

2010

WESTERN AUSTRALIA



Forty Seventh Annual Report
of
The Chief Commissioner of the
Western Australian Industrial Relations Commission
for the period
1 July 2009 to 30 June 2010

Pursuant to Section 16, subsection (2)(b) of the
Industrial Relations Act 1979

2010
WESTERN AUSTRALIA



Report of the Chief Commissioner of the
Western Australian Industrial Relations Commission
On the operation of the Industrial Relations Act 1979
1 July 2009 to 30 June 2010

Minister Responsible for the Administration of the Act
The Hon. William R Marmion, BE MBA MLA
In his capacity as Minister for Commerce

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Membership and Principal Officers

Western Australian Industrial Relations Commission

During the year to 30 June 2010, the Western Australian Industrial Relations Commission (WAIRC) was constituted by the following members:

President	The Honourable M T Ritter (<i>Acting</i>) (to 16 December 2009) The Honourable J H Smith (<i>Acting</i>) (from 17 October 2009) The Honourable Justice R L Le Miere (<i>Acting</i>) (from 15 June 2010)
Chief Commissioner	A R Beech
Senior Commissioner	J H Smith (to 16 October 2009) P E Scott (from 17 October 2009) (<i>Acting</i>)
Commissioners	P E Scott (to 16 October 2009) S J Kenner S Wood (to 13 December 2009) J L Harrison S M Mayman

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

Public Service Arbitrators

Senior Commissioner J H Smith's appointment as an additional Public Service Arbitrator ended on 16 October 2009.

Acting Senior Commissioner P E Scott continued her appointment as a Public Service Arbitrator throughout the period. This appointment is due to expire on 21 June 2011.

Commissioner S J Kenner continued his appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 25 June 2011.

Commissioner S Wood continued his appointment as an additional Public Service Arbitrator until 13 December 2009.

Commissioner J L Harrison continued her appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 2 May 2011.

Commissioner S M Mayman continued her appointment as an additional Public Service Arbitrator. This appointment is due to expire on 9 November 2010.

Railways Classification Board

Appointments will be made if and when an application is made to the Railways Classification Board.

Occupational Safety and Health Tribunal

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

Registry

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

Mr J Spurling	Registrar
Ms S Bastian	Registrar Designate
Ms S Hutchinson	Deputy Registrar
Mr A Wilson	Deputy Registrar (retired 9 July 2009)

The Western Australian Industrial Appeal Court

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

The Honourable Justice C A Wheeler	Presiding Judge
The Honourable Justice C J L Pullin	Presiding Judge and Ordinary Member
The Honourable Justice R L Le Miere	Ordinary Member
The Honourable Justice M J Buss	Ordinary Member
The Honourable Justice K J Martin	Ordinary Member

Industrial Magistrates Court

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

Ms M Boon
Mr R Bromfield
Mr G Cicchini

Matters Before the Commission

1. Full Bench Matters

The Full Bench has been constituted on each occasion by an Acting President and by two (2) Commissioners.

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

The Honourable M T Ritter (Acting President).....	7
The Honourable J H Smith (Acting President).....	24

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

Chief Commissioner A R Beech	12
Senior Commissioner J H Smith	2
Acting Senior Commissioner P E Scott.....	4
Commissioner P E Scott	2
Commissioner S J Kenner	15
Commissioner S Wood	3
Commissioner J L Harrison.....	16
Commissioner S M Mayman	8

The following summarises Full Bench matters:

Appeals

Heard and determined from decisions of the:

Commission – s 49.....	7
Industrial Magistrate – s 84	0
Coal Industry Tribunal	0
Public Service Arbitrator.....	12
Railways Classification Board.....	0
Occupational Safety and Health Tribunal	0

Organisations – Applications by or Pertaining to

Applications to register an organisation pursuant to s 53(1).....	3
Applications to amend the rules of a registered organisation pursuant to s 62	6
Applications relating to State branches of federal organisations pursuant to s 71	2
Applications to adopt rules of federal organisations pursuant to s 71A.....	0
Applications for registration of a new organisation pursuant to s 72	0
Applications seeking coverage of employee organisations pursuant to s 72A.....	0
Applications for cancellation/suspension of registration of organisations pursuant to s 73	1

Other

Proceedings for enforcement pursuant to s 84A brought by the Minister; the Registrar or a deputy registrar; an industrial inspector; or any organisation, association or employer	1
Questions of law referred to the Full Bench	0
Matters remitted by the Industrial Appeal Court	0
Number of Full Bench matters heard but not determined in 2009/2010	0

Orders

Orders issued by the Full Bench	36
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2. Acting President

Matters before the Acting Presidents sitting alone were as follows:

Applications for an order that the operation of a decision appealed against be stayed pursuant to s 49(11)	2
Applications for an order, declaration or direction pursuant to s 66.....	11

The following summarises s 66 applications:

Applications finalised in 2009/2010.....	6
Directions hearings	30
Applications part heard	0
Applications withdrawn by order	0
Applications discontinued by order	1

Orders

Orders issued by the Acting Presidents from 1 July 2009 to 30 June 2010 inclusive:	
Order pursuant to s 49 (11)	0
Order pursuant to s 66.....	25
Reference of rules by Full Bench under s 72A(6)	0
Application pursuant to s 92	0
Remitted from the Industrial Appeal Court	0

Consultations

Consultations with the Registrar pursuant to s 62 of the Act.....	8
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3. Commission in Court Session

The Commission in Court Session is constituted each time by three Commissioners with the exception of the 2010 State Wage order which was constituted by five Commissioners. The extent to which each Commissioner has been a member of the Commission in Court Session is indicated by the following figures:

Chief Commissioner A R Beech	8
Senior Commissioner J H Smith	0
Acting Senior Commissioner P E Scott.....	8
Commissioner P E Scott	0
Commissioner S J Kenner	4
Commissioner S Wood	1
Commissioner J L Harrison.....	8
Commissioner S M Mayman	6

These Commission in Court Session matters comprised of the following:

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

4. Federal Matters

Federal matters dealt with by WAIRC Commissioners	0
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5. Rule Variations by Registrar

Variation of Organisation Rules by the Deputy Registrar.....	10
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6. Boards of Reference

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

7. Industrial Agents Registered by Registrar

Number of new agents registered during the period.....	5
Total number of agents registered as corporate body.....	30
Total number of agents registered as individuals.....	22
Total number of agents registered as at 30 June 2010.....	52

Awards and Agreements in Force under the Industrial Relations Act 1979

Year	Number at 30 June
2006	2737
2007	2804
2008	2810
2009	2791
2010	2666

Industrial Organisations Registered as at 30 June 2010

	Employee Organisations	Employer Organisations
No. of organisations	45	16
Aggregate membership	162,266	4,181

