behalf of a senior plastic surgeon for loss of on-call and call-back allowances and private practice income due to his suspension.

The senior plastic surgeon, who was also Head of Plastic Surgery at Royal Perth Hospital, was stood down while the Hospital undertook a preliminary enquiry into alleged threatened industrial action by the medical staff of the plastic surgery department. No formal investigation was undertaken and no action was taken against the plastic surgeon. A number of months later, he was invited to return as a plastic surgeon but not as Head of Department, and he declined to return until the issue of his return as Head of Department was also resolved. Ultimately, he was required to return as a plastic surgeon and he negotiated to return to the role of Head of Department on an interim basis pending the advertising and formal appointment of a new Head of Department. He was absent from work for a period of approximately 12 months.

The AMA claimed that the entitlements to on-call and call-back allowances and private practice income, which are set out in an enterprise agreement, were incorporated into the plastic surgeon's contract of employment and therefore the Public Service Arbitrator could award damages for their loss.

The Public Service Arbitrator found that it has power to award compensation or damages for loss of a benefit arising under a contract of employment. However, in this case, the words used in the contract did not have the effect of incorporating the benefits into the contract.

The Public Service Arbitrator also found that, even though the employer had undertaken in the letter suspending the plastic surgeon, to maintain him on full pay or to pay him as if he had attended for duty, the on-call and call-back allowances were not part of his full pay but were disability payments due to be paid when the disability was experienced. The private practice income was not a benefit under the contract – the right to private practice was, but the income came directly from patients in the public hospital who had opted to be treated as private patients.

Finally, it was found that even if damages for loss of private practice income were due, the evidence provided did not allow any assessment of the loss said to have been suffered or of any mitigation of the loss. The matter was dismissed. (*AMA v The Minister for Health* [2015] WAIRC 00008; (2015) 95 WAIG 163)

Non-renewal of medical practitioner's contract an industrial matter

The Public Service Arbitrator found that there is jurisdiction to amend a claim to deal with a decision by the employer to not offer a medical practitioner a new contract when the existing fixed term contract expired.

The AMA originally made an application to the Public Service Arbitrator to deal with a claim that the medical practitioner had been treated unfairly and unlawfully when the employer suspended the medical practitioner pending a decision on whether to undertake a formal disciplinary inquiry into the practitioner's conduct.

There was a period of time during which the conciliation process was undertaken and when the parties had private discussions. During that time, the medical practitioner's contract was due to expire. The employer did not offer a new contract and the AMA said that this was due to the allegations about the employee's conduct and the findings made about it.

The AMA sought to amend the application to include the issue of the non-renewal of the contract. The employer objected, saying that the Public Service Arbitrator does not have jurisdiction to deal with the non-renewal of the contract. The employer also argued that there is a public sector standard, the Employment Standard, and therefore the Public Service Arbitrator is excluded from dealing with the matter.

The Public Service Arbitrator found that whilst the Public Service Appeal Board may not be able to deal with a non-renewal of a contract of employment because an appeal before it relates to a dismissal, in this case the matter relates not to a dismissal but to an industrial matter which is within the Public Service Arbitrator's jurisdiction.

The Public Service Arbitrator also found that the Employment Standard relates to a particular matter, that is the filling of a vacancy, and the issue before the Public Service Arbitrator is not about that matter but about the non-renewal of the contract and therefore there is no limitation on the Public Service Arbitrator's jurisdiction because of the Employment Standard. Therefore, the application could be amended and the expanded matter can be dealt with by conciliation and arbitration. (*AMA v The Minister for Health* [2015] WAIRC 00333; (2015) 95 WAIG 590).

Public Service Appeal Board

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

A decision of interest is listed below.

Profiting from government subsidised housing breached the obligation of fidelity and good faith

The appellant, a Housing Services Team Leader based in Karratha, was dismissed by the Department of Housing for misconduct in connection with her residential tenancy and appealed to the Public Service Appeal Board. The appellant had been provided with a subsidised rental property under the Government Regional Officers' Housing scheme. The Appeal Board dismissed the appeal, finding that the appellant accepted payments from an occupier that exceeded the appellant's rental payments. The appellant actively sought to conceal the true nature of those payments by asking the occupier to not call them "rent". The appellant also failed to disclose the payments to her Area Manager when an opportunity arose. The appellant was found to have used her substantial benefit of subsidised housing for personal gain.

The Appeal Board found that while the arrangement between the occupier and the appellant was not "subletting" in the strict sense, by receiving and concealing the substantial payments, the appellant failed to act with fidelity and good faith towards her employer. The appellant's conduct breached her contract of employment, the *Public Sector Management Act 1994* (WA), the Department's Code of Ethics and the Code of Conduct. In coming to its decision, the Appeal Board considered the operation of the *Residential Tenancies Act 1987* (WA) and relevant case law.
Civil Service Association v Director General, Department of Housing [2014] WAIRC 01232; (2014) 95 WAIG 196.

Members of the Board over the Last Year

The following people have served as members of Public Service Appeal Boards on the nomination of a party pursuant to s 80H of the *Industrial Relations Act 1979*:
Ms Michelle Andrews, Ms Cindy Barnard; Mr George Brown, Mr Nick Cinquina, Mr Tony Clark, Ms Michelle Conroy; Ms Bethany Conway, Ms Elizabeth Hides; Mr Peter Humphries; Mr Greg Lee, Mr Alex Lyon, Ms Mary McHugh, Ms Christine Porter; Mr Gavin Richards, Ms Cathy Sullivan; Mr Grant Sutherland, Ms Christine Thompson, Mr Carlo Tognolini, Ms Valerie Tomlin, Mr Simon Ward and Mr John Wood.

7. Award Review Process

The Department's Registry Services Branch has dedicated officers who provide information and assistance to the Commission and members of the public on matters pertaining to State awards. The same officers are also responsible for the maintenance of electronic versions of awards available to the general public in consolidated form on the Commission's website.

During this year, the number of applications relevant to awards received in the Registry were:

Type of Application	Number of Applications
Application for a new award (general)	1
Application to vary an award (general)	40
Application to vary an award (public sector)	10

Following determination of these matters by the Commission, Registry Services staff provided administrative assistance in terms of updating the Commission's case management system and ensuring that current and accurate information was made available to members of the public via the Commission's website shortly thereafter.

The Commission also, on its own motion, cancelled 20 awards. In some cases, the Registry assisted the Commission in undertaking reviews of the awards to analyse whether those awards may still be relevant. That question is often determinable from information compiled which would indicate whether there were still employees within the State industrial relations system to which a particular award applied. At the direction of the Commission, those reviews are undertaken in accordance with section 47 of the Act.

