Government of Western Australia
The Western Australian Industrial Relations Commission

Industrial Relations Act 1979

Report of the Chief Commissioner of The Western Australian Industrial Relations Commission 2019-20

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

THE HONOURABLE BILL JOHNSTON MLA,
MINISTER FOR INDUSTRIAL RELATIONS

ANNUAL REPORT 2019-20

In accordance with s 16(2) of the *Industrial Relations Act 1979*, I am pleased to provide to you the following report relating to the operation of the Act for the year ended 30 June 2020.

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

Pamela Scott
Chief Commissioner

25 September 2020

Table of contents

1 The objects of the *Industrial Relations Act 1979* 1
2 Membership and principal officers 2
3 Summary of main statistics 4
4 The Full Bench 6
5 Matters dealt with by the Chief Commissioner or Senior Commissioner 6
6 The Commission in Court Session 7
7 Commissioners sitting alone 8
8 The Registrar 10
9 Industrial Magistrate's Court 12
10 The Commission's response to the COVID-19 pandemic 13
11 Access to justice 17
12 Legislation 19
13 Conciliation and case management 20
14 Private sector coverage 21
15 Impediments to effective and efficient operation of the Commission 23
16 Community engagement 24
17 Professional Development and Training 24
18 Future Developments 25
19 Website access 25
20 Conclusion 25
21 Decisions and disputes of interest 26
22 Appendices 37

1 The objects of the *Industrial Relations Act 1979*

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

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

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

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

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

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

(c) The Chief Commissioner deals with matters relating to the observance of the rules of registered organisations

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

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

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

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

2 Membership and principal officers

2.1 Industrial Appeal Court

The IAC is made up of a Presiding Judge and two other Judges of the Supreme Court appointed by the Chief Justice.

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

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

2.2 The Commission

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

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

The Commission was constituted by the following members:

Chief Commissioner
Pamela Scott

Senior Commissioner
Stephen Kenner

Commissioner
Toni Emmanuel

Commissioner
Damian Matthews

Commissioner
Toni Walkington

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

2.2.1 Public Service Arbitrators

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

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

2.2.2 Public Service Appeal Board

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

2.2.3 Railways Classification Board

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

2.2.4 Occupational Safety and Health Tribunal

Commissioner Walkington continued as the Occupational Safety and Health Tribunal. Commissioner Walkington's appointment operates for the purposes of s 51H of the *Occupational Safety and Health Act 1984* (the OSH Act) and s 16(2A) of the Act, and will expire on 31 December 2020.

2.2.5 Road Freight Transport Industry Tribunal

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

2.3 Industrial Magistrate's Court

Magistrate M Flynn and Magistrate D Scaddan, both Stipendiary Magistrates, undertook this specialist area of work during this reporting period.

2.4 Registry

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

Registrar	Ms S Bastian
Deputy Registrar	Ms S Kemp

3 Summary of main statistics

3.1 The Commission

	MATTERS CONCLUDED				
	2015-16	**2016-17**	**2017-18**	**2018-19**	**2019-20**
IAC					
Appeals	5	2	2	3	3
Full Bench					
Appeals	18	15	17	9	18
Other matters	2	3	5	12	1
Chief Commissioner					
Section 66 matters	5	12	1	2	2
Section 72A(6) matters	0	0	0	0	0
Consultations under s 62	3	6	3	3	4
Chief Commissioner or Senior Commissioner					
Section 49(11) matters	0	1	2	2	0
Commission in Court Session					
General Orders	1	2	2	3	4
Other matters	1	6	3	1	0
Commissioners sitting alone					
Conciliation conference applications (s 44) [1]	88	60	56	77	55
New agreements	56	41	36	25	29
New awards	0	1	1	0	0
Variation of agreements	0	0	0	1	1
Variation of awards	36	11	11	7	18
Police Act 1892 Applications	0	1	2	0	0
Prisons Act 1981 Applications	0	3	0	0	1
Young Offenders Act 1994 Applications	0	0	0	0	0
Other matters [2]	51	69	42	34	35
Section 29 matters					
Unfair dismissal applications	118	101	91	66	110
Contractual benefits claims	121	89	73	69	78
Public Service Arbitrator					
Award/agreement variations	11	0	0	2	15
New agreements	3	4	15	2	15
Orders pursuant to s 80E	0	1	0	0	0
Reclassification appeals	86	12	3	24	17
Public Service Appeal Board					
Appeals to Public Service Appeal Board	12	21	27	27	29
Totals	**617**	**461**	**392**	**369**	**433**

Table 1 – Matters concluded 2015-16 to 2019-20

3.1.1 Notes to Table 1

[1] *CONFERENCE applications include the following:*	*2015-16*	*2016-17*	*2017-18*	*2018-19*	*2019-20*
Conference applications (s 44)	*40*	*34*	*30*	*40*	*27*
Conferences referred for arbitration (s 44(9)	*12*	*4*	*1*	*5*	*3*
Public Service Arbitrator conference applications (s 44)	*34*	*18*	*22*	*27*	*23*
Public Service Arbitrator conferences referred for arbitration (s44(9)	*2*	*4*	*3*	*3*	*2*
Totals	***88***	***60***	***56***	***75***	***55***

[2] *OTHER MATTERS include the following:*	*2015-16*	*2016-17*	*2017-18*	*2018-19*	*2019-20*
Apprenticeship appeals	*7*	*7*	*1*	*0*	*1*
Applications for interpretation of an award (s 46)	*0*	*0*	*0*	*2*	*1*
Public Service applications	*8*	*7*	*11*	*6*	*3*
Requests for mediation	*10*	*26*	*19*	*18*	*17*
Occupational Safety and Health Tribunal	*2*	*2*	*7*	*2*	*7*
Road Freight Transport Industry Tribunal	*24*	*27*	*4*	*6*	*6*
Totals	***51***	***69***	***42***	***34***	***35***

3.2 Awards and agreements in force under the Act – totals

Year	Number as at 30 June
2015	2,458
2016	1,505
2017	1,395
2018	1,178 [#]
2019	610 [#]
2020	609

Table 2 – Awards and agreements in force

[#] *The total number of agreements and awards in force fell significantly during 2017-18, and 2019-20, because the Commission reviewed existing agreements to cancel those that are defunct, to ensure that its records are up to date.*

3.3 Award and agreement variations

Nature of application	Number of awards/agreements affected
State Wage Case General Order	233
Location Allowances General Order	82
New industrial agreements (private sector)	10
New industrial agreements (public sector)	18
Agreements – retirements from	0
Agreements – cancelled	26

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

4 The Full Bench

4.1 Appeals – heard and determined from decisions of the:

Commission – s 49	11
Industrial Magistrate – s 84	5
Public Service Arbitrator – s 80G	1
Road Freight Transport Industry Tribunal – s 43 Owner Drivers Act	1

Table 4 – Number of appeals to the Full Bench heard and determined

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

Within this reporting period, the Registrar undertook investigations concerning the status of a number of registered organisations. These investigations considered various factors, including whether those organisations were meeting their reporting obligations under the Act, whether there were current financial members or whether the organisations, on the face of it, appeared to have become defunct. The status of 6 organisations, five by application of the Registrar and one at the instigation of the organisation concerned, remains under investigation as at 30 June 2020.

5 Matters dealt with by the Chief Commissioner or Senior Commissioner

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

Applications made	1

5.2 Applications regarding union rules pursuant to s 66 of the Act

Applications made	3
Applications finalised	2

5.3 Consultations

The Registrar is required to consult with the Chief Commissioner regarding particular matters set out in s 62 of the Act.

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

6 The Commission in Court Session

General Orders issued	4

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

6.1 State Wage Order

Section 50A of the Act requires that, before 1 July in each year, the Commission is to make a General Order setting the minimum weekly rates of pay for adults, apprentices and trainees under the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) and to adjust the rates of wages paid under the awards.

The application for the 2020 State Wage Order was created on the Commission's own motion. The Commission advertised the proceedings and received written submissions from the Honourable Minister for Industrial Relations, the Chamber of Commerce and Industry of Western Australia, UnionsWA, the Western Australian Council of Social Services Inc, and Professor Alison Preston of the Department of Economics, the University of Western Australia. In addition, evidence was given by Mr David Christmas, Director of Economic and Revenue Forecasting Division, Department of Treasury.

For the first time, this matter was dealt with on the papers. The process was protracted due to the need for written submissions to be filed and responded to, witness statements to be received and opportunities for interested persons to ask questions in writing of the witness, and for the Commission, likewise, to ask questions both of the witness and of the interested persons, and for those answers to be provided. The parties making submissions also sought an opportunity to make submissions following the issuing of the National Accounts in late May.

The Act requires the Commission to consider the Fair Work Commission's Annual Wage Review decision in issuing the State Wage Case decision. As this decision was issued later than usual, and with the protracted process, the State Wage Case decision was not issued in the first half of June as is usual. However it was issued within the statutory time frame.

The Commission in Court Session delivered its reasons for decision on 26 June 2020 ([2020] WAIRC 00301; (2020) WAIG 409), and issued a General Order that increased the minimum wage for award covered employees and award-free employees covered by the MCE Act to $760.00 a week.

The Commission concluded that it was appropriate to delay the increases until the first pay period after 1 January 2021, due to the high level of uncertainty that has resulted from the impacts of the COVID-19 pandemic.

In its decision, the Commission took account of the impact of the COVID-19 pandemic on the Western Australian economy, employers and employees, business levels, and the cost of living. It noted the high level of unemployment and the prospect of reduced inflation. The Commission also considered the capacity of employers as a whole to pay any increase, but also the need to contribute to improved living standards for employees.

The Commission concluded that this increase and its deferral for six months would allow time for the effects of the lifting of restrictions to develop and stabilise.