Summary of Main Statistics

Western Australian Industrial Relations Commission

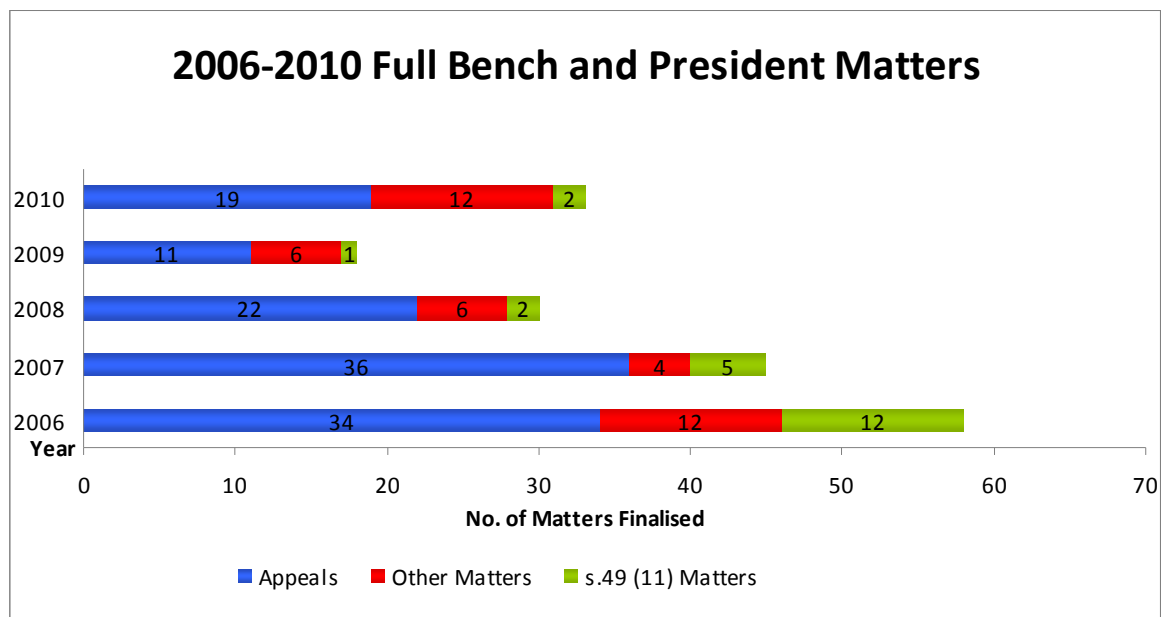
	MATTERS DEALT WITH			
	2006-2007	2007-2008	2008-2009	2009-10
Full Bench:				
Appeals	36	22	11	19
Other Matters	4	6	6	12
Acting President sitting alone:				
S 66 Matters (finalised)	1	0	9	6
S 66 Orders issued	6	1	29	25
S 49(11) Matters	5	2	1	2
Other Matters	0	0	0	0
S 72A(6)	0	0	0	0
Consultations under s 62	6	3	5	8
Commission in Court Session:				
General Orders	4	2	2	1
Other Matters	9	4	1	7
Public Service Appeal Board:				
Appeals to Public Service Appeal Board	13	6	19	17
Commissioners sitting alone:				
Conferences ¹	138	62	105	92
New Agreements	76	54	44	78
New Awards	5	1	0	0
Variation of Agreements	2	0	0	0
Variation of Awards	132	63	139	57
Other Matters ²	46	54	62	191
Federal Matters	0	0	0	0
Board Of Reference - Other Awards (Chaired by a Commissioner)	1	0	0	0
Boards of Reference – Long Service Leave	3	3	0	1
Unfair Dismissal Matters Concluded:				
Unfair Dismissal claims	324	123	163	176
Contractual Benefits claims	191	86	72	53
Unfair Dismissal & Contractual Benefits claims together	16	1	2	4
Public Service Arbitrator (PSA):				
Award/Agreement Variations	25	25	35	22
New Agreements	24	13	19	11
Orders Pursuant to s 80E	1	2	1	0
Reclassification Appeals	84	37	60	50
TOTALS:	1147	567	785	832

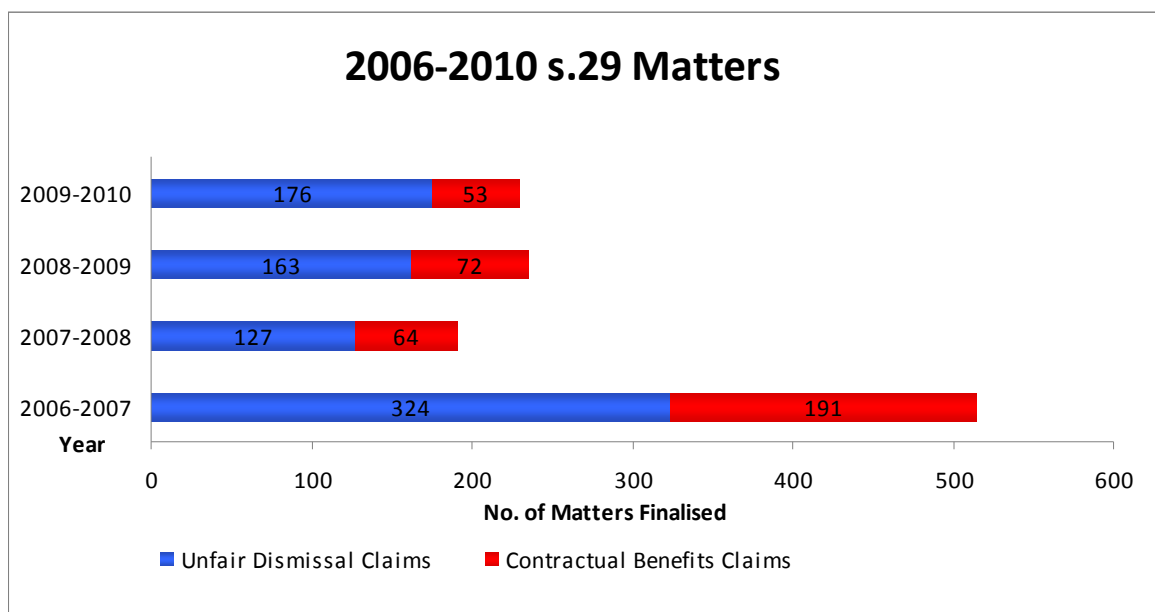
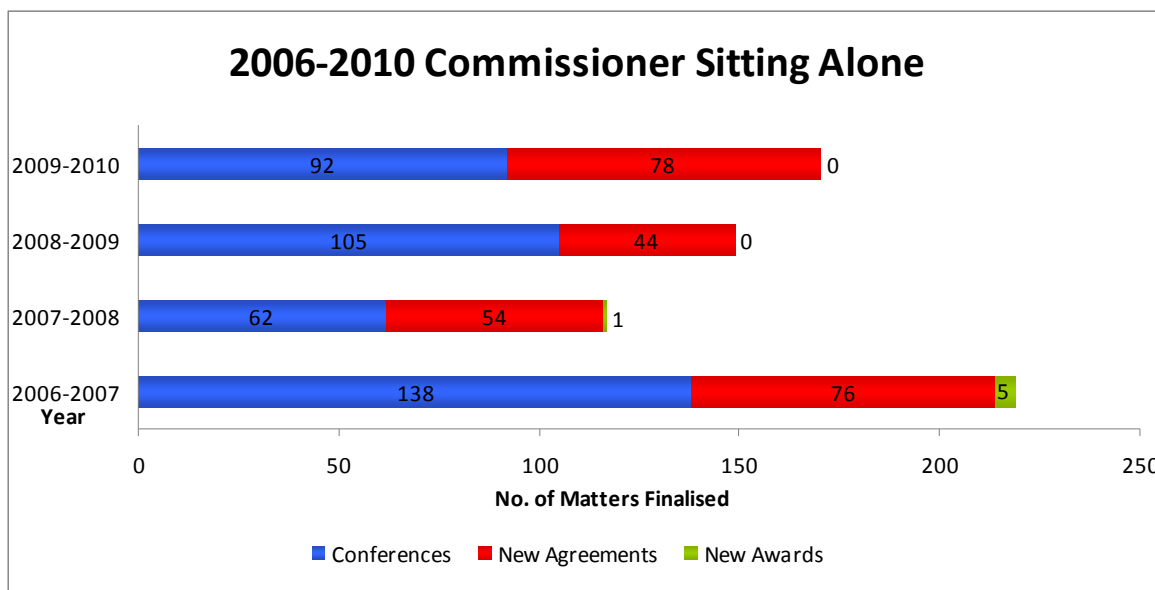
Notes