The Registry Services branch continues to receive enquiries from members of the general public concerning historical awards. Registry Services officers assist customers to locate the required information within the Western Australian Industrial Gazette, or in some cases, from the Commission's website. Information of this nature is often sought to support related claims commenced in other jurisdictions.

8. Right of Entry Permits Issued

Organisation	2011/12	2012/13	2013/14	**2014/15**
Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees, The	2	2	0	**0**
Australian Medical Association (WA) Incorporated	0	0	3	**1**
Australian Nursing Federation, Industrial Union of Workers Perth, The	0	14	13	**5**
Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch, The	2	1	3	**1**
Australian Workers' Union, West Australian Branch, Industrial Union of Workers, The	4	13	0	**2**
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch, The	5	6	1	**0**
Civil Service Association of Western Australia Incorporated, The	20	22	10	**10**
Electrical Trades Union WA	3	11	1	**0**
Construction, Forestry, Mining and Energy Union of Workers, The	0	5	1	**2**
Health Services Union of Western Australia (Union of Workers)	4	5	3	**2**
Independent Education Union of Western Australia, Union of Employees, The	2	1	3	**3**
Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, The	0	1	1	**0**
Shop, Distributive and Allied Employees' Association of Western Australia, The	0	5	11	**0**
State School Teachers' Union of W.A. (Incorporated), The	5	7	6	**5**
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	4	3	6	**3**
United Voice WA	93	38	39	**18**
Western Australian Municipal, Administrative, Clerical and Services Union of Employees	3	6	6	**4**
Western Australian Prison Officers' Union of Workers	9	0	26	**13**
TOTAL	**156**	140	**133**	**69**

Number of permits that have been issued since 8 July 2002 (gross total 1650

Number of permits issued during the 2013/14 financial year 74

Number of people who presently hold a permit..... 397

Number of permits that are current 401

Number and names of permit holders who have had their permit removed or suspended by the Commission in the current reporting period. 0

9. Claims by Individuals – Section 29

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

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

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

Section 29 Applications Lodged

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

	2011-2012	2012-2013	2013-2014	2014-2015
Unfair Dismissal	187	157	168	116
Denial of Contractual Benefits	85	99	111	121
TOTAL	**272**	**256**	**279**	**237**

Section 29 Applications Finalised

	2011-2012	2012-2013	2013-2014	2014-2015
Unfair Dismissal	188	176	159	144
Denial of Contractual Benefits	97	94	104	110
Both in same application	0	0	0	0
TOTAL	**285**	**270**	**263**	**254**

Section 29 Applications Lodged Compared with All Matters[1] Lodged

Section 29 applications represent 14.5% of all the matters lodged in the Commission.

	2011-2012	2012-2013	2013-2014	2014-2015
All Matters Lodged	697	1064	810	1632
Section 29 Applications Lodged	272	256	279	237
Section 29 as (%) of All Matters Lodged	**39%**	**24.1%**	**34.4%**	**14.5%**

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

Section 29 Applications Finalised Compared with All Matters Finalised

	2011-2012	2012-2013	2013-2014	2014-2015
All Matters Finalised	884	797	975	1163
Section 29 Applications Finalised	285	270	263	254
Section 29 as Percentage (%) of All Matters Finalised	**32.2%**	**33.9%**	**27%**	**21.8%**

Section 29 Matters – Method of Settlement

The following table shows that 85.3% of s 29 matters were settled without recourse to formal arbitration.

	Unfair Dismissal	Contractual Benefits	Both	Total	%
Arbitrated claims in which order issued	18	19	0	37	14.7
Settled after proceedings before the Commission	83	66	0	149	59.4
Matters referred for investigation resulting in settlement	0	0	0	0	0
Matters discontinued/dismissed before proceedings commenced in the Commission	27	16	0	43	17.1
Matters withdrawn/discontinued in Registry	14	8	0	22	8.8
Total Finalised in 2014/2015 Reporting Year	**142**	**109**	**0**	**251**	**100**

Demographic Data for Section 29 Applications

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

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

Representation

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

	Male	Female	No Data	Total	% Male	% Female	%No Data	%Total
Industrial Agent	14	7	0	**21**	9.3	8.2	0	**8.9**
Legal Representation	16	13	0	**29**	10.7	15.3	0	**12.2**
Personal	109	54	0	**163**	72.7	63.5	0	**68.8**
Other	11	11	0	**22**	7.3	12.9	0	**9.3**
No Data Provided	0	0	2	**2**	0	0	100	**0.8**
TOTAL	**150**	**85**	**2**	**237**	**100**	**100**	**100**	**100**

Age Groups

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

Age Group	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under 16	0	1	0	**1**	0	1.2	0	0.4
17 to 20	2	0	0	**2**	1.3	0	0	0.8
21 to 25	4	1	0	**5**	2.7	1.2	0	2.1
26 to 40	42	28	0	**70**	28	32.9	0	29.5
41 to 50	40	21	0	**61**	26.7	24.7	0	25.7
51 to 60	39	24	0	**63**	26	28.2	0	26.6
Over 60	17	10	0	**27**	11.3	11.8	0	11.4
No Data Provided	6	0	2	**8**	4	0	100	3.4
TOTAL	**150**	**85**	**2**	**237**	**100**	**100**	**100**	**100**

Employment Period

Period of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Under 3 months	22	4	0	**26**	14.7	4.7	0	**11**
4 to 6 months	11	10	0	**21**	7.3	11.8	0	**8.9**
7 to 12 months	25	8	0	**33**	16.7	9.4	0	**13.9**
1 to 2 years	20	13	0	**33**	13.3	15.3	0	**13.9**
2 to 4 years	28	18	0	**46**	18.7	21.2	0	**19.4**
4 to 6 years	10	7	0	**17**	6.7	8.2	0	**7.2**
Over 6 years	20	22	0	**42**	13.3	25.9	0	**17.7**
No Data Provided	14	3	2	**19**	9.3	3.5	100	**8**
TOTAL	**150**	**85**	**2**	**237**	**100**	**100**	**100**	**100**

Salary Range

	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under $200 P/W	23	8	0	**31**	15.3	9.4	0	**13.1**
$201 to $600 P/W	4	12	0	**16**	2.7	14.1	0	**6.8**
$601 to $1000 P/W	16	21	0	**37**	10.7	24.7	0	**15.6**
$1001 to $1500 P/W	55	25	0	**80**	36.7	29.4	0	**33.8**
$1501 to $2000 P/W	27	7	0	**34**	18	8.2	0	**14.3**
Over $2001 P/W	25	12	0	**37**	16.7	14.1	0	**15.6**
No Data Provided	0	0	2	**2**	0	0	100	**0.8**
TOTAL	**150**	**85**	**2**	**237**	**100**	**100**	**100**	**100**

Category of Employment

71% of all applicants stated that they were Full Time, Permanent or Permanent Full Time employees at the time of their termination.