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

The State Wage Order also ordered that the minimum weekly rate of pay applicable under s 14 of the MCE Act to an apprentice who has reached 21 years of age will remain at $638.20 per week until 1 January 2021, when it be increased to $649.40 per week.

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

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

Award free apprentices and trainees are to be the rates of pay determined by reference to rates of pay based on the *Metal Trades (General) Award*.

6.2 Location Allowances General Order – s 50

The Location Allowances General Order prescribes allowances to compensate employees employed at specified locations for the prices, isolation and climate associated with those locations. State private sector awards generally provide for a location allowance.

In accordance with the Commission's usual practice, the Commission in Court Session initiated a review of the prices components and issued a General Order to adjust the prices component ([2020] WAIRC 00340; (2020) WAIG 444). The increase by 2.32% to reflect the increase in the Consumer Price Index for Perth (excluding housing) for the year to March 2020. The increase was effective from 1 July 2020.

6.3 COVID-19 General Orders

The Commission issued General Orders dealing with leave flexibility and the JobKeeper Scheme as discussed at 6.3 COVID-19 General Orders.

7 Commissioners sitting alone

In addition to matters referred to the Commission by registered organisations, the Commission received 172 matters from individual employees pursuant to s 29, as well as other applications to the Commission's public sector jurisdiction.

7.1 Claims by individuals – s 29, *Industrial Relations Act 1979*

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

7.1.1 Applications lodged

	2015-16	2016-17	2017-18	2018-19	2019-20
Unfair dismissal	114	113	87	95	115
Denial of contractual benefits	110	103	75	89	57
Totals	**224**	**216**	**162**	**184**	**172**

Table 5 – Section 29 applications lodged

7.1.2 Applications finalised

	2015-16	2016-17	2017-18	2018-19	2019-20
Unfair dismissal	118	101	91	90	110
Denial of contractual benefits	121	89	73	80	78
Totals	**239**	**190**	**164**	**170**	**188**

Table 6 – Section 29 applications finalised

7.1.3 Applications lodged compared with all matters lodged

	2015-16	2016-17	2017-18	2018-19	2019-20
All matters lodged	1,075	1,046	984	1026	1008
Section 29 applications lodged	224	216	162	184	172
Total (%)	**21%**	**21%**	**16%**	**18%**	**18%**

Table 7 – Section 29 applications lodged compared with all matters lodged

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

7.2 Police Act 1892

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

One new appeal was filed during 2019-20, and another matter is in the process of being dealt with. Appeals lodged in previous years are often adjourned at the request of the appellant in circumstances where the officer is the subject of criminal charges and those charges are dealt with prior to the appeal against removal. This often means lengthy delays before the appeals to the Commission may be resolved.

7.3 Prisons Act 1981

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

No appeals of this nature were referred to the Commission during 2019-20.

7.4 Young Offenders Act 1994

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

No appeals of this nature were referred to the Commission during 2019-20.

7.5 Construction Industry Portable Paid Long Service Leave Act 1985

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

Two such matters were decided during this reporting period, one of which is the subject of an appeal to the Full Bench.

7.6 Employer-employee agreements

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

No Employer-employee agreements were lodged in the 2019-20 financial year. There have been no employer-employee agreements lodged since 2016.

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

The *Employment Dispute Resolution Act 2008* (EDR Act) provides that the Commission may mediate or otherwise resolve any question, dispute or difficulty that arises out of or in the course of employment by way of a voluntary mediation process. The scope of this is wider than an 'industrial matter' as defined under the Act. The EDR Act has been utilised by parties to industrial disputes which are not within the jurisdiction of the Commission pursuant to the Act, including parties to Fair Work Commission agreements. At the conclusion of the reporting period, the Commission was dealing with a dispute between a federal union and a major mining company about the interpretation and application of their federally registered agreement.

During the reporting period, 17 mediation matters were lodged.

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

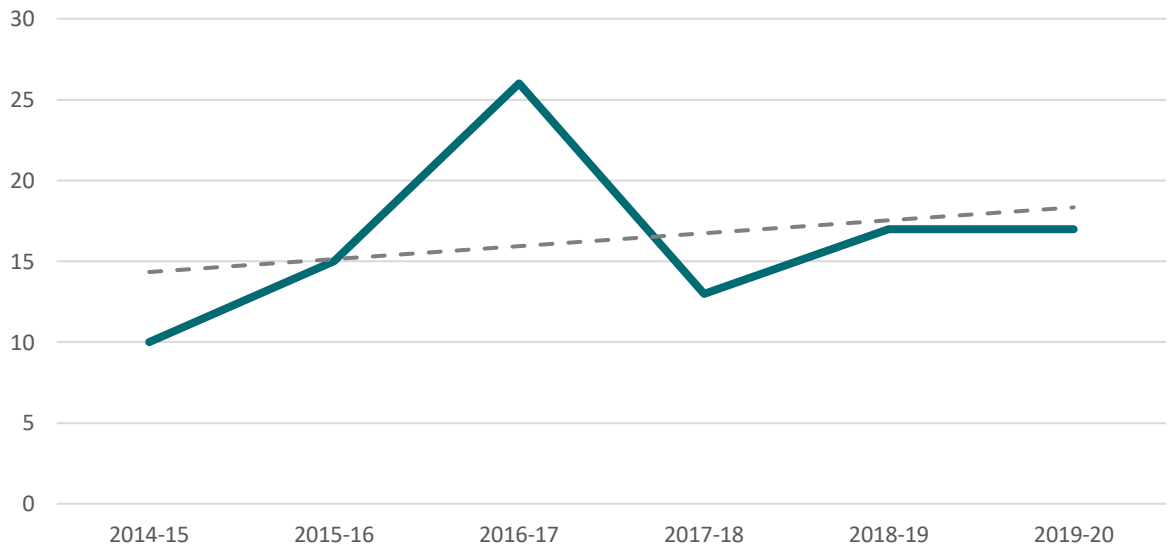

Figure 1 – Trend of mediation matters from 2014-15 to 2019-20

7.8 Boards of Reference

Each award in force provides for a Board of Reference to assist in resolving certain types of disputes (s 48 of the Act). There have been no Boards of Reference during this reporting period. A Board of Reference was last convened in 2012.

8 The Registrar

8.1 Industrial agents registered by Registrar

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

Issues regarding the very limited criteria for registration as well as the conduct and competency of industrial agents registered under the Act have been raised in previous Annual Reports, decisions of the Commission and were reflected in the *Final Report of the Ministerial Review of the State Industrial Relations System*. The regulations which deal with the registration and conduct of industrial agents, the *Industrial Relations (Industrial Agents) Regulations 1997*, are inadequate to deal with the issues that arise.

Those issues include that legal practitioners whose conduct, including criminal conduct, has resulted in their being struck off the roll of practitioners are able to register as industrial agents. The current industrial agents include companies who provide poor quality service to clients and whose competency to advise and represent is highly questionable.

One particular company applied for registration this year, stating that the directors included a "retired" legal practitioner. Enquiries by the Registrar disclosed that his "retirement" was in fact that he had been struck off the roll. The application also cited the company's registered business address which turned out to be a vacant office used for storing furniture. This false and misleading information is not currently sufficient to enable the Registrar to refuse registration.

More stringent requirements for registration, possibly including a character test, as well as a process for the Commission to deal with complaints about those agents, are needed to ensure that those individual employees in particular who need, and pay for, competent professional and ethical service, receive it.

During the 2019-20 financial year, five new industrial agents were registered.

Total number of agents registered as body corporate	27
Total number of agents registered as individuals	19
Total number of agents registered as at 30 June 2020	**39**

Table 8 – Industrial agents registered as at 30 June 2020

8.2 Industrial organisations

8.2.1 Registered as at 30 June 2020

	Employee organisations	Employer organisations
Number of organisations	34	13
Aggregate membership	173,293	3,653

Table 9 – Industrial organisations registered as at 30 June 2020

8.2.2 Rule alterations by Registrar

Alterations to rules lodged with the Registrar and finalised during this reporting period	4

8.2.3 Right of entry authorities issued

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

- hold discussions with employees who wish to participate in discussions; and

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

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

During the 2019-20 financial year, authorisations were issued to representatives of the organisations listed in Appendix 3 – Right of entry authorisations by organisation.

Authorisations:

Issued during 2019-20	52
Number of people who presently hold an authorisation	385
Number of authorisation holders who have had their authorisation revoked or suspended by the Commission in the current reporting period	0

Table 10 – Right of entry authorisations as at 30 June 2020

9 Industrial Magistrate's Court

The Industrial Magistrate's Court Registry received a total of 258 claims that fell within the Court's general jurisdiction during the reporting period.

Those claims were comprised of:

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

Claims lodged	258
Resolved (total)	268
Resolved (lodged in the period under review)	142
Pending	104
Total number of resolved applications with penalties imposed	15
Total value of penalties imposed	$84,350
Total number of claims resulting in disbursements	24
Total value of disbursements awarded*	$4,053.50
Claims resulting in wages being ordered	42
Total value of wages in matters resolved during the period	$456,543.59

Table 11 – Industrial Magistrate's Court statistics

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

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

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

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

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

During this reporting period, 113 claims proceeded to at least one pre-trial conference. Thirty-five claims were settled at a pre-trial conference or prior to a trial.

10 The Commission's response to the COVID-19 pandemic

Like the rest of the community, the Commission's operations and the matters that came before it were very significantly affected by the COVID-19 pandemic and the efforts of governments to control and contain its spread.

10.1 Timeline

The following timeline sets out the Commission's response, both in terms of its own operation and in relation to the industrial matters associated with the COVID-19 pandemic.