¹ CONFERENCES include the following:				
Conferences (s 44)	177	75	51	45
Conferences referred for arbitration (s 44(9))	23	22	8	7
Conferences divided	4	0	0	0
Conferences referred and divided	2	0	0	0
PSA conferences	44	35	39	39
PSA conferences referred	9	6	7	1
PSA conference divided	0	0	0	0
TOTALS	259	138	105	92

² OTHER MATTERS include the following:				
Applications	32	12	0	0
Apprenticeship Appeals	0	0	0	0
Occupational Safety & Health Tribunal #	13	7	0	0
Public Service Applications	42	27	39	29
Workplace Agreements	0	0	0	0
TOTALS	93	46	39	29

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





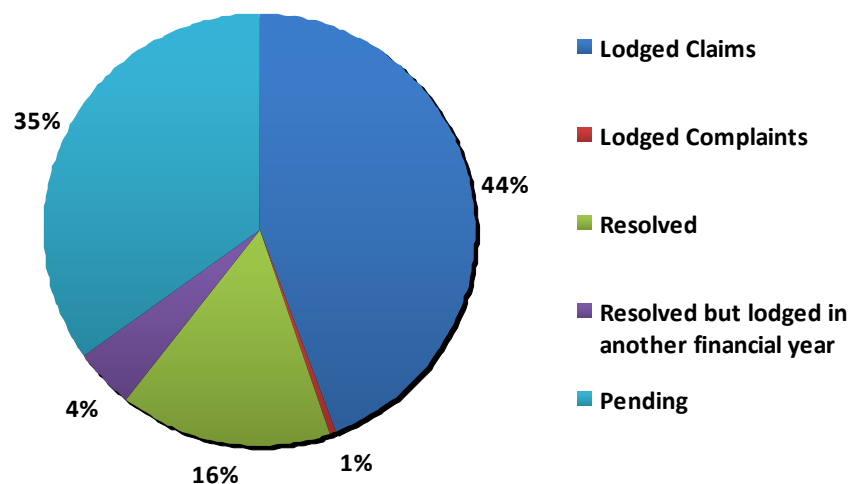
The Western Australian Industrial Appeal Court

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

Industrial Magistrates Court

The following summarises the Court for the period under review:

Lodged Claims	139
Complaints Lodged	2
Resolved (total).....	50
Resolved (lodged in the period under review)	36
Resolved but lodged in another financial period.....	14
Pending.....	110
Total number of resolved applications with penalties imposed	2
Total value of penalties imposed	\$8,000
Total number of claims/complaints resulting in disbursements	6
Total value of disbursements awarded.....	\$4,323.21
Claims/Complaints resulting in awarding wages	7
Total value of wages of Magistrate matters resolved during the period.....	\$69,459.29



The matters dealt with by the Industrial Magistrates Court related predominantly to claims alleging breaches of industrial instruments, namely acts, awards and agreements, at both the State and federal level. Claims of this nature are heard and determined within the general jurisdiction of the Industrial Magistrates Court. Some claims relating to enforcement of Commission Orders were determined within this jurisdiction also.

Similarly, complaints which fall within the prosecution jurisdiction of the Court were heard and determined by the Industrial Magistrate. These complaints were filed pursuant to the *Children and Community Services Act 2004* and resulted in the prosecution of certain employers, where it was proven that the Act had been breached concerning employment matters relating to children.

A number of small claims, filed pursuant to the *Workplace Relations Act 1996* were also heard and determined by the Court during the last financial year. Small claims will continue to remain within the general jurisdiction of the Industrial Magistrates Court pursuant to the *Fair Work Act 2009* in the future.

Commentary

1. Legislation

INDUSTRIAL RELATIONS ACT 1979

The following table conveniently summarises the names of the amending Acts.

Short title	Number and year	Assent	Commencement
Reprint 12: The <i>Industrial Relations Act 1979</i> as at 2 Jan 2009 ¹⁸ (includes amendments listed above except those in the <i>Legal Profession Act 2008</i> and the <i>Training Legislation Amendment and Repeal Act 2008</i>)			
<i>Acts Amendment (Bankruptcy) Act 2009</i> s. 45	18 of 2009	16 Sep 2009	17 Sep 2009 (see s. 2(b))
<i>Occupational Safety and Health Legislation Amendment Act 2009</i> Pt. 3	36 of 2009	3 Dec 2009	31 Dec 2009 (see s. 2(c))
<i>Police Amendment Act 2009</i> s. 19	42 of 2009	3 Dec 2009	13 Mar 2010 (see s. 2(b) and <i>Gazette</i> 12 Mar 2010 p. 941)
Reprint 13: The <i>Industrial Relations Act 1979</i> as at 9 Apr 2010 ¹⁸ (includes amendments listed above)			

During the period under review, the following consequential amendments were made to the *Industrial Relations Act 1979*:

On 17 September 2009, the Act was amended by the *Acts Amendment (Bankruptcy) Act 2009, No. 18 of 2009* which amended s 80O(5) in relation to the terms of office, etc of the Railway Classification Board, to include reference to the *Interpretation Act 1984* and to clarify the situations regarding vacancy of the office of a member.

On 31 December 2009, the Act was amended by the *Occupational Safety and Health Legislation Amendment Act 2009 (No. 36 of 2009)* which amended ss 8 and 16 in relation to the designation of a Commissioner exercising jurisdiction conferred by the *Occupational Safety and Health Act, 1984*.

On 13 March 2010, the Act was amended by the *Police Amendment Act 2009, No. 42 of 2009* which amended clause 2(3) of Schedule 3 - Police Officers, in relation to the jurisdiction of an Arbitrator.