Period of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Casual	4	4	0	**8**	2.7	4.7	0	**3.4**
Casual F/Time	4	0	0	**4**	2.7	0	0	**1.7**
Casual P/Time	0	2	0	**2**	0	2.4	0	**0.8**
Fixed Term	3	3	0	**6**	2	3.5	0	**2.5**
Full Time	23	11	0	**34**	15.3	12.9	0	**14.3**
Permanent	22	4	0	**26**	14.7	4.7	0	**11**
Permanent F/Time	80	28	0	**108**	53.3	32.9	0	**45.6**
Permanent P/Time	4	23	0	**27**	2.7	27.1	0	**11.4**
Probation	0	0	0	**0**	0	0	0	**0**
Part Time	2	10	0	**12**	1.3	11.8	0	**5.1**
No Data Provided	8	0	2	**10**	5.3	0	100	**4.2**
TOTAL	**150**	**85**	**2**	**237**	**100**	**100**	**100**	**100**

Reinstatement Sought

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

Reinstatement Sought	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Yes	20	26	0	**46**	13.3	30.6	0	**19.4**
No	53	30	0	**83**	35.3	35.3	0	**45**
No Data Provided	77	29	2	**108**	51.3	34.1	100	**45.6**
TOTAL	**150**	**85**	**2**	**237**	**100**	**100**	**100**	**100**

Reinstatement Sought by Age Group

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

Age Groups	Yes	No	No Data	Total	%Yes	%No	%No Data	%Total
Under 16	0	0	1	**1**	0	0	0.9	**0.4**
17 to 20	0	1	1	**2**	0	1.2	0.9	**0.8**
21 to 25	0	3	2	**5**	0	3.6	1.9	**2.1**
26 to 40	4	30	36	**70**	8.7	36.1	33.3	**29.5**
41 to 50	17	20	24	**61**	37	24.1	22.2	**25.7**
51 to 60	22	13	28	**63**	47.8	15.7	25.9	**26.6**
Over 60	3	14	10	**27**	6.5	16.9	9.3	**11.4**
No Data Provided	0	2	6	**8**	0	2.4	5.6	**3.4**
TOTAL	**46**	**83**	**108**	**237**	**100**	**100**	**100**	**100**

10. Employer-Employee Agreements (EEAs)

On 15 September 2002, the *Labour Relations Reform Act 2002* (LRR Act) came into effect, introducing Employer-employee Agreements (EEAs). The enactment of the LRR Act also paved the way for the phasing out of Workplace Agreements and the subsequent repeal of the *Workplace Agreements Act 1993*.

EEAs are individual employment agreements which identify specific, negotiated terms and conditions of employment agreed between an employer and an employee. Such agreements remain confidential to the parties.

An application to register an EEA is made to the Registrar of the Commission. Part VID of the Act details certain legislative provisions with which an EEA, and the parties to it, must comply. Those provisions include requirements around the lodgement and registration of an EEA. Included also, is a requirement that relevant tests be applied by the Registrar to ensure that the employee is not, on balance, disadvantaged by the proposed terms and conditions of employment when a comparison between the EEA and the relevant award is undertaken.

An EEA cannot be accepted for lodgement, nor can it be registered, in circumstances where the requirements of the Act have not been satisfied.

During 2014/15, there were five EEAs lodged in the Registry. Four of those EEAs were successfully registered. The remaining EEA was withdrawn by the parties.

The table below identifies statistics in relation to EEAs.

Applications to Lodge EEAs for Registration

Number of EEAs Lodged	2011-12	2012-13	2013-14	2014-15
Meeting Lodgement Requirements	5	3	4	4
Not Meeting Lodgement Requirements	1	0	0	1
Total	**6**	**3**	**4**	**5**

EEAs Lodged for Registration and Finalised

Outcome	2011-12	%	2012-13	%	2013-14	%	2014-15	%
Refused	1	20%	1	33%	0	0	0	0
Registered	3	60%	2	67%	3	100	4	80
Withdrawn	1	20%	0	0	0	0	1	20
Total	**5**	**100**	**3**	**100**	**3**	**100**	**5**	**100**

11. 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 or the Senior Commissioner.

During the reporting period, there were two appeals filed in the Commission. One was heard and dismissed, and the other has been listed for mention in the next reporting period, pending determination of charges against the appellant in another jurisdiction. In addition, in the last reporting period, an appellant whose appeal was dismissed by the Commission filed an appeal in the Industrial Appeal Court. That court dismissed the appeal in this reporting period.

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

The *Employment Dispute Resolution Act 2008* (EDR Act) was proclaimed on 1 December 2008. It provides that the Commission can be asked to mediate any question, dispute or difficulty that arises out of or in the course of employment. This is wider than an "industrial matter" under the Industrial Relations Act.

During the reporting period, 11 mediation applications were lodged, and nine of those were finalised. Of those 9, five did not proceed due to non-consent of each party to the Commission acting as mediator, one was withdrawn as an alternative means of reaching a settlement was employed, two were closed after an agreement was reached and one went to hearing with a resulting order that discontinued the mediation referral. Two of the mediation applications that were lodged in this reporting period are pending.

Six pending mediation applications from the previous reporting period were finalised during this reporting period. Of those, three did not proceed - one due to non-consent from a party, one due to the parties preferring an internal means of reaching a settlement, and the other was closed as there was no further response from the applicant after attempted contacts. For the other two pending applications, several mediation meetings were held in each, at the end of which agreement was reached in each case.

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.

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

In the reporting period there was a total of 28 applications to the Road Freight Transport Industry Tribunal (the RFT Tribunal). This is higher than the number of applications to the RFT Tribunal last year. The nature of the applications have continued to include principally disputes in relation to recovery of debts under owner-driver contracts and disputes in relation to the negotiation and re-negotiation of owner-driver contracts. One matter, referred to below, considered for the first time, the unconscionable conduct provisions of the legislation.

Order of payment of significant sum of claims [2014] WAIRC 01201; (2015) 95 WAIG 208 *(and others)*

This matter, along with a number of other applications referred to the Tribunal against the respondent, involved significant payment claims as a result of alleged breaches of owner-driver contracts. Claims were also made for recovery of monies as debts due under owner-driver contracts.