- 17 March 2020 – Commission's Registry closed, phased working remotely began
- 18 March 2020 – Waiver of requirement for documents to be lodged in person
- 26 March 2020 – All staff worked remotely
- 30 March 2020 – Special Procedures Note
- 6 April 2020 – Leave Flexibility General Order application initiated
- 14 April 2020 – Leave flexibility General Order issued
- 4 May 2020 – JobKeeper General Order application initiated
- 15 May 2020 – JobKeeper General Order issued
- 12 June 2020 – Updated Special Procedures Note
- 1 July 2020 – Return to Office, Registry re-opened, matters recommence in person.

10.2 The Commission's operations

In late March, the Commission had to make significant adjustments to its operations to take adequate precautions and deal with the consequences of the COVID-19 pandemic. Senior Commissioner Kenner oversaw the urgent and necessary adjustments to the Commission's operations and I delegated to him the administrative matters associated with the COVID-19 pandemic in accordance with section 16A of the Act from 27 March until 27 June 2020.

The matters Senior Commissioner Kenner was responsible for in that period were matters of an administrative nature relating to the Commission and commissioners in respect of the arrangements for the operation of the Commission in the circumstance of the COVID-19 pandemic:

1. Protocols, procedures and arrangements for the conduct of hearings and conferences where those hearings and conferences were to be conducted by telephone, video or in writing rather than in person;
2. Arrangements for public access to the Commission's Registry and conference and hearing rooms;
3. Technological support and protocols for Commissioners and their staff to work remotely from the Commission's premises; and
4. Matters incidental to points 1 to 3 above.

I retained all other administrative responsibilities as per section 16(1aa) of the Act.

The Commission closed its premises to the public. Staff worked remotely for some weeks before a graduated return to the Commission's premises. All conferences and hearings were conducted remotely either by telephone or video (Zoom).

By 1 July 2020, all Commissioners and staff had returned to the premises and conducted conferences and hearings in the Commission's conference and hearing room premises. Staggered staff commencement and finishing times, and rosters for working from home assisted with social distancing. Some Commissioners, having returned to the office, continued working one to two days per week from home. The Commission's facilities as well as conference and hearing room structure and availability are arranged to allow social distancing.

The Commission is also prepared to ensure that it can quickly respond to a possible second wave of the COVID-19 pandemic.

10.2.1 Effect on workflow

During the period of remote working and video hearings, some hearings involving contentious and complicated matters were delayed. However, the hearings of other matters which were particularly urgent continued and, in spite of the difficulties of dealing with those matters via video facilities, were successfully dealt with.

10.2.2 Matters dealt with remotely

The Commission has traditionally undertaken conferences and hearings with the parties physically present. It has been considered by the Commissioners and the parties who regularly appear to be more effective than through telephone and video facilities. However, where it has been impractical for a party or witness to attend the Commission's premises, telephone or video arrangements are used.

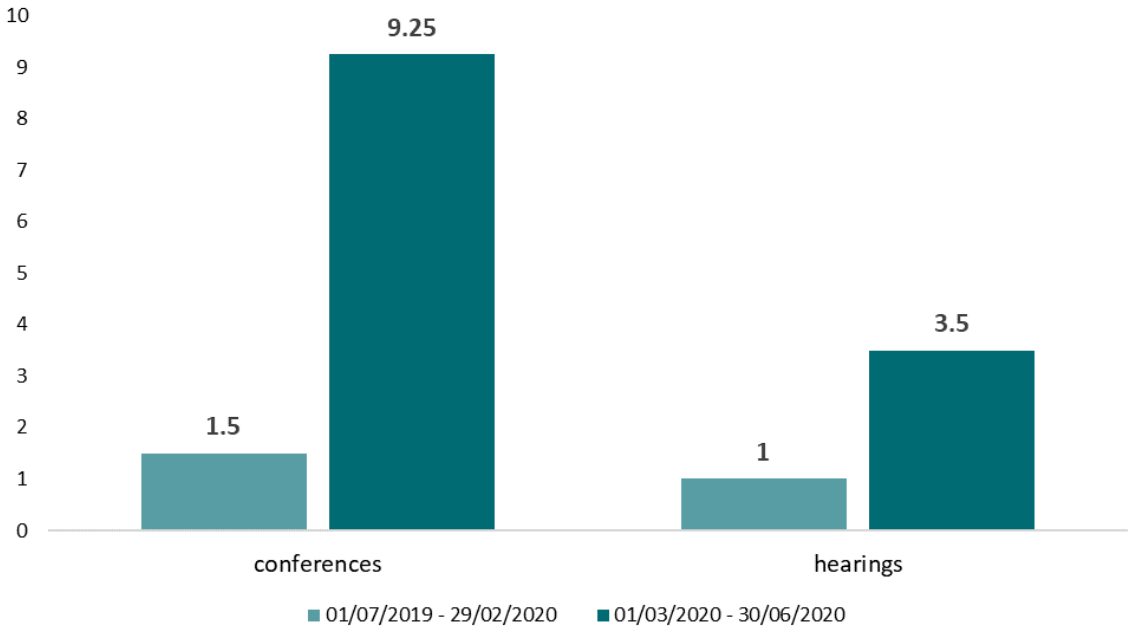

Figure 2 – Average video and telephone listings per month

During the period 1 March to 30 June 2020, matters were dealt with either on the papers, or where a conference or hearing was required, by video or telephone. The 2020 State Wage Case was dealt with on the papers. Further detail is provided in point 6.1 State Wage Order.

10.3 COVID-19 General Orders issued

10.3.1 Leave Flexibility General Order

On April 14 2020, the Commission issued a General Order under s 50 of the Act that allows all private sector, State system, employees to take unpaid pandemic leave, annual leave on half pay and annual leave in advance, during the COVID-19 pandemic.

The Commission ordered these flexible leave arrangements to assist businesses to continue to operate and to preserve employment and the continuity of employment for the benefit of those businesses, their employees, and the economy generally.

The terms of the General Order provide flexibility and leave options to be available to employees for:

1. Unpaid pandemic leave of up to two weeks if the employee is required, by government or medical authorities or acting on the advice of a medical practitioner, to self-isolate or is

otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic;

2. Double annual leave at half pay, by agreement between the employer and employee; and

3. Annual leave to be taken in advance, by agreement between the employer and employee.

Where an award or industrial agreement contains a more beneficial term than the General Order, the award will apply. Otherwise, where there is conflict between the terms of the General Order and the award, the terms of the General Order will apply.

These measures initially operated from 14 April 2020 until 31 July 2020 but were extended until 31 March 2021.

As part of the review of the General Order, UnionsWA sought that the leave provided in the order be paid, not unpaid. This claim is to be heard by the Commission in coming months.

10.3.2 JobKeeper General Order

On 15 May 2020, the Commission issued a General Order under s 50 Act to provide private sector employers with increased flexibility to manage employment arrangements in a manner that supports the JobKeeper Scheme established under the *Coronavirus Economic Response Package Omnibus (Measures No.2) Act 2020* (Cth). This General Order also applies to all private sector employers and employees in the State system, whether covered by an award or not.

The General Order provides for the following specific temporary measures:

1. A requirement that where a JobKeeper payment is payable, the employer is to provide eligible employees the value of the JobKeeper payment or the amount owed for work performed;

2. Ability for an employer to stand down employees (either fully or partially) because they cannot be usefully employed arising from the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19;

3. Ability for an employer to alter the duties or work of an employee in order to continue employment of one or more employees of the employer;

4. Ability for an employer to alter the location of work in order to continue the employment of one or more employees of the employer; and

5. Options for an employer and employee to agree to work being performed on different days and times, provided that the employee does not unreasonably refuse an employer's request.

The General Order also sets out the ways employees, organisations and employers can refer disputes about the General Order to the Commission for conciliation and arbitration.

These measures initially operate until 28 September 2020 and will be reviewed by the Commission on 15 September 2020.

10.4 Other effects of the COVID-19 pandemic

Unfair dismissal claims increased. The claimants often cited COVID-19 pandemic business closures, both temporary and permanent, for redundancy and JobKeeper payment issues. Employees also reported being unable to mitigate loss from any dismissal due to the difficulties in finding alternative employment.

Contractual benefits claims increasingly included JobKeeper payment disputes, albeit that JobKeeper payments are not strictly contractual benefits.

Settlement of claims has been more difficult because the prospects of employees finding alternative employment are reduced and because employees are pursuing any contract breach to bolster their limited resources in times of uncertainty.

A number of industrial agreements have been registered which contain more flexible employment and leave arrangements. These are in the non-constitutional corporation, local government authorities.

Appeals to the Occupational Safety and Health Tribunal relating to hazards in the workplace associated with the COVID-19 pandemic have increased.

Claims relating to the cancellation of traineeships and apprenticeships due to business closures, both temporary and permanent, have increased in number.

A number of unions have applied to the Chief Commissioner under s 66 of the Act, to waive strict compliance with their rules for the purpose of delaying the conduct of their Annual General Meetings or elections, where the effects of dealing with the COVID-19 pandemic have made compliance difficult.

There have been no applications to amend awards by unions to deal with the effects of the COVID-19 pandemic. A number of employers have sought relief from redundancy pay provisions in awards.

11 Access to justice

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

11.1 Commission's pro bono scheme

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

- Ashurst Australia
- Clayton Utz
- DLA Piper
- Jackson McDonald
- Kott Gunning Lawyers
- MinterEllison

- Workwise Advisory Services
- MDC Legal
- Norton Rose Fulbright
- John Curtin Law Clinic

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

11.1.1 Feedback

The Commission seeks feedback from both the pro bono providers and the people who receive their assistance.

A total of eight applicants were referred to the pro bono scheme during the year. Five were employees claiming to have been unfairly dismissed, with two making appeals to the Public Service Appeal Board and one employer defending an unfair dismissal application in which the decision of the single Commissioner was appealed by the employee to the Full Bench.

A number of pro bono assistance recipients reported the very positive difference that the assistance made to how they experienced the process and they expressed their appreciation to the pro bono provider.