INDUSTRIAL RELATIONS COMMISSION REGULATIONS 2005

Citation	Gazettal	Commencement
Reprint 1: The <i>Industrial Relations Commission Regulations 2005</i> as at 16 May 2008 (includes amendments listed above except those in the <i>Industrial Relations Commission Amendment Regulations (No. 3) 2008</i>)		
<i>Industrial Relations Commission Amendment Regulations (No. 3) 2008</i>	6 May 2008 p. 1757	15 May 2010 (see r 2 and Gazette 14 May 2010 p 2015)
<i>Industrial Relations Commission Amendment Regulations (No. 4) 2008</i>	29 Jul 2008 p. 3420	15 May 2010 (see r 2(b) and Gazette 14 May 2010 p 2015)
<i>Industrial Relations Commission Amendment Regulations 2009</i>	10 Jul 2009 p. 2739-44	r. 1 and 2: 10 Jul 2009 (see r. 2(a)); Regulations other than r. 1 and 2: 11 Jul 2009 (see r. 2(b))
Reprint 2: The <i>Industrial Relations Commission Regulations 2005</i> as at 2 Oct 2009 (includes amendments listed above except those in the <i>Industrial Relations Commission Amendment Regulations (No. 3) 2008</i> and the <i>Industrial Relations Commission Amendment Regulations (No. 4) 2008</i>)		
<i>Industrial Relations Commission Amendment Regulations (No. 3) 2009</i>	22 Dec 2009 p. 5270-2	r. 1 and 2: 22 Dec 2009 (see r. 2(a)); Regulations other than r. 1 and 2: 23 Dec 2009 (see r. 2(b))

INDUSTRIAL RELATIONS (GENERAL) REGULATIONS 1997

Citation	Gazettal	Commencement
Reprint 1: The <i>Industrial Relations (General) Regulations 1997</i> as at 10 Sep 2004 (includes amendments listed above)		
<i>Industrial Relations (General) Amendment Regulations 2009</i>	31 Jul 2009 p. 3026	r. 1 and 2: 31 Jul 2009 (see r. 2(a)); Regulations other than r. 1 and 2: 1 Aug 2009 (see r. 2(b))

2. State Wage Order Case

On 11 June 2010 the Commission in Court Session delivered its decision in the 2010 State Wage order case pursuant to s 50A of the Act. Section 50A requires the Commission before 1 July in each year, to make a General Order setting the minimum weekly rate of pay applicable under the *Minimum Conditions of Employment Act 1993* (MCE Act) to adults, apprentices and trainees and, to adjust rates of wages paid under awards.

The application for the 2010 State Wage order was created on the Commission's own motion. The Commission placed public advertisements of the proceedings and received submissions from the Hon Minister for Commerce (the Minister), the Trades and Labor Council of Western Australia

(TLCWA), the Chamber of Commerce and Industry of Western Australia (Inc) (CCIWA), Australian Mines and Metals Association, Western Australian Council of Social Services Inc, the Australian Hotels Association Western Australia, Mr F Nicoletti and Mr G Gray. The Minister, TLCWA and CCIWA appeared in the proceedings and also made oral submissions.

After hearing submissions and considering the evidence, the Commission issued a General Order that adjusted the current minimum wage and rates of wages paid under awards by an increase of \$17.50 per week from the first pay period on or after 1 July 2010.

The Commission said given that the risks to the economic outlook for WA remain uncertain, they considered it appropriate to adjust the minimum wage by reference to movements in the cost of living in WA which is measured as 2.25% in annual average terms and 3.4% for the year since their last decision.

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

The computerised system for updating and maintaining awards used in 2008 was again successfully used in 2009 and 2010. The automated process applied the wage increases from the State Wage Orders that took effect from the first pay period on or after 1 October 2009 and the first pay period on or after 1 July 2010 respectively. However further developments on this system are continuing because it could only adjust pay rates in 81% of the 319 awards affected by the 2009 State Wage order and 80% of the 240 awards affected by the 2010 State Wage order.

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

On 11 June 2010, the Commission in Court Session, on its own motion, issued a State Wage order pursuant to s 50A of the *Industrial Relations Act 1979* increasing the minimum weekly rate of pay prescribed for the purpose of the MCE Act to \$587.20 on and from the commencement of the first pay period on or after 1 July 2010.

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

The State Wage order referred to above ordered that the minimum weekly rate of pay applicable under s 14 of the MCE Act to an apprentice who has reached 21 years of age shall be \$510.75 per week on and from the commencement of the first pay period on or after 1 July 2010.

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

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

Apprentices under the MCE Act refer to the class of apprentice to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into. For this class of apprentice, it was ordered that the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal*

Trades (General) Award. The date of operation is the commencement of the first pay period on or after 1 July 2010.

Trainees under the MCE Act refer to the class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into. The Commission ordered that for this class of trainee, the minimum weekly rate of pay at the relevant Industry/Skill level is based on the *Metal Trades (General) Award*. The date of operation is the commencement of the first pay period on or after 1 July 2010 .

6. Public Service Arbitrator and Public Service Appeal Board

Public Sector – General

The Public Service Arbitrator continued to deal with a wide range of matters applicable to the public sector generally.

Reclassification Issues

Specified Callings

The Public Service Arbitrator has continued to oversee a process, which began in 2003 for the review of all public sector and hospital salaried officer professional positions. That process is reaching its conclusion with the remaining handful of positions being the subject of appeals to the Public Service Arbitrator. A very detailed process, developed with a great deal of goodwill between the parties has reviewed all professional positions, firstly to determine whether they fell within the scope of the review and then to determine whether the work value of the particular position or calling warranted an increase in classification level on account of increased work value. It is anticipated that all positions will be finalised by the end of 2010.

WorkCover Arbitrators

A number of Arbitrators within WorkCover appealed to the Public Service Arbitrator against WorkCover's refusal to reclassify their positions from Level 9 to Class 1. During the course of conciliation the Public Service Arbitrator recommended that WorkCover undertake a Mercer CED assessment of the positions as the Arbitrators asserted that the outcome of such an assessment may assist in the resolution of the matter. WorkCover and the Public Sector Commission agreed to the Mercer CED assessment however that assessment did not resolve the matter and the Public Service Arbitrator then determined the reclassification appeal.

The WorkCover Arbitrators said that the positions were comparable with other statutory positions of a higher classification.

The Public Service Arbitrator found that the position was not under-classified at Level 9, and dealt with the requirement of the position to "act judicially" as being a requirement applicable to many administrative decision-makers, to "observe the practical requirements of fairness", to "carry out its decision-making functions rationally and reasonably and not arbitrarily". The reclassification appeals were dismissed. Appeals have since been filed with the Full Bench of the Commission against the Public Service Arbitrator's decision.

Award Review Process

The Public Service Arbitrator has finalised the bulk of the reviews of public sector awards to ensure that they reflect current statutory requirements, are up-to-date and promote efficiency. Through the enterprise bargaining and conciliation processes those awards have been examined and amended. A number of awards remain outstanding however in nearly all cases an enterprise bargaining agreement is exhaustive of almost all conditions of employment, and at the conclusion of the latest round of enterprise bargaining agreement negotiations, the awards will be amended to reflect the up-to-date conditions contained in the agreement.

Decisions of Interest of the Public Service Arbitrator

Public Health Sector – Salary Packaging Dismissals

In the latter part of 2009 and early 2010, a number of claims were referred to the Commission, the Public Service Arbitrator and the Public Service Appeal Board by unions and employees where the employees had been dismissed in circumstances where they had made claims for salary packaging taxation benefits using copied receipts for meals and entertainment expenses. A number of claims have been the subject of conciliation and as at 30 June 2010 others were set down for hearing and determination but had not yet been resolved.

The Civil Service Association of Western Australia Inc. v. Director General, Department for Child Protection (2009) 90 WAIG 66

The issue of the employing authority's ability to initiate or continue a disciplinary process against an officer whose employment had terminated was referred to the Public Service Arbitrator.

An officer of the Department who had been engaged on a fixed term contract had been the subject of disciplinary process. His contract of employment expired however the respondent indicated an intention to continue with the disciplinary investigation. The Civil Service Association sought an order from the Public Service Arbitrator that the respondent cease the disciplinary process. The respondent said that there was no legislative impediment to it continuing to undertake an investigation upon the cessation of employment of the officer.