As a result of conciliation conferences before the Tribunal, the parties reached agreement and consent orders in 13 applications were made in the total sum of nearly $350,000. These matters demonstrate the effectiveness of the Tribunal's jurisdiction in promptly conciliating significant claims leading to a cost effective outcome for the parties and the community.

Nature of contractual arrangement between parties [2015] WAIRC 00178; (2015) 95 WAIG 408

This matter involved an alleged breach of contract claim. An issue arising in the proceedings was whether there was an ongoing contractual relationship between the hirer and owner-driver.

After considering the evidence, the Tribunal considered the nature of the contractual arrangement between the parties. In particular, the issue arising was whether on the evidence the conduct of the parties, objectively considered, showed an intention that the parties intended to be contractually bound: *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1998) 5 BPR 11,110. Further consideration was given by the Tribunal to whether an agreement can be inferred from conduct and the objective approach to determining the nature of the contractual relationship between the parties: *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523; *Toll (FGCT) Pty Limited v Alphapharm Pty Ltd* (2004) 219 CLR 165.

The Tribunal concluded that the contracts in question in this case, were stand-alone contracts and there was no ongoing contractual relationship giving rise to the breach alleged.

Consideration of formation or variation of owner-dispute contracts [2015] WAIRC 00300; (2015) 95 WAIG 641

This matter involved a claim before the Tribunal involving the alleged variation of an owner-driver contract and a claim for damages of approximately $140,000.

In dealing with the matter, the Tribunal had to determine whether there was a variation to the contract as claimed, and applied relevant principles of contract law concerning the formation and variation of contracts. In concluding that there was no variation of contract as claimed, the Tribunal held that in the case of commercial contracts, such as owner-driver contracts, whether a contract was formed or varied may not sit neatly within the usual approach of offer and acceptance applying

contract principles. In many cases, the formation or variation of contracts may be inferred from the particular circumstances of the case: *GB Energy Ltd v Protean Power Pty Ltd* [2009] WASC 333.

Consideration of unconscionable conduct provisions of the Owner-Drivers (Contracts and Disputes) Act 1007 [2015] WAIRC 00203; (2015) 95 WAIG 649

This matter involved an initial claim of some $283,000 in damages for an alleged breach of an owner-driver contract. At the commencement of the proceedings the damages claim was significantly revised down to about $82,500.

The case involved delivery work undertaken by an owner-driver in the foodstuffs industry and whether the respondent was in breach of various undertakings given to the applicant at the time the contractual relationship commenced. Significantly, the case also involved a claim, for the first time, of a breach of the unconscionable conduct provisions of the *Owner-Drivers (Contracts and Disputes) Act 2007*, in s 30.

The Tribunal, having considered the extensive evidence in the case, concluded that there was a breach by the respondent of the applicant's owner-driver contract in that the respondent had failed to meet a term that a certain type of product delivery would be available to the applicant, thereby enabling a higher rate of revenue to be earned. In particular, an issue arose as to the terms of the contract as formed, and the Tribunal had regard to relevant contractual principles concerning formation and interpretation of contracts, as set out by Beech J in *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323.

Having concluded there was a breach of contract the Tribunal then proceeded to deal with the allegation of unconscionable conduct brought by the applicant. It was contended that the respondent had taken advantage of its superior bargaining position to the detriment of the applicant. The Tribunal, although rejecting this claim, considered that for the purposes of s 30 of the OD Act, dealing with unconscionable conduct by hirers, the relevant principles applicable to "unconscionable conduct" from comparable provisions under the former *Trade Practices Act 1974* (Cth) Part IVA and the Australian Consumer Law of the *Competition and Consumer Act 2010* (Cth) were of assistance. The Tribunal also considered relevant principles in relation to determining loss and damages and awarded the applicant the sum of $69,600.

14. Occupational Safety and Health Tribunal

At the conclusion of the reporting year, five applications had been filed. In one of these, after conducting a hearing and onsite inspections, the Tribunal affirmed with modification the Prohibition Notice from the WorkSafe Western Australia Commissioner.

In another, one referral to review three Improvement Notices was challenged by the WorkSafe Western Australia Commissioner on the ground that the *Occupational Safety and Health Act 1984* did not permit it. After a hearing on this issue, the Tribunal issued a declaration that one referral of more than one Improvement Notice is valid. After hearing the referral, the Tribunal revoked and cancelled those notices.

In another matter, the Tribunal revoked and cancelled the Improvement Notice and dismissed the applicant's application for costs.

The final two matters were dismissed for want of meeting the requirements of s 51(2) of the *Occupational Safety and Health Act 1984*, being the form of the reference made to the Tribunal.

The Tribunal also issued an order discontinuing a matter that was filed and later discontinued in the previous reporting period.

15. Other Matters

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

Education

Decentralised Deployment of Teachers

The State School Teachers Union of Western Australia Incorporated (SSTUWA) referred to the Commission a dispute with the Director General of the Department of Education regarding issues of deployment and appointments of teachers being decentralised due to schools taking up Independent Public School (IPS) status. The previous centralised management of teacher deployment has been significantly decentralised by the introduction of IPS, leaving very few schools to manage the transfer and other arrangements of teachers who had expectations of transfers brought about by the old system, or who for various reasons needed to be considered for transfer, such as on compassionate grounds (C 38 of 2014).

Student reports' details

Following a series of conferences, a matter has been listed for hearing and determination relating to the Department of Education's policy which sets out the details of requirements of teachers preparing student reports. The SSTUWA says that the Department has unilaterally withdrawn from an agreement reached in 2009, which specified the degree of detail required to be included in student reports. The issue is said to relate to the workload of teachers by requiring them to increase the amount of detail in the reports (CR 15 of 2014).

Location allowances

In a series of conferences convened pursuant to s 32 of the Act, the Commission assisted the SSTUWA and the Director General of the Department of Education to resolve a dispute about the levels of a number of allowances paid to teachers living in country locations (APPL 8 of 2014).

Restriction of rights to seek or claim a remedy under the Act considered

Last year's Report noted that the Full Bench had determined that s 41(3) of the *Working with Children (Criminal Record Checking) Act 2004* operated to preclude a teacher seeking a remedy for unfair dismissal under the *Industrial Relations Act 1979*. The appeal raised the proper construction of the phrase 'the reason' (for dismissal) and whether the Full Bench should have applied an objective approach.

The matter was then the subject of an appeal to the Industrial Appeal Court which dismissed the appeal against a decision by the Full Bench. In determining the appeal the Industrial Appeal Court considered the proper test to be applied in statutory construction and the application of the principle of legality. Their Honours also considered whether any practical alternatives to dismissal were open at law to the employer [2015] WASCA 00286; (2015) 95 WAIG 429.