For example, one recipient of the pro bono scheme commented on how responsive, approachable and patient the pro bono firm representatives were. The representatives advocated on the recipient's behalf to secure further conciliation proceedings and assist her in reaching a mutually agreed resolution with the respondent, thereby avoiding the need to go to hearing. The recipient indicated she was very happy with the outcome, and commented on the great coordination of the pro bono scheme. The recipient advised that her representatives successfully assisted her to overcome her anxiety and help her through a difficult process.

Another recipient of the pro bono scheme advised that the support from his representative assisted him to get through a really difficult time, and advocated for him in his matter when he could not afford a lawyer. The recipient reported that he had a disability which made the legal process very difficult to follow. He said that it was great to have someone on his side given his circumstances

Pro bono scheme members have reported that the structure of the scheme is simple, personalised, quick and effective, with one member commenting that the referral process is seamless and "works perfectly".

Four applicants for pro bono assistance did not receive assistance in 2019/20 because:

(a) the applicant was not eligible for access to the scheme;

(b) the pro bono application was not proceeded with at the request of the applicant; and

(c) the matter settled prior to the applicant being referred to the pro bono provider.

The eligibility criteria will be revised in the coming year with a view to making it available to more applicants.

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

During the reporting period, with the assistance of the Employment Law Centre of WA (Inc.) (ELC) and the John Curtin Law Clinic (JCLC), the Commission has been able to provide often vulnerable people with guidance.

Where the ELC is able to provide direct assistance to employees coming before the Commission, the JCLC has offered to provide assistance to small business employers.

11.2.1 ELC information sessions

The Commission facilitates information sessions for applicants and respondents to claims of unfair dismissal and denied contractual benefits. These sessions are usually conducted at the Commission's premises and are presented by the ELC. They provide information about threshold issues in s 29 applications and demystify the conciliation process. Parties are usually able to attend in person or they may elect to attend by video link or telephone link. This year, due to the COVID-19 pandemic restrictions, more of these sessions were conducted via video.

Eleven sessions were held over the 2019/2020 year, with a total of thirty-five attendees, twenty seven attending in person, and eight attending via video link or telephone link.

In addition to being of great benefit to the parties concerned, the Commission also benefits. The parties who receive assistance have a better understanding of the issues, are better prepared for proceedings and do not require the same level of intervention and guidance by the Commission. It also makes the process easier for the opposing party as they are dealing with a better-informed person.

11.2.1.1 Feedback from information sessions

At the end of each session, participants are asked to provide feedback. Of those who responded:

- 100% felt more comfortable dealing with their matter before the Commission;
- 94% found the information session useful or very useful;
- 100% rated the service as good or excellent; and
- 100% indicated that they would recommend the session to others.

The Commission also asked participants for feedback after their conciliation conference. Of those who responded, 100% felt that the information helped them prepare for, and improved the outcome of, the conference.

Several participants commented that the session improved their confidence, and another stated the information helped to calm their nerves when attending their conciliation conference. Another participant said the sessions were ‘very well set out’ and ‘engaging’. Other comments included ‘fantastic’, ‘very useful’, ‘really good experience for unrepresented parties’, ‘definitely would recommend the session to others’, ‘very comfortable attending due to presenter being independent of the Commission’ and ‘gave me further clarity on specific questions I had’.

I record my most sincere appreciation to the ELC for its involvement in providing direct assistance to employees and in delivering the information sessions, and the JCLC for their assistance to small business employers.

12 Legislation

There have been no changes to the legislation or regulations in the reporting period.

13 Conciliation and case management

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

13.1 Compulsory conferences

Section 44 of the Act allows a union or employer to apply for a compulsory conciliation conference. Under this section, the Commission also has power to summons a party to attend and to make orders to, amongst other things, prevent the deterioration of industrial relations. The s 44 regime deals well with urgent industrial disputes within both the private and public sectors.

Following allocation of the matter to a Commissioner by the Chief Commissioner, which occurs after the application has been served on the respondent, the Commission contacts the applicant to ascertain the urgency of the application. The Registry aims to serve s 44 applications on relevant parties within two to four hours of an application being filed. This turnaround time is dependent on the urgency of each particular matter.

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

Average time to first conference	Number of matters
Within five days	14
Within six - seven days	8
Within eight - ten days	4
Within 11- 14 days	5
Within 15 - 21 days	1
Within 22 - 28 days	3
Within one – two months	1*

Table 12 – Time from filing until the first conference

**This matter was delayed due to parties' lack of availability in January 2020.*

13.2 More than one conference per application

Some matters may require only one conciliation conference before:

(a) agreement is reached;

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

(c) the applicant decides not to proceed.

Others, though, require more than one conference.

13.2.1 Conferences convened in s 44 matters

Of the 53 conference applications made under s 44 of the Act concluded in this year, without being referred for hearing and determination, 22 required only one conference.

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

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

13.2.2 Conferences convened in s 29 matters under s 32 of the Act

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

In 2019-20, 172 applications made by individuals claiming either unfair dismissal or denied contractual benefits were resolved. More than one conference was convened with parties in 17% of matters.

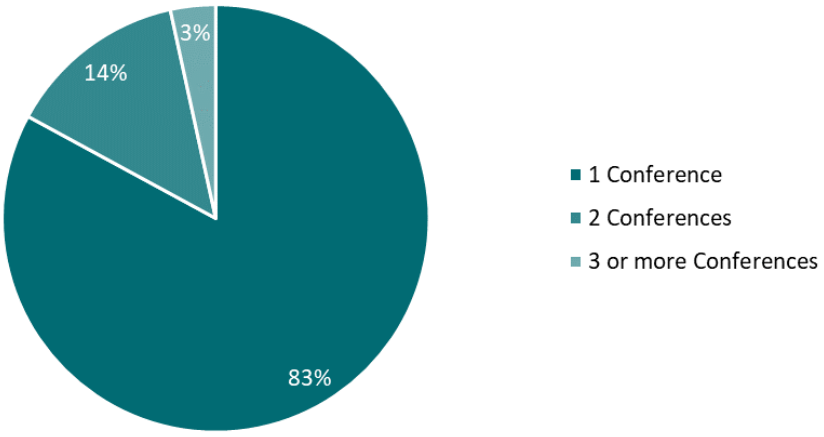

Figure 3 – Conferences convened in s 29 matters

13.3 Conferences by telephone and video link

During the 2019-20 reporting period, a total of 198 conferences were convened by the Commission under s 32 and s 44 of the Act. Where possible, the parties are expected to attend conferences in person as this results in more effective conciliation and better outcomes. However, this is not always practicable so the conference may be conducted by telephone or video link.

	2018-19	2019-20
Conferences convened by telephone link	7	33
Conferences convened by video link	2	49

Table 13 – Conferences by telephone and video link

There has been a significant increase in both telephone and video links, which is attributable to the Commission’s management of matters during the COVID-19 pandemic. From 30 March to 30 June 2020, the Commission held all conferences by telephone or video link where possible. In that time period there were 20 conferences by telephone link and 35 by video link.

14 Private sector coverage

14.1 The scope of existing awards

Most of the Commission’s awards were established decades ago and contain complicated provisions setting out the industries, employees and employers that are covered by the awards. The difficulties

are referred to later in relation to a dispute about the Shop and Warehouse (Wholesale and Retail Establishments) Award and its application to the retail pharmacy industry.

A further recent example arose in an application by the Health Services Union of Western Australia (Union of Workers) (HSU) to become a party to the Dental Technicians' and Attendant/Receptionists' Award, 1982. Applications are required to be served on all named respondents. As this award was issued in 1982 and its respondency has not been updated since then, a number of copies of the HSU's application have returned to the Registrar on the basis that the named respondent is no longer operating a dental practice, others have retired and at least one is deceased.

There are also many callings in the private sector that are award-free. Currently, the Act does not give the Commission capacity to initiate a review of the scope of an award to overcome these issues and unions and employers rarely make application to amend their awards to bring them up to date. I welcome the Minister's announcement of an intention to amend the Act to enable the Commission to initiate such matters.

14.2 Updating awards

In last year's Annual Report, I commented on the lack of applications by unions in the private sector to keep private sector awards up to date, and indicated that I intended to initiate reviews, pursuant to s 40B of the Act, to do so. My intention was to start with the awards most commonly applicable to small businesses in the state.
In February 2020, I commenced reviews of the following awards:

- Restaurant, Tearoom and Catering Workers' Awards 1979;
- Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977;
- Building Trades (Construction) Award 1987;
- Metal Trades (General) Award 1966;
- Hairdressers Award 1989

The review under s 40B of the Act is to ensure that the award:

a) does not contain wages that are less than the minimum award wage as ordered by the Commission under section 50A;

b) does not contain conditions of employment that are less favourable than those provided by the *Minimum Conditions of Employment Act 1993*;

c) does not contain provisions that discriminate against an employee on any ground on which discrimination in work is unlawful under the Equal Opportunity Act 1984;

d) does not contain provisions that are obsolete or need updating; and

e) is consistent with the facilitation of the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises.

The reviews were published in the daily and business newspapers, notified to the parties to the awards and to UnionsWA, Chamber of Commerce and Industry of Western Australia (Inc), the Australian Mines and Metals Association and the Hon Minister for Industrial Relations.

The Commission welcomes the strong interest from industrial organisations representing unions, union members and employers. Many organisations experienced significant demands on their resources as a result of the measures implemented to arrest the spread of the COVID-19 pandemic

and the need to support and assist their members increased during this time. The logistics for progressing discussions and consideration of issues raised in the review process has also been challenging in this environment, and has resulted in slower progress than had been hoped.

The Department of Mines, Industry Regulation and Safety has greatly assisted the award review process through the provision of discussion papers to facilitate the identification of those award provisions that require updating. I record my appreciation to the Department for this valuable assistance in this process.