Prior to the matter being determined, the respondent challenged the jurisdiction of the Public Service Arbitrator saying that the matter involved a decision of the respondent in relation to the interpretation of the disciplinary procedures contained within the *Public Sector Management Act 1994* and accordingly the matter was within the jurisdiction of the Public Service Appeal Board, not the Public Service Arbitrator. The Public Service Arbitrator determined the issue of jurisdiction finding that the matter was one for the Public Service Appeal Board not for the Public Service Arbitrator.

The decision of the Public Service Arbitrator was appealed to the Full Bench of the Commission. The Full Bench found that the Public Service Appeal Board had jurisdiction to deal with the matter and it ousted the jurisdiction of the Arbitrator ((2010) 90 WAIG 214).

Public Service Appeal Board

Membership of the Public Service Appeal Board

During the year the following persons were nominated by parties to appeals to the Public Service Appeal Board (the Board), and sat as members of the Board:

Ms L McKay	Ms F Roche	Mr K Watson
Mr G Richards	Mr S Seeds	Mr J Frame
Mr K Trent	Mr A Pittock	Ms D Bentley
Mr G Brown	Mr N Hastings-James	Mr D Solosi
Mr R Becker	Ms B Conway	Mr J Rossi
Ms A Spaziani	Ms R Lavell	Mr J Hague
Mr S Gregory	Mr C Floate	Mr J Travers
Mr N Fergus	Mr J Wrightson	Mr P Stewart
Mr G Townsing	Ms J Higgins	

Formation of the Public Service Appeal Board

Previous Annual Reports have noted the delays in the Board dealing with appeals due to the length of time taken by both parties to nominate members to participate on the Board.

In the last year the union parties which have nominated members of the Public Service Appeal Board have been more efficient in their processes for notifying the nominations. This has reduced the time taken by those unions to nominate a member of the Board. It has also been of assistance that remuneration for Public Service Appeal Board members has been updated in accordance with Regulation 120(1) of the *Industrial Relations Commission Regulations 2005* resulting in nominations to the Board of persons who are retired public service officers, making the nomination process faster. The average time taken by unions for nominations was 8.7 days, with employing agencies taking an average of 15.28 days. The maximum times taken were 81 and 55 days respectively. As each appeal requires the formation of a new Board and an induction process for each new Board member, the process is time-consuming and very inefficient. The Commission in its general jurisdiction and the Public Service Arbitrator are able to commence proceedings in a matter of a day or two.

Decisions of Interest of the Public Service Appeal Board

Appeal Out of Time (2009) 89 WAIG 2487

An officer had retired in 2008 and appealed to the Public Service Appeal Board on 19 March 2009 alleging that she was constructively dismissed. The appeal was 13 weeks and 3 days out of time. The Public Service Appeal Board assessed the application for an extension of time in which to file the appeal including the merits of the appeal. It found that at the time the officer had resigned her performance was under review and had been for some time. There had been an excessive delay in bringing the appeal and no good reason for that delay. The application to extend time in which to lodge the appeal was dismissed.

Dismissal of Officer Under Training (2009) 89 WAIG 2493

A senior custody officer undertaking training had appealed to the Public Service Appeal Board against the respondent's decision not to continue with his employment. The Public Service Appeal Board found that the officer was a risk to safety by his behaviour and that it was reasonable that the respondent had not permitted him to complete the training which was a necessary pre-condition to permanency. The appeal was dismissed.

Suspension of Officer (2010) 90 WAIG 312

An officer appealed against the decision of the respondent to suspend him without pay. He was employed as a Youth and Family Support Worker. The Board found that the respondent's policy dealing with the discipline process which required exceptional circumstances to warrant the suspension without pay had not been applied properly and that the discretion to suspend him without pay had been unreasonably and unfairly exercised. A suitable alternative position ought to have been found for him and as a consequence the decision to suspend him without pay was set aside.

7. Award Review Process

The Award Review officers provide information and award services to the Commission and are responsible for the maintenance of electronic records of all State awards and industrial agreements. This information is available to the public via the Commission's website and from the Western Australian Industrial Gazette.

During the year the Commission, on its own motion, identified a number of awards which could be considered for cancellation under s 47 of the Act on the ground that there are no longer any employees to whom the award applies because of the effect of the *Fair Work Act 2009* (Cth). The Commission directed the Registry to enquire into and report on these awards as is required by s 47(3)(a) of the Act. In making its reports, Registry had support from the TLCWA, CCIWA, AMMA and Department of Commerce. The Registrar reported to the Commission that 97 awards could be considered for cancellation. Of these, the Commission cancelled 81 awards.

Award Review officers also deal with award and agreement enquiries and provide information on historical award and statutory minimum pay rates. Throughout the year approximately 1500 "back-rate" enquiries were received from the general public, employers, employees, practitioners, accountants, academics, students, parents, guardians and government departments. The enquiries ranged from obtaining historical rates for the purposes of calculating underpayment of wages claims, workers' compensation claims, academic research, child support obligations and disputed estate claims.

Award review officers processed 68 new industrial agreements and 40 award variations with relevant notices prepared and published on the Commission's website and in the WAIG as required.

Support was also given to the Commission in the production and application of the 2009 and 2010 State Wage General Orders to ensure that the new pay rates, where applicable, were available to the public and published on the Commission's website prior to the effective date of the pay increases.

The speed and accuracy of the publication of the pay rates continues to be invaluable to employers and employees to minimise underpayments which also assist in the prevention of industrial disputes. This standard is only able to be maintained while there are officers with detailed knowledge, expertise working closely with efficient information technology staff. The Commission acknowledges the excellent contribution by David Holmes and John Collier in this work.

8. Right of Entry Permits Issued

Organisation	2006/07	2007/08	2008/09	2009-10
Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees, The				1
Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch	3	6	2	0
Australian Nursing Federation, Industrial Union of Workers Perth, The				19
Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch, The	1	6	0	0
Australian Workers' Union, West Australian Branch, Industrial Union of Workers, The	1	1	3	4
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch, The	2	6	1	6
Civil Service Association of Western Australia Incorporated, The	13	20	14	35
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	0	1	0	3
Construction, Forestry, Mining and Energy Union of Workers, The	7	7	6	7
Food Preservers' Union of Western Australia, Union of Workers, The	1	1	0	0
Forest Products, Furnishing & Allied Industries Industrial Union of Workers, WA, The	1	1	0	0
Health Services Union of Western Australia (Union of Workers)	0	3	0	0
Independent Education Union of Western Australia, Union of Employees, The	5	3	1	2
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	33	13	38	31
Media, Entertainment and Arts Alliance of Western Australia (Union of Employees)	0	4	0	0
Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, The	0	1	0	0
Sales Representatives' and Commercial Travellers' Guild of W.A. Industrial Union of Workers	1	0	0	0
Shop, Distributive and Allied Employees' Association of Western Australia, The	2	5	6	3
State School Teachers' Union of W.A. (Incorporated), The	0	3	4	7
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	0	1	2	1
United Firefighters Union of Australia, West Australian Branch	0	1	1	0
Western Australian Branch of the Australian Medical Association, The	0	0	0	2
Western Australian Prison Officers' Union of Workers	0	19	9	0
Western Australian Railway Officers' Union	2	2	2	0
TOTAL	72	98	89	121

Number of permits that have been issued since 8 July 2002 (gross total).....	1025
Number of people who presently hold a permit.....	366
Number of permits that are current	394
Number and names of permit holders who have had their permit removed or suspended by the Commission in the current reporting period.....	0

9. Claims by Individuals – Section 29

This Report continues an analysis of applications concerning unfair dismissal and denial of contractual benefit. These applications are made under the following provisions of the *Industrial Relations Act 1979*.