Firefighters' Bans

The United Firefighters Union of Australia WA Branch instigated bans concerning grievance procedures and performance management processes. On the application of the Department of Fire and Emergency Services, the Commission convened a number of conferences and progress is being made towards the resolution of the matter (C 1 of 2015).

Medical Practitioners

The Commission found that a pharmacist in charge of a pharmacy, who left the pharmacy on a number of occasions, contrary to instructions, and then denied doing so, and denied smoking, contrary to the employer's policies, was validly dismissed for serious misconduct. The fact that the pharmacist left the pharmacy potentially placed her employer in breach of the *Pharmacy Act 2010*.

The fact that the employer allowed her to return to work for approximately 2½ hours while it considered her responses and viewed CCTV footage did not mean that the employer had condoned the conduct and waived the right to dismiss. Therefore, the employee was not entitled to pay in lieu of notice [2015] WAIRC 00016; (2015) 95 WAIG 288.

Theatre nurses' meal breaks and roster arrangements

The Australian Nursing Federation, Industrial Union of Workers Perth referred to the Commission a dispute relating to meal break and roster arrangements for theatre nurses employed on night and weekend shifts at King Edward Memorial Hospital (KEMH). The matter was unable to be resolved by conciliation and the Commission determined, taking account of the history of the situation and practices elsewhere, that there was a longstanding custom and practice of theatre nurses at KEMH being paid meal breaks on weekends and nightshifts. However, there was no evidence of them being placed on call. The employer had demonstrated good reasons for seeking to change the longstanding arrangement which appeared to be unique amongst similar hospitals. The evidence demonstrated that the taking of meal breaks could be more efficiently coordinated.

However, before the Hospital could make the changes it sought, it was required by clause 26 – Flexibility in Hours and Rostering of the *Registered Nurses, Midwives and Enrolled Mental Health Nurses – Australian Nursing Federation – WA Health Industrial Agreement 2010* to consult with the employees by undertaking a roster review [2014] WAIRC 00993; (2014) 94 WAIG 1611.

Police Support Staff

Proceedings were brought before the Commission by the CSA under s 44 of the Act concerning a dispute between it and the Commissioner of Police regarding the implementation and reorganisation of police operations, arising from the "Frontline 2020" reform programme. A number of compulsory conferences were convened in order to assist the parties in the resolution of the dispute, principally regarding the process of consultation and provision of information regarding the impact of the reform on support staff (PSAC 19/2014).

Prisons

A claim was brought by a former prison chaplain that he had been unfairly dismissed by his employer. The complaint was that the applicant had, contrary to prison rules and regulations, communicated written material from one prison to another on behalf of a prisoner. As a consequence of these matters, the Superintendent of Casuarina Prison revoked the applicant's right of access to the prison under the *Prisons Act 1981*.

The Commission, having regard to the circumstances of the case, concluded that the effect of the ban imposed by the Superintendent, was to make the performance of the applicant's duties as a Prison Chaplain impossible. Thus, the Commission concluded that the applicant's contract of employment had become, in law, frustrated and impossible to perform. As a consequence, there was, for the purposes of the Commission's jurisdiction, no "dismissal" and the application was dismissed [2014] WAIRC 01301; (2014) 95 WAIG 159.

Public Transport

Compression of relativities

A significant matter in the reporting period was an application by the ARTBIU to vary the Public Transport Authority Railway Employees Award 1969 and the Public Transport Authority Railcar Drivers (Transperth Train Operations) Award 2006: *The Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch v Public Transport Authority of Western Australia* (2015) 95 WAIG 712. The applications were made under Principle 10 of the Wage Fixing Principles, to increase wages to address compression of relativities. The Union contended that as a consequence of flat dollar wage increases awarded by the Commission in State Wage cases, the rates of pay in the awards in question had as a consequence of compression, rendered the base rates of pay in the awards obsolete. It was common ground that the actual rates of pay for employees, were considerably higher than that set out in the relevant awards, as being prescribed by industrial agreements.

The Authority on the other hand contended that the effect of the application, if granted, would be to undermine the process of minimum wages adjustments made by the Commission under s 50A of the Act, as there never had been any nexus between increases in the minimum wage, expressed in percentage terms, and minimum award rates.

The Commission set out relevant principles in relation to compression of award wage relativities and the purposes for which relativities within award classification structures are established. The Commission found on the evidence that whilst there was some compression of relativities in some classifications, other classifications had benefitted from the impact of State Wage Order increases. It would potentially undermine the setting of minimum wages under s 50A if the application was granted. The Commission further concluded that restoration of the original relativities in both subject awards would be the appropriate course. However, given that neither the Union nor the employer sought that outcome, the Commission was not prepared to grant the application and it was dismissed. The decision has been appealed to the Full Bench.

Drug and alcohol policy

A further matter of some significance was an application by the ASU to challenge the fairness of the PTA's drug and alcohol policy as it applies to officers of the Authority, eligible to be members of the Union: *Western Australian Municipal, Administrative, Clerical and Services Union of Employees v Public Transport Authority* (2015) 95 WAIG 600. The Union contended that the Authority's drug and alcohol policy, which provides for a zero tolerance approach to drug and alcohol in the workplace and a .00% blood alcohol minimum, was inconsistent with rail safety legislation and was unreasonable and unfair.

The Authority contended that the limit set by rail safety legislation, presently at 0.02% blood alcohol concentration, was a legislative minimum and did not preclude the Authority from implementing a policy with a "zero tolerance" approach for alcohol in the workplace. Reference was also made by the Authority to new legislation for rail safety presently before the State Parliament, which will provide, consistent with a national regime, a zero BAC level testing regime for alcohol.

The Commission considered the reasonableness of the policy in view of earlier decisions of the Commission in Court Session in *BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia Western Australian Branch* (1998) 78 WAIG 2593 and *The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch and Others v Argyle Diamond Mines Pty Limited* (2001) 81 WAIG 324. The Commission had regard to the nature of the public rail transport system operated by the Authority in the State. The Commission concluded that consideration needs to be given to not only the safety and health of employees, but also others in the workplace such as contractors and visitors, and also to the safety of the travelling public at large. Having regard to these considerations, the Commission concluded that the Authority's drug and alcohol policy was reasonable and consistent with accepted industrial standards.