Following the distribution of the Discussion Papers, it was agreed that where issues common to the five awards were identified, sample model clauses would be provided to the parties to the awards and the peak industrial organisations for their consideration. The issues include annual leave, bereavement leave, carer's leave, parental leave, public holidays and sick leave. Feedback from the parties on the incorporation of the model clauses into the awards will determine the next steps. Where there are issues unique to each of the awards, there are plans to convene conciliation conferences between the parties to the specific award to progress the review.

15 Impediments to effective and efficient operation of the Commission

15.1 Difficulties associated with the Public Service Appeal Board's jurisdiction

The difficulties associated with the jurisdiction of the Public Service Appeal Board have been commented on in previous Annual Reports. Recommendations were made by a number of reviews of the Commission, including the *Ministerial Review of the State Industrial Relations System* supporting the absorption of jurisdictions of the Public Service Arbitrator and the Public Service Appeal Board into the Commission's general jurisdiction. This would remove confusion amongst employees, increase the Commission's efficiency and provide greater consistency in dispute resolution.

In addition to the jurisdictional issues are the practical and administrative ones. Generally, it takes twice as long for a hearing of the Public Service Appeal Board to be scheduled as it does for other matters before the Commission. The types of problems encountered by the Public Service Appeal Boards in the last year have included:

- Unavailability of a Board member for a period of 3 weeks, meaning that the process of preparing for the hearing was delayed;
- The requirement that the Civil Service Association of Western Australia Inc (CSA) nominate a Board member unless the appellant is a member of another union (s 80H (4) and (5)). This places a burden on the CSA to provide a Board member in matters in which it has no direct interest; and
- The Civil Service Association of Western Australia Incorporated, the Health Services Union of Western Australia (Union of Workers) and the Australian Nursing Federation, Industrial Union of Workers Perth have reported difficulties in finding suitable, available representatives to make up the Board. In one case, the particular union took four weeks to provide the name of a nominee, following three reminders by the Commission. However, these problems are not limited to the unions. Government agencies have reported similar difficulties and on a number of occasions, they have taken between 2 and 3 weeks to nominate a representative.

16 Community engagement

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

16.1 Information sessions

The Commission hosted the WA Chapter of the Council of Australasian Tribunals Inc (COAT) for a 'Meet the Commission' event in February 2020. This was the first in a range of events scheduled by COAT, designed to enhance liaison and knowledge sharing throughout varying member jurisdictions.

The Chief Commissioner's Executive Assistant, Elizabeth Roberts, provided training to North Metropolitan TAFE students about the Commission and its role, in November 2019.

A number of other training and orientation sessions were cancelled due to the COVID-19 pandemic.

16.2 Consultation Group

This year the Commission established the Western Australian Industrial Relations Commission Consultation Group. The aim of the group is to provide a forum for the major industrial parties and other interested groups, who regularly have involvement with the Commission, to discuss issues affecting them including the Commission's practices, procedures and regulations.

The inaugural meeting was held on 20 February 2020, where I outlined some of the upcoming activities of the Commission.

During the early stages of the COVID-19 pandemic, Senior Commissioner Kenner corresponded with the consultation group on matters relating to the Commission's response to the COVID-19 pandemic.

16.3 Work experience at the Commission

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

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

16.4 Other events supported by the Commission

A number of members of the Commission attended the Industrial Relations Society of Western Australia's 'Women in Industrial Relations' breakfast held on 16 October 2019.

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

17 Professional Development and Training

Members of the Commission undertook professional development during the year on a range of topics including mediation, gender equity, information technology, online dispute resolution, and legal practice and procedure. Some of this training was undertaken in person, however the majority of this

training was undertaken online. Additionally, some planned training was cancelled due the COVID-19 pandemic.

17.1 Joint Conference of State Industrial Courts and Tribunals

The Commission was due to host the inaugural Joint Conference of State Industrial Courts and Tribunals in late April 2020. Unfortunately this was cancelled due to the COVID-19 pandemic, however, it is anticipated that once inter-state travel restrictions are removed, it will be re-scheduled.

18 Future Developments

18.1 Website

The Commission recognises the need to provide easy access to its services in the modern digital age. To this end, the Commission has completed a review of and has rewritten much of the material on its website to ensure it is easy to understand and provides all the necessary information for both first time users as well as professional advisors and legal representatives. It is expected the new website will launch in late 2020.

18.2 Portal

Following the proclamation of the *Industrial Relations Commission Amendment Regulations 2019* which amended the *Industrial Relations Commission Regulations 2005*, effective from 5 March 2019, the forms contained in the Regulations were updated. The new forms were built using modern website architecture to create interactive type forms which are accessible via a secure website site.

The Commission is now looking to expand the forms website into a “Client Portal” where parties and their representatives can gain access to the forms they have lodged. They can update or amend as well as upload documents associated with their matter in a secure and easy manner, and generally monitor and understand the process of their matter as it proceeds through the Commission.

18.3 Paperless Commission

The Commission is in the early stages of developing a paperless file management system. This will include upgrades to the Commission’s file management software.

19 Website access

Access to the Commission's website is actively monitored. A Google report indicates that there was a 11% increase in the number of hits on the website during the reporting period which continues to demonstrate the use made of the Commission’s online resources.

20 Conclusion

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

21 Decisions and disputes of interest

21.1 Industrial Appeal Court Decisions

21.1.1 Public Sector Continuous service includes service in another Australian State

The Western Australian Industrial Appeal Court (IAC) upheld an appeal against a decision of the Full Bench of the Commission relating to the calculation of an entitlement to severance pay. The IAC determined that for the purpose of calculating a severance pay under *the Public Sector Management (Redeployment and Redundancy) Regulations 2014*, the officer's period of continuous service in the public sector includes his service in the Tasmanian public service.

At first instance, Senior Commissioner Kenner found in favour of the applicant and concluded that service in the public sector in Tasmania was to be included.

On appeal, the majority of the Full Bench (Matthews C, with whom Emmanuel C agreed) preferred the method of calculation by reference to the definition of "public sector" which relied on service in the WA public sector. Acting President Smith dissented, preferring the approach used in the *Long Service Leave General Order.*

On appeal to the IAC, Buss and Murphy JJ found that the majority Full Bench erred in relying on the definition of "public sector". Le Miere J concurred, and explained that the meaning of continuous service within the *Long Service Leave General Order* is to be read in context and having regard to its purpose. This included the need to enlarge the meaning of the term "continuous service" to include service in the public sector in another State.

The IAC reinstated the Senior Commissioner's order.

Floyd Bedford Browne v Director General, Department of Water and Environmental Regulation
[2020] WAIRC 00091; (2020) 100 WAIG 78

21.2 Registered organisations rules matters

21.2.1 Member permitted to inspect registered association's books

The Chief Commissioner issued an order pursuant to s 66 of the Act granting a member of the Master Plumbers and Gasfitters Association of Western Australia (Union of Employers) the opportunity to inspect the books pursuant to the Association's rules. The Association is an organisation of employers registered under the Act. The member sought inspection of the books, namely the management accounts and other documents and agreements, pursuant to Rule 8(15)(c) of the Association's rules. The Association declined the request for a number of reasons.

During the course of the hearing, the Association agreed to provide the member with the invoices that were the subject of legal professional privilege, but the information which contained legal advice would be redacted. The Association was ordered to provide the remainder of the documents.

Sanwell Pty Ltd v Master Plumbers & Gasfitters Association of Western Australia (Union of employers)
[2019] WAIRC 00587; (2019) 99 WAIG 1382

21.2.2 Representation of a member and expulsion of a member

Two other matters were referred to the Chief Commissioner under s 66 of the Act, both of them relating to the Master Plumbers & Gasfitters Association of Western Australia (Union of Employers). They relate to the refusal of the Association to accept a person nominated by a member as a

representative of the member, and the expulsion of a member. At the time that this report is being prepared, those matters were the subject of mediation under the *Employment Dispute Resolution Act.*

21.3 Full Bench matters

21.3.1 Application of the Shop Award to the retail pharmacy industry

In early 2019, the Commission at first instance interpreted the Shop and Warehouse (Wholesale and Retail Establishments) Award 1997 (the Award) and declared that it applies to the retail pharmacy industry in Western Australia. When the award was originally made, it named a number of retail pharmacies as respondents. In 1995, the last of those named respondents engaged in the retail pharmacy industry, was removed from the respondency schedule to the Award.

The Full Bench upheld appeals against the decision of the Commission. The majority of the Full Bench, Chief Commissioner Scott and Senior Commissioner Kenner, found that the Commission at first instance had erred in finding that there was ambiguity in the Award and in taking into account clauses of the Award beyond the scope clause and schedule or respondents. They found that there was no ambiguity in the scope clause and respondency schedule and that the determination of the scope clause required a fact-finding exercise. They also rejected an argument that the process for the 1995 amendment to the schedule of respondents did not comply with the requirements of s 29A of the Act. Further, the union had subsequently applied to replace the respondency schedule, and the schedule was completely replaced, without containing reference to any retail pharmacy employers.

Commissioner Walkington dissented, finding that the Commission at first instance did not err in taking into account clauses beyond the scope clause and respondency schedule in determining the scope of the Award. She disagreed with the appellants' contention that the Commissioner's reasons for decision were inadequate. She also agreed with the Commissioner's conclusion that the 1995 amendments were not made according to the requirements of the Act.

The Shop, Distributive and Allied Employees' Association of Western Australia has appealed to the Industrial Appeal Court against the Full Bench's decision. The Court has stayed the Full Bench decision pending the hearing of the appeal, which is likely to be held in early 2021.