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

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

Section 29 Applications Lodged

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

	2006-2007	2007-2008	2008-2009	2009-10
Unfair Dismissal	154	127	184	193
Denial of Contractual Benefits	124	64	64	86
TOTAL	278	191	248	279

Section 29 Applications Finalised

	2006-2007	2007-2008	2008-2009	2009-10
Unfair Dismissal	324	123	163	176
Denial of Contractual Benefits	191	86	72	53
Both in same application	16	1	2	4
TOTAL	531	210	257	233

Section 29 Applications Lodged Compared with All Matters¹ Lodged

Section 29 applications represent 26.4% of all the matters lodged in the Commission.

	2006-2007	2007-2008	2008-2009	2009-10
All Matters Lodged	829	849	839	1056
Section 29 Applications Lodged	278	191	248	279
Section 29 as (%) of All Matters Lodged	33.50%	22.5%	29.5%	26.4%

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

Section 29 Applications Finalised Compared with All Matters Finalised

Section 29 applications represented more than half of all the matters dealt with.

	2006-2007	2007-2008	2008-2009	2009-10
All Matters Finalised	1239	593	804	836
Section 29 Applications Finalised	531	210	237	233
Section 29 as Percentage (%) of All Matters Finalised	43%	35%	29.5%	27.9%

Section 29 Matters – Method of Settlement

The following table shows that approximately 89% of s 29 matters were settled without recourse to formal arbitration.

	Unfair Dismissal	Contractual Benefits	Both	Total	%
Arbitrated claims in which order issued	21	8	0	29	12.5%
Settled after proceedings before the Commission	86	20	2	108	46.5%
Matters referred for investigation resulting in settlement	0	1	2	3	1.3%
Matters discontinued/dismissed before proceedings commenced in the Commission	42	12	0	54	23.3%
Matters withdrawn/discontinued in Registry	26	12	0	38	16.4%
Total Finalised in 2009 - 2010 Reporting Year	175	53	4	232	100%

Demographic Data for Section 29 Applications

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

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

Representation

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

	Male	Female	No Data	Total	% Male	% Female	%No Data	%Total
Industrial Agent	10	11	2	23	43	48	9	8.3
Legal Representation	24	10	11	45	53	22	24	16.1
Personal	90	92	0	182	49	51	0	65.2
Other	14	10	0	24	58	44	0	8.6
No Data Provided	1	1	3	5	20	20	60	1.8
TOTAL	139	124	16	279	50	44	6	100

Age Groups

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

Age Group	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under 16	0	2	0	2	0	100	0	0.7
17 to 20	1	1	0	2	50	50	0	0.7
21 to 25	6	10	0	16	38	62	0	5.7
26 to 40	44	38	0	82	54	46	0	29.4
41 to 50	34	33	1	68	50	49	1	24.4
51 to 60	36	32	0	68	53	47	0	24.4
Over 60	11	6	0	17	65	35	0	6.1
No Data Provided	7	2	15	24	29	8	62	8.6
TOTAL	139	124	16	279	50	44	6.0	100

Employment Period

It is significant to note that 21.5% of all applicants were employed for 1 to 2 years compared to 10.1% in the last reporting period.

Period of Employment	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under 3 months	22	21	0	43	51	49	0	15.4
4 to 6 months	9	16	0	25	36	64	0	9.0
7 to 12 months	24	18	1	43	56	42	2	15.4
1 to 2 years	25	35	0	60	42	58	0	21.5
2 to 4 years	24	13	0	37	65	35	0	13.3
4 to 6 years	5	3	0	8	62	38	0	2.9
Over 6 years	17	15	1	33	52	45	3	11.8
No Data Provided	13	3	14	30	43	10	47	10.7
TOTAL	139	124	16	279	50	44	6	100

Salary Range

	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under \$200 P/W	4	14	10	28	14	50	36	10
\$201 to \$600 P/W	8	30	0	38	21	79	0	13.6
\$601 to \$1000 P/W	39	40	1	80	49	50	1	28.7
\$1001 to \$1500 P/W	53	27	1	81	65	33	1	29
\$1501 to \$2000 P/W	15	10	1	26	58	38	4	9.3
Over \$2001 P/W	20	3	0	23	87	13	0	8.3
No Data Provided	0	0	3	3	0	0	100	1.1
TOTAL	139	124	16	279	50	44	6	100

Category of Employment

67% of all applicants stated that they were Full Time, Permanent or Permanent Full Time employees at the time of their termination.

Period of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Casual	3	10	0	13	23	77	0	4.6
Casual F/Time	4	1	0	6	80	20	0	1.8
Casual P/Time	0	3	0	3	0	100	0	1.1
Fixed Term	5	5	0	10	50	50	0	3.6
Full Time	24	14	0	38	63	37	0	13.6
Permanent	13	9	1	23	57	39	4	8.2
Permanent F/Time	82	43	1	126	65	34	1	45.2
Permanent P/Time	4	25	0	29	14	86	0	10.4
Probation	2	1	0	3	67	33	0	1.1
Part Time	1	8	0	9	11	89	0	3.2
No Data Provided	1	5	14	20	5	25	70	7.2
TOTAL	139	124	16	279	50	44	6	100

Reinstatement Sought

54.1% of applicants did not seek reinstatement when they lodged their application compared with 36.3% in the 2006/2007 period.

Reinstatement Sought	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Yes	39	30	1	70	56	43	1	25.1
No	71	79	1	152	50	52	1	54.1
No Data Provided	29	15	14	58	50	26	24	20.8
TOTAL	139	124	16	280	50	44	6	100

Reinstatement Sought by Age Group

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

Age Groups	Yes	No	No Data	Total	%Yes	%No	%No Data	%Total
Under 16	0	1	1	2	0	50	50	0.7
17 to 20	2	0	0	2	100	0	0	0.7
21 to 25	4	10	2	16	25	62	12	5.7
26 to 40	14	57	11	82	17	70	13	29.4
41 to 50	22	38	8	68	32	56	12	24.4
51 to 60	21	32	15	68	31	47	22	24.4
Over 60	4	8	5	17	24	47	29	6.1
No Data Provided	3	5	16	24	12	21	67	8.6
TOTAL	70	151	58	279	25	54	21	100

10. Employer-Employee Agreements (EEAs)

Employer Employee Agreements (“EEA”s) were introduced with effect from 15 September 2002. An EEA is a voluntary individual employment agreement between an employer and an employee which covers working arrangements, pay and conditions. A number of tests must be satisfied before an EEA can be registered, including the requirement that the EEA passes a “No Disadvantage Test” which is intended to ensure that the employee is not on balance, disadvantaged in relation to the terms and conditions of employment when compared to the relevant award.