16. Decisions of Interest

Industrial Appeal Court

Working with Children Legislation [2015] WASCA 66; (2015) 95 WAIG 429

Last year's Report noted that an appeal had been lodged against the decision of the Full Bench confirming that the Commission cannot deal with a decision to dismiss a teacher where the decision was based on the issuing of an Interim Negative Notice under the *Working With Children (Criminal Record Checking) Act 2004 (WA)* (WWC Act). The appellant had been employed by the respondent as a teacher in 'child-related employment' as defined in the WWC Act when he was charged with two offences under the Criminal Code (WA) which resulted in him being issued with an interim negative notice pursuant to the WWC Act. Section 22(3) of the WWC Act provides that an employer must not employ a person in child-related employment if the employer is aware that an interim negative notice has been issued to the person. The respondent terminated the appellant's employment by letter dated 22 May 2012 and the appellant applied to the Commission for an order for reinstatement or compensation in respect of a harsh, oppressive or unfair dismissal. By the time the Commission at first instance heard the application the appellant had been acquitted of the charges and had been re-employed by the respondent. His application, however, continued as an application for compensation for wages and benefits lost during the period he had been unemployed. The Commission at first instance found that the provisions of s 41(3) of the WWC Act had been met and dismissed the appellant's application.

The appeal to the Industrial Appeal Court turned on the correct interpretation of s 41(3), in particular whether the word 'reason' in s 41(3)(b) concerned the subjective state of mind of the employer or also required an objective consideration of whether the respondent could practicably have complied with the WWC Act by means other than the dismissal of the appellant.

The Industrial Appeal Court found the test whether the reason the employer dismissed the person was to comply with the WWC Act is not whether the employer was required to dismiss the person to ensure compliance with the WWC Act. The test is whether, as a matter of fact, the reason the employer dismissed the person was to comply the WWC Act. The Industrial Appeal Court found that there was no error made in construing or interpreting s 41(3)(b) by the majority of the Full Bench.

They then found it was unnecessary to consider whether there were practicable alternatives for the respondent to comply with the WWC Act other than dismissing the appellant. However, as the matter was argued, they briefly set out their findings on that issue, finding that transferring the appellant to another category of employment was not a practicable alternative given that there was no opportunity to redeploy or transfer the appellant to a regional office or head office, there was no capacity to find other work for the appellant, and the respondent did not need other work to be undertaken.

Although the appellant proposed that the respondent could have suspended him, the Industrial Appeal Court found that a teacher who is suspended or ordered to stay away from school premises

cannot carry out functions which involve contact with a child in connection with an educational institution for children and hence cannot carry out child-related work.

Their Honours then went on to find that the purpose of s 23 of the WWC Act, which provides that if a person holds a current Interim Negative Notice the person must not be 'employed' in child-related employment, is to prevent a person who holds a current Interim Negative Notice from carrying out child-related work by prohibiting persons who have been charged with or convicted of relevant offences from carrying out child-related work whilst in an employment-like relationship. Further, that the WWC Act does not regulate the contract of employment between an employer and an employee or requiring contracts of employment to be terminated. They found that if an employer suspends an employee from carrying out child-related work, or all work, or orders the employee to stay away from the premises on which child-related work is carried out then the employer would not be contravening s 22(3) of the WWC Act, notwithstanding that the contract of employment continued to subsist.

Jurisdictional constraints inhibiting an appeal to the Industrial Appeal Court [2014] WASCA 186; (2014) 94 WAIG 1645

An appeal against a decision of the Full Bench was dismissed for want of jurisdiction and the Industrial Appeal Court revisited the jurisdictional constraints inhibiting an appeal under s 90(1)(b) of the Act. Justice Kenneth Martin, with whom Le Miere J agreed, set out a series of earlier decisions of the Industrial Appeal Court in which the jurisdictional limits set under s 90(1) of the IR Act limiting an appeal to the Industrial Appeal Court had been considered. His Honour first of all considered the reasoning of Hasluck J in ***United Construction Pty Ltd v Birighitti*** [2003] WASCA 24 in which Hasluck J observed that in s 90(1) the words 'in that there has been an error in the construction or interpretation of any Act' clearly suggests that it is not enough for the prospective appellant to point to some error of law according to common law principles. That which is said to be 'erroneous in law' must be linked to the presence of a statutory provision which purports to govern the situation: [100].

Justice Kenneth Martin then turned his mind to the question whether the decision of the Full Bench arguably manifested some elements of an erroneous interpretation towards the phase 'contract of employment' as used within s 29(1)(b)(ii) of the IR Act. After considering the reasons given by Acting President J H Smith, with whose reasons Scott ASC and Mayman C agreed, Kenneth Martin J found that Smith AP identified in an orthodox fashion the well-established contractual principles governing the criteria for the implication of a term on an ad hoc basis.

Justice Kenneth Martin then evaluated the reasons for decision of the Full Bench and found that:

(a) there is no identifiable reference at any point within the reasons to a consideration by the Full Bench as to the meaning of s 29(1)(b)(ii) at any point; and

(b) there has been no discernible exercise in statutory construction by the Full Bench undertaken towards the phrase 'contract of employment', within s 29(1)(b)(ii).

His Honour then held that the jurisdictional objection pressed by the respondent was correctly raised. He also found that the reasons of the Full Bench disclosed no erroneous construction or interpretation of s 29(1)(b)(ii). His Honour found rather, what manifested was merely an orthodox application of established legal principle to the underlying factual circumstances as raised by the appellant's contractual benefit claim, seeking payment for additional hours worked. Further, what unfolded before the Full Bench, essentially, saw an application of uncontroversial contractual law principles to the facts before the Commissioner and then before the Full Bench.

Finally, his Honour found that the argument sought to be put on behalf of the appellant was not in truth, directed at the required identification of an error in the interpretation of legislation, or of an industrial instrument, and did not satisfy the jurisdictional standard of s 90(1)(b).

For these reasons, the Industrial Appeal Court issued an order dismissing the appeal for want of jurisdiction.

Full Bench Appeals

Whether a job-share position was held on a permanent basis [2014] WAIRC 01192; (2014) 94 WAIG 1655

Qantas Airways Ltd appealed against decisions made by the Commission in which declarations and orders were made that it was a term of the current contracts of employment of two employees that they were employed in a job-share position on an ongoing basis and that Qantas was to continue to employ them in their job-share positions on this basis. Both employees had entered into arrangements to job-share a full-time position as a customer service agent at Level 3 at Perth Airport. They began these arrangements in February 2008 and claimed that they were permanent and ongoing. Qantas said the term of each of the job-share arrangements were fixed and on secondment.

The issues raised in the appeals were as follows:

(a) Whether a Heads of Agreement entered into between Qantas and the Australian Services Union (ASU) on 19 August 1996 which set out the basis upon which job-share positions were to be made available set a 'context' which enlivened custom and usage between 1996 and 2008 throughout Australia of Qantas employees being engaged in job-share positions on a permanent and ongoing basis.