The Shop, Distributive and Allied Employees' Association of Western Australia v Samuel Gance (ABN 50 577 312 446) t/as Chemist Warehouse Perth
[2019] WAIRC 00874; (2019) 100 WAIG 25

21.3.2 Deed bars claim for contractual benefits

An employee signed a deed of settlement and release with her employer at the end of her employment. The deed said that it settled all matters between the parties.

However, the employee made a claim that she had been unfairly dismissed. She said that she had signed the deed under duress and was threatened that if she did not sign the deed, she may be dismissed.

The Commissioner at first instance found that the pressure exerted on the employee to sign the deed was not "undue" because "it did not involve any actual or threatened unlawful conduct" by the employer. In addition, the Commissioner found that the employee, though stressed, was under no special disadvantage, and the employer did not breach or threaten to breach the contract.

On appeal to the Full Bench, the employee argued that the Commissioner erred in law by failing to properly consider the issue of actual or threatened breaches of the employment contract, and whether this constituted duress or a threat.

The Full Bench unanimously found that the employer had given the employee an option to either sign the deed and resign or it would undertake an investigation into allegations that she had misconducted herself. The employee knew and understood that she was not being threatened with dismissal, the Full Bench agreed that there was no duress or threat. Further, the employee had received independent advice from an industrial agent prior to signing the deed, and she was also told by the employer that she must not sign the deed under duress.

The Full Bench also dismissed the employee's argument that the employer's conduct constituted unlawful conduct amounting to the tort of deceit because it had not been argued before the Commission at first instance.

The Full Bench also found that:

- The Commissioner at first instance was correct in finding that there was no contractual duty on the employer to act with good faith;
- There was a legitimate reason for suspicion of wrongdoing by the employee as a basis for the employer commencing disciplinary proceedings; and
- It was in the public interest for parties to be bound by their agreements and not be able to make claims that they had agreed not to pursue, by signing the deed.

The Full Bench dismissed the appeal.

Heald v Metlabs (Australia) Pty Ltd
[2020] WAIRC 00117; (2020) 100 WAIG 176

21.3.3 Prison officer dismissal for excessive and unreasonable use of force

The Full Bench unanimously dismissed an appeal regarding the dismissal of a senior prison officer. The Director General of the Department of Justice alleged that he had used excessive and unreasonable force by his use of Oleo-resin Capsicum spray (OC spray) against two prisoners in separate incidents. The first incident involved two sprays at the prisoner.

At first instance, Senior Commissioner Kenner found that in the first incident, the first of the two sprays did not constitute excessive force, but the second spray was not justified. In respect of the second incident, he found that the deployment of the OC spray was justified and did not constitute unreasonable force. He also determined that reliance on one incident alone, being the second spray in the first incident, could not warrant the dismissal of the officer. He ordered that the officer be reinstated in his position without loss.

The Minister for Corrective Services appealed against the decision, arguing that the Senior Commissioner erred in the way he applied the test of determining whether the officer's use of force fell outside the provisions of s 14(1D) of the *Prisons Act*.

Chief Commissioner Scott, with whom Commissioner Walkington agreed, found that all of the circumstances, including the officer's perceptions at the time of the incidents, were relevant considerations. She found that Senior Commissioner Kenner was entitled to conclude that the use of force was reasonable and that he had taken into account and assessed the particular use of force by reference to the statutory criteria, the benefit of hindsight, the prisoners' conduct and the officer's state of mind and the issue of proportionality in his response.

However, Commissioner Matthews dissented and found that the officer's conduct in the first incident was not reasonable in either application of the OC spray.

The appellant also contended that the dismissal was not a penalty for established breaches of discipline but was because the Director General had lost trust and confidence in the officer. However,

the majority of the Full Bench found that this contention was inconsistent with the way the allegations were couched and the ultimate decision was expressed by the Director General. The allegations particularized in the correspondence to the officer were in relation to his conduct and actions, and not ultimately to a lack of trust and confidence.

The appeal was dismissed.

The Minister for Corrective Services v Mr Gary Hawthorn
[2020] WAIRC 00358; (2020) 100 WAIG 453

21.3.4 Truck driver's serious misconduct

A transport company engaged a contractor. The contractor's employee, a truck driver, was involved in an incident where the front of his truck came into contact with another driver.

The Full Bench unanimously dismissed an appeal against a decision of the Road Freight Transport Industry Tribunal that found that the respondent (the transport company) lawfully terminated a Cartage Agreement with the appellant (the contractor) after the driver's conduct was found to constitute serious misconduct as well as a serious safety breach.

The truck driver moved his truck towards another driver who was standing in front of his truck. The Tribunal found that by continuing to move the truck when he was or should have been aware that the driver was standing in his way, constituted serious and wilful misconduct, or alternatively, reckless indifference. It was a safety breach.

On appeal to the Full Bench, the contractor argued that the Tribunal's findings were not supported by the evidence and did not take account of certain matters including that the driver standing in front of the truck was in his blind spot.

The Full Bench, on viewing the video footage of the incident, unanimously observed that the driver, the appellant, had provoked the other driver who was standing in front of his truck, and then, after being infuriated at being gestured to, deliberately drove in the direction of the other truck driver, with his truck making physical contact with the other driver. He was not in a blind spot. The Full Bench found that there was no error in the Tribunal's findings nor in the acceptance and rejection of various pieces of evidence. The Full Bench determined that they were findings that were open to the Tribunal to make based on all of the evidence.

D & K Holden Pty Ltd v Holcim (Australia) Pty Ltd
[2020] WAIRC 00185; (2020) 100 WAIG 448

21.3.5 Police medical expenses claim

The Industrial Magistrate's Court (IMC) issued an order requiring the Commissioner of Police to reconsider a police officer's claim for reimbursement of certain non-work-related medical expenses. The Full Bench found that the IMC did not have the power to make such an order, even though it was suggested to him by the parties. The Full Bench also found that the hire and purchase of a continuous positive airway pressure (CPAP) machine did not relate to a "service" within the meaning of clause 36(1) of the Western Australian Police Industrial Agreement 2014.

The Commissioner of Police appealed to the Full Bench on the basis that the Industrial Magistrate's Court's powers are limited to either issuing a caution or a penalty, or on finding a breach, making an order for the purpose of preventing a further contravention. An order preventing a further contravention could only be made where the magistrate found a breach and issued a penalty.

Chief Commissioner Scott and Commissioner Matthews found that as no penalty was imposed, there was no power to make an order preventing a further contravention nor was there power to require the Commissioner of Police to reconsider the claim.

The Commissioner of Police also argued that, in finding that the hire or purchase of the CPAP machine amounts to receipt of an "other service" by the employee within the meaning of that term in clause 36(1)(b) of the Agreement, the industrial magistrate erred.

Chief Commissioner Scott found that the hire and purchase of the CPAP machine did not fall within the meaning of a "service" but was more akin to a medical aide. She found that in this context the industrial magistrate erred in finding that it was open to the Commissioner of Police to construe clause 36(1) to find that the machine hire and purchase expenses claims relate to an X-ray or "other service".

Scott CC and Matthews C found that the purchase and hire of the CPAP machine did not constitute a reimbursable expense resulting from a service and therefore did not fall within clause 36(1).

Commissioner of Police v Brian John McCormack
[2020] WAIRC 00112; (2020) 100 WAIG 472

21.3.6 Refusal to employ teacher was harsh and unjust

The Full Bench dismissed an appeal by the Director General, Department of Education against a decision of the Commission where it found that the refusal of the Director General to employ a teacher was unfair.

The Director General had summarily terminated the teacher's employment following an incident involving a primary school student. The incident resulted in a criminal charge being brought against the teacher. The criminal charge caused the teacher to be issued with a notice under the *Working with Children (Criminal Record Checking) Act 2004* (WA) (Working with Children Act) and cancellation of the teacher's registration with the Teacher Registration Board. The notice under the Working with Children Act was withdrawn, the teacher registration reinstated and the criminal charge was discontinued. However, the Director General still refused to employ the teacher. It was at this stage that the Director General commenced disciplinary action into the teacher's conduct, the conduct which had led to the previously discontinued criminal charge. This investigation found that the teacher's actions were inconsistent with the Code of Conduct and that he had engaged in excessive physical contact with a student. His employment file would remain marked "not suitable for future employment with the Department of Education", and a reprimand was imposed on him.

At the hearing at first instance, the Senior Commissioner found that the Director General's refusal to employ the teacher was unfair and ordered the teacher be offered a contract of employment as a primary school teacher at a level and salary equal to his qualifications and experience. The Director General was also ordered to pay the teacher for the salary and benefits he would have earned had he been employed from the date when the Director General's refusal to employ him ceased to be reasonable because of the removal of the Working with Children Act notice and the renewal of the Teacher Registration Board registration.

The Director General appealed to the Full Bench. The first ground of appeal related to the provision of s 23(2a) of the Act which excludes from the Commission's jurisdiction any matter relating to the filling of a vacancy which is a procedure referred to in s 97(1)(a) of the *Public Sector Management Act 1994*. The Full Bench concluded that the circumstances of this case did not relate to the filling of a vacancy, that the Director General's refusal to employ was because she had wrongly concluded that the teacher was unsuitable for re-employment. The Full Bench found that the Director General's

approach in other circumstances of the re-employment of teachers did not require the filling of a vacancy.

The Director General also asserted that the Senior Commissioner made an error in law when he found that the Working with Children Act did not prevent the teacher from obtaining relief in the proceedings because that Act says that any teacher dismissed on the basis of a Notice under that Act cannot receive a remedy in relation to the dismissal. The Full Bench found that the Senior Commissioner concluded that the Working with Children Act only prevents relief where the remedy sought is for a dismissal and not for an order for employment where there was an unfair refusal to employ. The teacher was seeking new employment, not challenging the fairness of the dismissal as such.