INDUSTRIAL RELATIONS ACT 1979 PART VID

Applications to Lodge EEAs for Registration

Number of EEAs Lodged	2006-2007	2007-2008	2008-2009	2009-10
Meeting Lodgement Requirements	43	54	9	6
Not Meeting Lodgement Requirements	3	2	0	0
Total	46	56	9	6

EEAs Lodged for Registration and Finalised

Outcome	2006-2007	%	2007-2008	%	2008-2009	%	2009-10	%
Refused	4	8	6	16%	2	17%	1	20%
Registered	35	69	29	78%	10	83%	4	80%
Withdrawn	12	23	2	6%	0	0%	0	0%
Total	51[#]	100%	37	100%	12	100%	5	100%

Note – # The Total Number of EEAs finalised in 2007-2008 includes some EEAs that were lodged in 2006-2007 but not finalised during the 2006-2007 period.

Guidelines and Principles for No Disadvantage Test

There were no changes to the Guidelines and Principles for the No Disadvantage Test. During the year, no applications were made under s 97VZ to the Commission by the Minister or a peak industrial body to have the test amended or replaced.

Demographic Data for Registered EEAs

Registered EEAs by Gender	2007-08	%	2008-09	%	2009-10	%
Female	14	48%	6	60%	3	75%
Male	15	52%	4	40%	1	25%
Total	29	100%	10	100%	4	100%

Registered EEAs by Age	2007-08	%	2008-09	%	2009-10	%
Employees 18 years of age or over	29	100%	10	100%	4	100%
Employees under 18 years of age	0	0	0	0%	0	0%
Total	29	100%	10	100%	4	100%

Reduced Wages Payable for People with Disabilities (s 97VW)

	2007-08	% of Total Registered EEAs	2008-09	% of Total Registered EEAs	2009-10	% of Total Registered EEAs
Number of Registered EEAs where the employee had a disability	0	0%	2	20%	0	0%

EEAs Registered by Term of Agreement

Term of EEA	2007-08	%	2008-09	%	2009-10	%
<1 year	13	45%	3	30%	0	0%
1 to 2 years	2	7%	2	20%	1	25%
2 to 3 years	14	48%	5	50%	3	75%
Total	29	100%	10	100%	4	100%

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

During the reporting period, the Commission dealt with seven appeals pursuant to s 33P of the *Police Act, 1892* by police officers who had been removed from the WA Police under s 8 of that Act. These appeals are heard by three Commissioners, one of whom must be either the Chief or the Senior Commissioner. Three of the appeals were filed during this reporting period, the first of which was lodged in May 2010 and listed for hearing in order to determine whether the police officer had in fact been removed under s 8 of the Police Act; the decision that the officer had not been removed under s 8, and thus that the appeal was incompetent, was delivered outside the reporting period. The second appeal was lodged in June 2010 and has been listed for hearing on a date outside the reporting period to deal with an application for an interim order that the hearing of the appeal be stayed. The third appeal was also lodged in June 2010 and is yet to be listed for hearing.

Four of the appeals dealt with had been lodged in previous reporting periods. In two of these appeals, there were hearings and decisions regarding various preliminary matters with the substantive hearing of one of them being listed for the next reporting period and in the other appeal there is a reserved decision on an additional preliminary issue. The remaining two appeals were heard and determined: one appeal was upheld and one appeal was dismissed. In each case, the decisions of the Commission were appealed to the Industrial Appeal Court: in one, the appeal was dismissed as it was out of time and thus incompetent; in the other appeal, it was heard during this reporting period with the decision dismissing the appeal for lack of jurisdiction being delivered outside this reporting period.

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

The *Employment Dispute Resolution Act 2008* (EDR Act) was proclaimed on 1 December 2008. It provides that the Commission can be asked to mediate any question, dispute or difficulty that arises out of or in the course of employment. This is wider than an "industrial matter" under the *Industrial Relations Act 1979*.

During the reporting period, 15 requests for mediation were lodged. Of these, six were discontinued, seven were closed and two are pending.

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

The Road Freight Transport Industry Tribunal was established on 1 August 2008 on the proclamation of the *Owner-Drivers (Contracts and Disputes) Act 2007* (the OD Act). The Act was passed to promote a safe and sustainable road freight transport industry by regulating the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so. The OD Act regulates employees, sub-contractors, corporations and partnerships that carry on the business of transporting goods.

There were 34 applications filed during the reporting period. The vast majority have involved payment disputes as defined in s 37(2) of the OD Act. Whilst the jurisdiction of the Tribunal under the OD Act is very broad, and a wide range of orders may be made by the Tribunal under s 47 of the OD Act, the applications to the Tribunal to date have been somewhat limited in scope.

Of the 34 applications filed, eight were resolved: five by discontinuance or dismissal and three by orders for the respondent to pay the applicants. The majority of these finalised applications were resolved after a conference, with only three proceeding to a hearing. Of the remaining 26 unresolved applications, four have either a conference or hearing listed for the next reporting period and 22 are pending, with the majority having had a conference held during this reporting period.

14. Occupational Safety and Health Tribunal

During the year 138 applications relating to two major workplaces were filed before the Occupational Safety and Health Tribunal pursuant to the *Occupational Safety and Health Act* 1984. These resulted in extensive and lengthy conciliation and in one instance, arbitration proceedings. Of those applications ten were closed and the remainder, with the exception of one, are awaiting notices of discontinuance to be filed.

15. Other Matters

Education

School Support Officers

Since February 2009 the Commission has continued to assist the Department of Education and Training and the Civil Service Association of Western Australia with a dispute about the workloads of school support officers. After a number of conferences were held in the Commission the parties reached agreement on trialling an interim consent arrangement for additional resources to assist school support officers and this trial commenced in Term 1, 2010.

Independent Public Schools Program

In August 2009 the State School Teachers Union of WA applied to the Commission for assistance about a dispute over a decision by the Department of Education and Training to introduce major changes to schools by the implementation of the Independent Public Schools Program. The Union claimed that the implementation of this program was likely to have significant effects on the employment conditions of its members and after a conference was held in the Commission the parties had further discussions about the proposed changes. The Union then sought orders extending the Department's timeline for consultation and the deadline for schools to express an interest in becoming an Independent Public School and postponing the implementation of the program to the end of 2010 and after hearing from the parties the Commission declined to issue the orders sought by the Union. Further report back conferences have been held in the Commission to assist the parties to deal with issues with respect to the implementation of this program.

Education Assistants

On 5 November 2009 the Department of Education and Training sought orders from the Commission that Education Assistants cease industrial action being taken with respect to a new industrial agreement and several conferences about this issue and about the terms of the new industrial agreement took place. On 25 November 2009 the Department sought orders preventing

members of the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch from attending a half day stoppage on 26 November 2009 and on 25 November 2009 the Commission issued an order requiring the Union and Education Assistants to cease all industrial action. A Commission in Court Session arbitrated the Education Assistants' claims with respect to a new industrial agreement.

Health

The Commission conciliated the following disputes:

- the use of casual and fixed term contract employees at several public hospitals;
- the change management process at Sir Charles Gairdner Hospital with respect to Personal Service Assistants (cleaning and catering);
- the role of Hospital Service Assistants at Sir Charles Gairdner Hospital;
- a dispute between the Australian Medical Association WA Incorporated and the Department of Health with respect to disciplinary proceedings over salary packaging;
- a dispute about roster changes whereby 12-hour shifts were being proposed for security officers at Sir Charles Gairdner Hospital; and
- a Department of Health review of the workloads of nurses.