(b) Whether the terms of the 2004 contracts of employment entered into by the employees remained on foot from the time they began working in the job-share arrangements of one full-time line of work; or whether agreements were reached to vary the 2004 contracts of employment. Further, if an agreement was formed in 2008 between each party to the contracts of employment to vary the 2004 contracts in respect of the duration of the job-share arrangements, what were the terms of those variations.

An order was made by the Full Bench in each decision to uphold the appeal and quash the decisions made at first instance.

Commission's power to award damages considered [2015] WAIRC 00244; (2015) 95 WAIG 437

The Commission's power to make an award of compensation in the form of damages for breach of a term of a contract was considered. The respondent claimed in his application that the appellant owed him a car allowance to the value of $23,750 and a bonus in the amount of $17,339 (being a total of $41,089). The respondent's claim was substantially successful. At first instance an order was made by the Commission that the appellant pay the respondent $34,536 (less applicable taxation) within 21 days of the date of the order.

On appeal the Full Bench considered the five conditions that must be satisfied for a term to be implied on grounds of fact to give business efficacy to a contract stated in ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings*** (1977) 180 CLR 266; (1977) 52 ALJR 20 and ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** [1982] HCA 24; (1982) 149 CLR 337, 347. The appeal also considered the principles that apply to determining whether the terms of an agreement can be partly oral and partly in writing. An order was made to uphold the appeal, suspend the operation of the decision and remit the matter for further hearing and determination.

The admissibility of an answer to a leading question [2014] WAIRC 01246; (2014) 94 WAIG 1840

The principles that are to be applied by members of the Commission when hearing and assessing answers to leading questions in a matter before it were examined. The central issue in dispute between the parties at the hearing at first instance was whether the employee had engaged in misconduct and whether the employer had given him any warnings during his employment. it was held that:

(a) in accepting material to justify orders, that material must have rational probative force;
(b) facts can be found without demanding adherence to the rules of evidence, but a Commissioner must base his or her decision upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or the likelihood or unlikelihood of the occurrence of some event, past or future;
(c) whilst the Commission is not bound by the rules of evidence, that does not mean all the rules of evidence should be ignored. Examples of rules of evidence that should not be ignored are the rules in ***Browne v Dunn*** (1894) 6 R 67 (HL) and ***Jones v Dunkel*** [1959] HCA 8; (1959) 101 CLR 298 which are rules designed to ensure a fair trial;
(d) although tribunals can act upon hearsay, it should be given little weight if it is not sourced or no supporting evidence is adduced; and
(e) the Commission should not receive into evidence, or rely upon challenged evidentiary material, where the matter is important, of which there is or should be better evidence.

It was found on appeal that the prohibition against asking leading questions was not breached in any manner that could properly be regarded as material. As the Full Bench was not in a position to weigh the conflicting evidence and draw its own inferences and conclusions about whether the employee had been harshly, oppressively or unfairly dismissed the Full Bench reluctantly made an order to suspend the decision and remit the matter for further hearing and determination to enable the matter to be re-heard.

Whether notional profit should be deducted from damages [2014] WAIRC 01294; (2014) 94 WAIG 1835

This appeal considered whether the Road Freight Transport Industry Tribunal had erred in the assessment of the appellant's damages arising from the wrongful termination of the owner-driver contract by the respondent. At the hearing before the RFT Tribunal, the respondent made a submission that a profit margin of $2,000 per week ought to be offset from the award of damages. At first instance the RFT Tribunal had accepted the submission and deducted an amount of $2,000 per week from the award of damages.

The Full Bench found that the task before the RFT Tribunal was to assess the damage that flowed from the breach of the owner-driver contract and that the loss that flowed to the appellant from the breach of contract was the loss of income the appellant would have received if provided with reasonable notice to terminate the contract. Importantly, the Full Bench found in circumstances where there was no dispute that the appellant had mitigated its loss, no deduction should have been made for a notional loss of profit. It then found that to make a deduction of an amount allocated to profit could not be said to place the appellant in the same position so far as money can do it, as if the contract had been performed. Thus, there was no reason in fact or at law why an amount representing a notional profit should have been deducted from the award of damages. The appeal was upheld and the decision at first instance was varied.

Whether 'notice' of a witness statement was sufficient to comply with s 26(3) of the Act [2014] WAIRC 00562; (2014) 94 WAIG 775

The issue raised in the appeal was whether the Commission at first instance had made an error of law by failing to observe the requirements of s 26(3) of the IR Act by taking into account matters set in a statement of evidence of a witness, which was evidence that was provided to the Commission by the Public Transport Authority after the hearing of the matter; and failing to notify the union and affording the union the opportunity of being heard in relation to the statement.

Section 26(3) of the IR Act provides as follows:

> Where the Commission, in deciding any matter before it proposes or intends to take into account any matter or information that was not raised before it on the hearing of the matter, the Commission shall, before deciding the matter, notify the parties concerned and afford them the opportunity of being heard in relation to that matter or information.

It was held that although the union had 'notice' of the witness statement as it was provided with a copy by email, that notice in these circumstances was not sufficient to comply with s 26(3) of the Act. This was because the union had not been provided with an opportunity to be heard and the failure to do so could not be cured by the absence of an objection by the union to the Commission having regard to the whole or part of the witness statement. Non-compliance with s 26(3) of the Act invalidated the decision. Although the union sought an order that the case be remitted to the Commission for further hearing and determination, it was held that where a decision is void and a nullity there is nothing to suspend and the appropriate order was to quash the decision. When a decision of the Commission is quashed on grounds of invalidity, the Commission is not prohibited from further hearing and determining the matter.

Power to extend time to institute an appeal [2014] WAIRC 01361; (2015) 95 WAIG 13

The appeal in this matter was filed out of time and the respondent challenged the power of the Full Bench to extend the time for filing an appeal. Relevantly, s 49(3) of the IR Act provides that an appeal shall be instituted within 21 days of the date of the decision against which the appeal is brought. Section 27(1)(n) of the IR Act provides:

> Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
> (n) extend any prescribed time or any time fixed by an order of the Commission;

The majority of the Full Bench (Smith AP and Beech CC, Kenner C dissenting) held that a previous decision of the Full Bench in which the issue was squarely raised and considered (***Arpad Security Agency Pty Ltd v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch*** (1989) 69 WAIG 1287) should not be overruled. An order was made extending time to the appellant to institute the appeal.