Another ground of appeal alleged that the Senior Commissioner erred in fact and law in finding that there was a refusal to employ within the meaning of s 7 of the *Industrial Relations Act 1979*, other than on two discrete occasions. The Full Bench found that the evidence demonstrated that there were repeated requests and repeated refusals to employ, with at least one of those refusals being unreasonable.

The Full Bench agreed with the comments made by the Senior Commissioner in the decision at first instance that the teacher had been treated harshly and unjustly. It was also noted that the red flag on the teacher's employment record also indicated the Director General's ongoing refusal to employ.

The Director General, Department of Education v
The State School Teachers' Union of WA (Inc)
[2019] WAIRC 00754; (2019) 99 WAIG 1609

21.3.7 Paid leave to attend Public Service Appeal Board hearing dismissed

The Industrial Magistrate's Court found that the provision within the Public Service Award 1992, which entitles an employee to paid leave to attend union business, does not apply to an employee attending proceedings on his own behalf before the Public Service Appeal Board because that did not relate to union business.

The Civil Service Association of Western Australia (Inc) appealed against the Industrial Magistrate's Court finding and said that this contravened freedom of association principles and was manifestly unreasonable.

The Full Bench found that the industrial magistrate had not erred and that the union business referred to in the clause meant to the professional operations or commercial dealings of the CSA as a collective, not a matter relating to the individual member's own proceedings. That could not be characterised as either union or association business.

Civil Service Association of Western Australia (Inc) v
Director General, Department of Justice
[2019] WAIRC 00713; (2019) 99 WAIG 1531

21.3.8 Teacher's historical claims dismissed

A teacher claimed that he was unfairly dismissed and was entitled to challenge three previous separate disciplinary actions which cumulatively were taken into account by the Director General in making a decision to dismiss him. The Commissioner at first instance found that two of the matters ought to be dismissed because the teacher had excessively delayed in bringing the proceedings, and a third application was dismissed on the basis that the teacher had signed a deed of settlement that barred him from bringing any claim.

The teacher appealed to the Full Bench on the basis of such considerations as the Commissioner not having regard to hardship to him; the public interest and interests of employees generally; the lack of prejudice to the Department; that the Commissioner had prejudged the teacher after the teacher had admitted to wrongdoing; that investigation reports had prejudiced the teacher's case or that the Commissioner was biased against the teacher.

The Full Bench noted that it had not been shown that there was any error in the Commissioner's decision-making. There was no bias or prejudice against the teacher and the deed was a conclusive settlement including the teacher's promise that he would not commence further proceedings. The Full Bench also found that there was no evidence to suggest that the teacher had been misled by the Department when he signed the deed. The appeal was dismissed.

Mr Leslie Magyar v Department of Education
[2019] WAIRC 00718; (2019) 99 WAIG 1595

21.4 Commission at First Instance

21.4.1 Private Sector Matters

21.4.1.1 Contract of employment was a sham

The Commission dismissed a denied contractual benefits claim after finding that the contract of employment that existed between the parties was a sham directed toward fooling the Commonwealth Department of Immigration.

Commissioner Matthews also found that although the contract of employment between the parties contained the terms that the applicant was to be employed full time and to receive $1,173.08 per week, a side agreement that existed between the parties evidenced that the applicant was in fact a casual employee who worked for $25 per hour. Further, Matthews C found that where the applicant earned less than $1,173.08 per week he would refund the difference to his employer.

Matthews C dismissed the application on the basis that there was no contract of employment to enforce as the purported contract was no more than a sham.

Maciej Sprutta v The Trustee for The Luo Family Trust
[2019] WAIRC 00607; (2019) 99 WAIG 1414

21.4.1.2 Employer reasonably withheld approval of a study application

A seafarer alleged that he had been denied a contractual benefit when his employer did not approve his request to study and sit for an AMSA Chief Mate Certificate of Competency. The applicant alleged that his entitlement was contained in clause 13.9 of the *Svitzer Australia Pty Ltd and Australian Maritime Officers Union Offshore Oil and Gas Enterprise Agreement 2010* (the Agreement) which was referred to in his contract of employment.

Commissioner Matthews determined that cl 13.9 conferred a contractual entitlement on the applicant because the parties' contract of employment included language of contractual incorporation and it was reasonable to consider that the Agreement was incorporated into the contract. However, he observed that cl 13.9 included a qualification, that the entitlement must not be unreasonably withheld by the employer. The respondent's financial situation and the fact that there was no pressing need for the applicant to become a chief mate meant that the respondent had not withheld its consent unreasonably.

The Commission dismissed the application.

Bradley Cooper v OSM Maritime Group
[2019] WAIRC 00826; (2019) 99 WAIG 1737

21.4.1.3 Family trusts found to be national system employer

The Commission determined that it was unable to hear an unfair dismissal claim because the applicant was employed by a national system employer, in the form of a trust which is a corporation.

Commissioner Walkington noted that a trust is not the employing legal entity and it is the trustee, the person/entity responsible for administering the trust, who enters into the employment contracts. She noted that if the trustee is a company, it may be a constitutional corporation and a national system employer.

Aiden Bilcich v Stockman Paper Merchants
[2020] WAIRC 00162; (2020) 100 WAIG 199

21.4.2 Public Sector

21.4.2.1 Police enterprise bargaining

The WA Police Union of Workers made an application to the Commission for assistance in bargaining for the making of a new industrial agreement.

The Commission convened eight compulsory conferences and the parties met for the purposes of negotiation at least fifteen times. The applicant rejected five offers made by the respondent for a new industrial agreement. Despite the endeavours by the parties and the Commission, the parties were unable to reach an agreement.

The Commission is empowered under s 42H(1) of the Act to declare bargaining between the parties has ended, as long as the Commission is satisfied as to a number of matters.

Senior Commissioner Kenner, as the Public Service Arbitrator, found that the applicant had bargained in good faith, bargaining had failed and there was no reasonable prospect of reaching an agreement. The Commission issued a declaration under s 42H(1) of the Act that bargaining for an industrial agreement to replace the Western Australian Police Industrial Agreement 2017 has ended.

The matter is proceeding to arbitration.

Western Australian Police Union of Workers v Western Australia Police Force
[2020] WAIRC 00269

21.4.2.2 Re-employment of teacher

The State School Teachers' Union of WA (Union) alleged that its member, a teacher, was unfairly dismissed from his employment with the Department of Education on medical grounds. The teacher had had mental health issues associated with conduct of a student towards him.

The Commission at first instance concluded that if all the relevant information were available to the decision-maker, they could not have determined that the teacher was unable to work due to ill health but was not going to work for other reasons and that his response to a disciplinary process was abnormal. Commissioner Matthews found the dismissal was unfair but that reinstatement or redeployment was impracticable. He awarded the teacher compensation.

The Union appealed to the Full Bench, which found that the Commission at first instance erred in concluding that:

1. the teacher was not going to work for reasons unrelated to his health;
2. the teacher's reason for not working were 'dramatic and exaggerated' and was an 'unreasonable, and an emotional one, not a medical one'. The Full Bench found that this was not a conclusion open to the Commission on the evidence; and
3. that re-employment was not practicable.

The Full Bench allowed the Union's appeal and ordered that the decision at first instance be suspended and the matter remitted to the Commission for further hearing and determination on the practicability of reinstatement

or reemployment in consideration of the employee's then current state of health and whether he ought to be reemployed at a school other than the one he had worked at.

On remittal, Commissioner Matthews found, on the expert medical evidence provided by a psychiatrist, that the teacher was fit for work in another school.

The Commissioner rejected the Director General of Education's application to dismiss the claim because of a medical certificate known to the Union but not provided to the employer. The medical certificate contained information said to be contrary to the Union's submissions. The Commissioner rejected the employer's application.

The Commissioner also found that the compensation awarded to the teacher be reduced because of his failure to mitigate loss and failure to discover documents at first instance.

This matter is now subject to a further appeal to the Full Bench, this time by the Director General.

The State School Teachers' Union of W.A. (Incorporated) v
The Director General, Department of Education
[2020] WAIRC 00292; (2019) 100 WAIG 371

21.4.2.3 Application for conversion from fixed term contract to permanent employment dismissed

The Public Service Arbitrator has dismissed an application for the conversion of a fixed term contract employee to permanency on the basis that the employee did not meet the requirements of clause 2.1(a) of *Commissioner's Instruction No. 23*. This Instruction requires that 'the reason for engagement on a fixed term contract is not a circumstance mentioned in the relevant industrial instruments'.

A circumstance mentioned in the *Public Service and Government Officers General Agreement 2014* and the *Public Service and Government Officers General Agreement 2017* was for employment on a fixed-term contract to cover a "one-off period of relief". The officer's contract explicitly stated his fixed term position was a "one-off period of relief" to cover the position of another worker during the period between July and December 2018.

As the contract indicated a reason for his engagement on the contract mentioned in the agreements, he had not met cl 2.1(a) of CI 23 of the Instruction and therefore the Arbitrator found the employee was ineligible for conversion to permanency.

The Arbitrator also observed that CI 23 had a commencement date of 10 August 2018, and by its scope and application, was limited to persons employed at the time of its commencement. He found it was not intended to apply to future employees.

Civil Service Association (Inc.) v
Department of Water and Environmental Regulation
[2020] WAIRC 00216; (2018) 100 WAIG 325

21.5 Public Service Appeal Board

21.5.1 Senior Police Departmental Officer's demotion

A public service officer with the WA Police, who had been part of the senior management team, admitted to allegations of misuse of the Department's computer system, unauthorised release of official information and inappropriate behaviour over a six-year period. The Commissioner of Police imposed a penalty of permanent reduction in work classification from level 8.3 to level 5.4.

The officer appealed to the Public Service Appeal Board against the severity of the penalty on the basis that the penalty was harsh and unfair given the mitigating circumstances, including his unblemished record and personal issues. He sought that the penalty be reduced to a reprimand and a reduction in classification to Level 8.1.