The Full Bench then considered the merits of the appeal and agreed that the appeal should be upheld. The issue in dispute was whether a member of the appellant union had been performing, as part of her duties and responsibilities at a school, teaching functions and one of the orders sought by the union was an order that the respondent make an application to the Teacher Registration Board for a limited authority to teach which would enable the member to be registered as a teacher. The Commission at first instance dismissed the application on grounds that what the appellant was seeking the Commission to consider was whether the respondent was in breach of cl 38 of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2011* (2011 General Agreement) and that this was not a matter within the jurisdiction of the Commission but is solely contained within the jurisdiction of the Magistrate's Court pursuant to s 83(3) of the IR Act.

On appeal, it was found that the remedy sought by the appellant was in effect to compel the respondent to offer the member a teaching position and make an application to nominate the member in an application to the Teacher Registration Board for limited registration. The order

sought was not an attempt to enforce the 2011 General Agreement and it was clear that the Commission is empowered with the jurisdiction to make the order sought. An order was made by the Full Bench to allow the appeal, suspend the operation of the decision and remit the case to the Commission for further hearing and determination.

At the time of writing this report the respondent filed an appeal against the decision that the Commission to extend time for filing the appeal. This is yet to be heard and determined by the Industrial Appeal Court.

Denied Contractual Benefits

Claim for wages owing where employee covered by a national award [2014] WAIRC 01042; (2014) 95 WAIG 348

The Commission dealt with a claim by an employee covered by a national award seeking her leave entitlements and the payment of her ordinary wages for a period of time when she claims she was 'forced' to take sick, annual and unpaid leave although she was in fact fit for work. The Commission was doubtful that the provisions under the national award constitute benefits under the applicant's contract of employment. However, in this case, the applicant's contract of employment specified an annual wage rate for her position which was above the annual rate of wage in the national award. Accordingly, as the employee's entitlement to that wage came from her contract of employment the claim for payment of her ordinary wages was a claim for a denied contractual benefit and was within jurisdiction.

17. Conclusion

I am pleased to report that the key sections of the Act, s 44 and s 29(1) operate well. The summaries of matters decided by the Commission which are set out earlier in this Report illustrate the breadth of matters which the Commission is required to deal with. Industrial disputes requiring the intervention of the Commission are, necessarily, unpredictable and it is pleasing that the Act enables an organisation or an employer, including public sector employers, to readily to bring a dispute to the Commission. Applications by employees who claim that they have either been unfairly dismissed, or they are entitled to a benefit under their contract of employment which has been denied them by their employer, similarly operate well and 85% of such matters were resolved without recourse to arbitration.

Efficiencies would be achieved if the distinction between the general jurisdiction of the Commission and the discrete jurisdiction of the Commission in relation to government officers exercised by the Public Service Arbitrator and the Public Service Appeal Board (the constituent authorities) was removed. The effect of the removal would allow any Commissioner to deal with a dispute concerning a government officer without that Commissioner having to be first designated as a Public Service Arbitrator, or additional Public Service Arbitrator. In particular, it would allow the Chief Commissioner to be able to be appointed as a Public Service Arbitrator. As the numbers of members of the Commission decrease, the need for this flexibility has become more apparent.

In cases of unfair dismissal in the private sector, many employees, and some employers, are unaware of the necessity to correctly identify the employer. This is necessary in order to determine whether in a particular case an employer is, or is not, a constitutional corporation and thus a national system employer covered by operation of the Fair Work Act. The Commission has, with the assistance of a number of law firms based in Perth, established a pro bono scheme which is able, in certain circumstances, to provide legal advice to an employee or an employer on this issue and I here express my thanks to those firms who willingly agreed to participate.

It is often not appreciated that the jurisdiction of the Commission to deal with a claim by an employee that they are entitled to a benefit under their contract of employment includes national system employers. The significance of this is illustrated in the case reported at p 47 in this Report. Where a national system employer pays a salary higher than that prescribed by a national modern award and a claim of underpayment of salary arises, the Commission will have the jurisdiction to deal with the claim where the source of the entitlement to the salary arises from the contract of employment and not from the national award.

I have reported in previous years about the Act not permitting the Commission to deal on its own motion with the deficiencies in the structure and operation of State awards. Most State awards were created prior to the 2006 Commonwealth legislation which overrode the Commission's jurisdiction in relation to national system employers. I repeat here the pressing need for appropriate legislation to be passed to enable the Commission on its own motion to create modern State awards to replace those existing awards.

In addition, the power in the Act to cancel an existing industrial agreement is not designed to address the significant numbers of such agreements which parties 'left behind' when they became national system employers and employees. One project of significance this year involved undertaking a process to formally cancel 82 such industrial agreements which had the same union as a party to each agreement. In each case, the agreements had become obsolete either as a direct result of the introduction of the 2006 Commonwealth legislation or because, subsequent to the registration of a particular agreement, the respondent employer had ceased to trade. Registry Services officers provided procedural information and guidance to the union to guide the union's industrial advocate through the process required to retire from each industrial agreement. The Registry Services officers' assistance to the Commission in this regard also extended to the preparation and publication of appropriate notices in the Western Australian Industrial Gazette

which are required. I draw to your attention the expertise of the Registry Service officers and express my thanks to them. At the same time, this project illustrates the significant administrative work which the Act requires to be done to cancel each agreement. There are in excess of 2000 such agreements with differing parties to them and the resources of the Commission and Registry do not permit a project of this scale to address the significant number of remaining agreements.

I have previously requested that the Act be amended to allow the Commission to address the issue of cancelling redundant agreements in an administratively efficient manner and repeat that here.

The ability of the Commission to mediate employment disputes at the request of employers and employees by agreement, including national system employers, has not generated a significant number of applications. Nevertheless, it is worth reporting that increasing use is being made of it by national system employers in industries of significance to the State's economy who are involved in matters before federal courts. Where, in such matters, the court directs the parties into mediation, the availability under the Employment Dispute Resolution Act for a Commissioner to mediate has allowed the mediations to be conducted by the Commission to the satisfaction of those parties.

In addition, there have been occasions when the Commission has been asked by a national system employer to mediate an employment dispute between one or more employees in the workplace. Where this agreed to by all parties, mediation by a Commissioner has assisted the business concerned to resolve the grievance. In the case of some small business employers, the mediation has been held in the employer's workplace which can be less disruptive to the operation of the business than holding the mediation in the Commission.

I thank the Registrar and CEO of the Department of the Registrar Ms Sue Bastian for her assistance throughout the reporting period, and the staff of the Department for the support they have provided to the Commission in the proper performance of its functions under the Act.

A.R. Beech
Chief Commissioner

16 September 2015