The Public Service Appeal Board found that in light of the appellant's engagement in sustained misconduct, profound abuse of the respondent's email system, numerous breaches of the respondent's code of conduct and his senior position, the respondent's decision to permanently reduce the appellant's work classification was entirely appropriate. The Board found that the personal matters referred to by the appellant in his mitigation submissions could not be relied upon in mitigation of sustained misconduct over many years.

John Purcell v Western Australian Police
[2020] WAIRC 00246; (2020) 100 WAIG 565

21.5.2 No dismissal of government officer on fixed term contracts

The Public Service Appeal Board unanimously dismissed an appeal by a government officer who claimed she was dismissed. She had been employed on a series of fixed term contracts. After her final contract ended, the appellant filed an appeal under s 80I(d) of the *Industrial Relations Act 1979* (WA) against what she said was the respondent's decision to dismiss her. She argued that she was unfairly dismissed because the respondent did not offer her a further fixed term contract or a permanent position.

The Board found that the failure to offer a subsequent contract was not a dismissal and that the employment ended in accordance with the final fixed term contract. The Board found that it was the effluxion of time in accordance with the parties' agreement, and not any action on the part of the respondent, that resulted in the contract and the employment relationship ending.

The Board dismissed the appeal for want of jurisdiction.

Rachel Catherine Townes-Vigh v North Metropolitan Health Service
[2020] WAIRC 002188; (2020) 100 WAIG 256

21.6 Occupational Safety and Health Tribunal

21.6.1 OSH Tribunal reviewed and revoked improvement notices and exemption applications

Hanssen Pty Ltd is a builder of multi-level buildings. It had devised a system called the Hanssen Penetration System (HPS) to cover holes in concrete laid on construction sites and to manage the risk of falls through the holes when the holes are not covered.

However, a Worksafe Inspector issued Improvement Notices under the *Occupational Safety and Health Regulations 1996* (WA) for four sites because the holes were not covered.

Hanssen Pty Ltd sought an exemption from the requirements of reg 3.54 of the *Occupational Safety and Health Regulations 1996* (WA), which requires that a wire mesh be installed over the holes, on the basis that the HPS 'substantially' complies with the regulations. Hanssen Pty Ltd contended that the HPS provides an equal or greater protection from the risk of injury, and that any risks or hazards associated with not having a wire mesh over the holes are addressed by alternate safety measures of the HPS.

The WorkSafe Commissioner refused the exemption saying that the HPS does not achieve substantial compliance with reg 3.54 because it only complies with two of the three requirements of the regulation.

Hanssen applied to the Occupational Health and Safety Tribunal to revoke the improvement notices. By the time the matter came to be dealt with by the Tribunal, 3 of the 4 construction sites had reached the stage where there were no longer holes. The Tribunal dismissed the exemption applications in relation to those three sites. However, the Tribunal noted that revocation of notices because of the completion of construction and the passage of time should not infer that the notices were not appropriate or justified.

The Tribunal found that the fourth site was still operational and ordered that Hanssen Pty Ltd ensure all holes meet the requirements of reg 3.54, including the requirement to embed wire mesh over it. The Tribunal also affirmed the WorkSafe Commissioner's decision to not grant Hanssen Pty Ltd an exemption from the requirements of reg 3.54 for the fourth site.

The Worksafe Commissioner also applied for an order that Hanssen Pty Ltd pay $14,192.75 in costs for the preparation of reports and attendance at the hearing of an expert witness. The Tribunal found that there were

no extreme circumstances in the conduct of Hanssen Pty Ltd in bringing the applications nor that the applications were instituted without reasonable cause or were manifestly groundless.

The application for costs was dismissed.

Hanssen Pty Ltd v Worksafe Western Australia Commissioner
[2020] WAIRC 00141; (2020) 100 WAIG 384

21.7 Construction Industry Portable Paid Long Service Leave

The requirements for employers to be registered and make contributions to the Construction Industry Portable Paid Long Service Leave Board have been contentious for many years. Two such matters arose during the year.

21.7.1 Maintenance and repairs to established client premises

In the first case, Chief Commissioner Scott found that the applicant, a company undertaking maintenance and repairs of established and operating plant, equipment and structures, on the premises of clients, including mines and processing plants, employed employees "on a site" or "onsite" and for the purposes of the definition of construction industry in the Act, were required to register under the scheme for providing portable paid long service leave. Chief Commissioner Scott noted that the term "construction industry" under that Act is not limited to building or construction sites where new buildings or structures are being built. Therefore, employees may perform work "on a site" if this was at a location away from the employer's premises.

An employer may be exempted from the scheme set up by the Act if the employer is "not substantially engaged in the construction industry" as defined in the Act.

Programmed Industrial Maintenance Pty Ltd v
The Construction Industry Long Service Leave Payments Board
[2019] WAIRC 00843; (2019) 99 WAIG 40

21.7.2 Telegraphic work

The second matter related to employees engaged as technicians under the Telecommunications Services Award 2010 (Cth). Senior Commissioner Kenner noted that determining whether an employer employs employees in the construction industry as defined requires a two-step process. The Senior Commissioner said that the question was whether the work was characterised as work in the construction industry because it fell within the meaning of "telegraphic" contained in the Act's definition of “construction industry”.

The Senior Commissioner decided that the applicant's employees have more than a passing association with the work identified in the list of at least 11 classifications from nine awards that were cited by the respondent as possibly applying to the applicant.

Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme
[2019] WAIRC 00860; (2019) 99 WAIG 125

Both of these decisions arise in circumstances where the coverage of the construction industry portable paid long service leave arrangement is set out in an act with a title that is confusing and unclear to employers and employees. As Chief Commissioner Scott noted in the decision in Programmed Industrial Maintenance, the generally accepted definition of "construction industry" is not what applies under the *Construction Industry Portable Paid Long Service Leave Act 1995* but a far more complex interrelationship of terms and definitions provisions. The term of the Act could be amended to clarify this long-running confusion.

22 Appendices

22.1 Appendix 1 – Legislation

Construction Industry Portable Paid Long Service Leave Act 1985
Employment Dispute Resolution Act 2008
Fair Work Act 1995
Long Service Leave Act 1958
Mines Safety and Inspection Act 1994
Minimum Conditions of Employment Act 1993
Occupational Safety and Health Act 1984
Owner Drivers (Contracts and Disputes) Act 2007
Petroleum (Submerged Lands) Act 1982
Police Act 1892
Prisons Act 1981
Public Sector Management Act 1994
Vocational Education and Training Act 1996
Young Offenders Act 1994

22.2 Appendix 2 – Members of the Public Service Appeal Board

Name	Party nominating the member
Ms Josephine Auerbach	Australian Medical Association of Western Australia
Mr Michael Aulfrey	Perth Children's Hospital; Health Support Services
Ms Michelle Bastian	Department of Mines, Industry Regulations and Safety
Ms Sherina Bhar	Commissioner of Police
Ms Kellie Blyth	South Metropolitan Health Service
Ms Louise Brick	North Metropolitan Health Service
Mr Charlie Brown	The Civil Service Association of Western Australia Incorporated
Mr George Brown	The Civil Service Association of Western Australia Incorporated
Mrs Leanne Brown	The Civil Service Association of Western Australia Incorporated
Mr Peter Byrne	Department of Communities
Ms Kendall Carter	Department of Communities
Mr Joshua Chapman	Department of Justice
Mr Nicholas Cinquina	Western Australia Police; Department of Education
Ms Bethany Conway	The Civil Service Association of Western Australia Incorporated
Mr Ross Davenport	Department of Communities
Mr Tony DiLabio	Department of Transport
Mr Warren Edwardes	Australian Medical Association (WA) Incorporated
Mr Darian Ferguson	Department of Justice
Mr Mark Golesworthy	North Metropolitan Health Service and Western Australian Country Health Service
Mr Matthew Hammond	Department of Justice
Mr Peter Heslewood	Western Australian Country Health Service
Mr Dan Hill	Health Services Union of Western Australia (Union of Workers)
Mr Michael Jozwicki	Department of Premier and Cabinet
Ms Amanda Kaczmarek	Australian Medical Association (WA) Incorporated
Mrs Lois Kennewell	The Civil Service Association of Western Australia Incorporated
Mr Bruce Kirwan	East Metropolitan Health Service
Mr John Lamb	The Civil Service Association of Western Australia Incorporated
Mr Greg Lee	The Civil Service Association of Western Australia Incorporated
Ms Julie Love	East Metropolitan Health Service
Ms Morgan Marsh	Department of Education
Mr Piers McCarney	Rail, Tram and Bus Industry Union of Employees, West Australian Branch

Name	Party nominating the member
Mr Jamie McDiarmid	Public Transport Authority
Ms Jane Nicolson	Western Australian Country Health Service
Mr John O'Brien	Department of Justice
Ms Helen Redmond	Western Australian Police
Mr Gavin Richards	The Civil Service Association of Western Australia Incorporated
Ms Karen Roberts	Department of Justice
Ms Maria Ruane	Department of Education
Ms Rebecca Sinton	Department of Health; Path West Laboratory Medicine WA
Mr Damien Stewart	Commissioner of Police, Western Australia Police Force; Department of Biodiversity, Conservation and Attractions
Ms Jenny Stone	Department of Justice
Mr Grant Sutherland	The Civil Service Association of Western Australia Incorporated
Mr Mark Taylor	Department of Justice
Ms Val Tomlin	Department of Communities
Ms Donna Townsend	Department of Communities
Ms Jane van den Herik	North Metropolitan Health Service
Mr Robert Warburton	Department of Transport

22.3 Appendix 3 – Right of entry authorisations by organisation

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

This page has been intentionally left blank.

This page has been intentionally left blank.