Local Government

The question whether a local government organisation was a trading corporation was determined by a Full Bench in an appeal against a declaration that a Shire was not a trading corporation for the purposes of s 51(xx) of the *Australian Constitution* and s 16 of the *Workplace Relations Act 1996* (Cth). ((2009) 89 WAIG 2283).

The majority of the Full Bench dismissed the appeal. The Full Bench applied the 'activities test' which requires an assessment of the activities of the Shire to determine whether the Shire engaged in trading activities to a 'substantial' or 'significant' extent. Ritter AP found that as the Shire derived the majority of its income from grants and non-trading activities it was not a trading corporation. He also found that the trading activities were generally incidental to the activities of the Shire as a whole as the functions of the Shire pursuant to the provisions of the *Local Government Act 1995* (WA) and other legislation is to govern a local district. In particular he held that this stamps the character of the Shire and its activities which may or may not constitute trading, do not change this. Beech CC made similar observations.

Fire and Emergency Services

The Commission has assisted the United Firefighters Union of Australia West Australian Branch and the Fire and Emergency Services Authority ("FESA") with a number of disputes including the following:

- staffing levels and practices at FESA's communication centre.

- FESA's move to the new Wellington Street station. Issues dealt with include:
 - industrial action by firefighters commencing and undertaking work at the new station;
 - traffic management problems;
 - showers in the Tunic Room;
 - the layout and functioning of Dormitories;
 - Locker Room doors; and
 - engine room procedures.

- classification of instructors working at recruit schools.

- appropriate competencies for area officers.

16. Decisions of Interest

Award Modernisation of Cleaners and Caretakers Award, 1969 (2009) 89 WAIG 1086

In this matter, a Commission in Court Session, pursuant to s 40B of the Act, made substantial variations to almost every provision in this award. In completing this statutory function, the Commission was ably assisted by considerable work being undertaken by an industrial officer employed by the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch and the Chamber of Commerce & Industry of Western Australia Inc, which resulted in agreement to many changes to the award which had the effect of updating the award to reflect the modern needs of the employers in the industry of cleaning and employees in that industry. One of the most notable changes was to vary the area and scope of the award to change the scope of the award from a list of nominated industries defined by the work of employers who are no longer bound by the provisions of the Act as they are constitutional corporations and whose employees are now covered by the *Fair Work Act 2009* to a vocational award by defining the industry to which the award extends to the callings of cleaners and caretakers defined in the wages clause. The effect of this change is to reflect the fact that the employment of cleaners and caretakers covered by the provisions of the Act are engaged in work in a very diverse range of enterprises throughout the State.

Status of Medical Certificates (Application C 37 of 2009)

The Commission assisted in the resolution of a dispute between the Liquor, Hospitality and Miscellaneous Workers' Union and the Department of Health regarding the necessity for a medical certificate to verify illness for paid personal leave. The Department's policy was that a medical certificate was required for certain absences even though the industrial agreement provided for the employee to provide "evidence to satisfy a reasonable person".

This dispute had the potential to affect arrangements for claiming personal leave across the public sector.

In the course of a number of conciliation conferences, the parties reached an agreement for a protocol which provided for the employer to accept evidence other than a medical certificate and for managers to have greater flexibility and discretion in what was acceptable to prove illness or injury.

Suburban Rail Car Drivers Stoppage (Application C 28 of 2009)

The Commission convened an urgent conciliation conference on 26 August 2009, of its own motion, when rail car drivers employed in the Perth suburban rail network indicated an intention to stop work due to a dispute about changes to rostering practices. The stoppage would have had a significant effect on school student and commuter travel at peak times. The Commission issued an interim order prohibiting the stop-work meeting and a further interim order was issued on 4 September 2009.

Further conciliation assisted in the resolution of the dispute.

Onus of Proof in Jurisdictional Matters (2009) 89 WAIG 2063 and (2009) 89 WAIG 2262

The Full Bench upheld an appeal against a decision in which a finding was made that the onus of proof was on the employee to establish the Commission has jurisdiction where the issue was raised whether the employer is a constitutional corporation. The Full Bench in reasons for decision and supplementary reasons for decision held that in making the finding in respect of onus, the Commission had erred.

The question before the Commission at first instance was whether the *Workplace Relations Act* 1996 (Cth) through s 109 of the *Australian Constitution* applied to remove the jurisdiction of the Commission. The Full Bench applied the reasoning of *Gerhardy v. Brown* (1985) 159 CLR 70 at 141-142 and held whether a corporation is a constitutional corporation (trading or financial corporation) does not so much involve an onus of proof but requires a determination whether the employer was in fact a constitutional corporation. The reason for so finding was that findings of constitutional facts are matters that cannot or do not form issues between parties. A further appeal against these decisions of the Full Bench was dismissed by the Industrial Appeal Court ([2010] WASCA 53; (2010) 90 WAIG 367).

CSA v. Director-General Department for Child Protection (2010) 90 WAIG 214

In this matter the Full Bench considered the scope of the jurisdiction of the Public Service Arbitrator under s 80E(1) of the *Industrial Relations Act 1979* (WA) to enquire into and deal with any industrial matter relating to a government officer and the Public Service Appeal Board to hear and determine an appeal under s 80I of the *Industrial Relations Act 1979* (WA) by a public service officer against a decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994* (WA), concerning the conditions of service (other than salaries and allowances) of public service officers.

An application was brought by the CSA under s 80E(1) seeking an order that the respondent cease disciplinary action against a former public service officer. The Public Service Arbitrator dismissed the application on grounds that the jurisdiction of the Arbitrator was ousted by the jurisdiction of the Public Service Appeal Board under s 80I. The Full Bench dismissed an appeal against the decision. The Full Bench found that whilst the Arbitrator prima facie had jurisdiction to deal with the matter the scheme of the Act was such that it is not intended that two jurisdictions operate

cumulatively and that where the jurisdiction of the Public Service Appeal Board is capable of being enlivened the jurisdiction of the Arbitrator is excluded.

17. Conclusion

The Act has continued to operate in a substantially un-amended form since my last report. In those areas where the Commission still exercises a substantive jurisdiction, that is, in areas relating principally to the State government sector I have reported previously on the inefficiencies which can occur as a result of the distinction in jurisdiction between the Public Service Arbitrator and the Public Service Appeal Board and from the time taken to receive nominations for membership of a Public Service Appeal Board. Further efficiencies of an administrative nature would be able to be achieved by amending s 29A of the Act which requires the publishing of the area and scope of proposed new agreements where the new agreement does not replace an existing agreement and the area and scope of the new agreement is not the same as the agreement which is to be replaced. The requirement to publish does slow down the process of registration of a proposed new agreement that in all other respects might be quite uncontroversial. In particular the wording in s 29A(2a) of the Act, which provides for waiving publication in certain limited circumstances, creates some uncertainty where the Government parties to a proposed new agreement have different departmental names from the names used in the agreement to be replaced; whilst in a practical sense, the scope of the agreement to be registered may be the same as the agreement to be replaced, on some occasions the requirement to publish the area and scope of a proposed new agreement, with its consequent delay, will mean that an agreement may not be able to be registered as speedily as would otherwise be the case.

During the course of the year under review, Commissioner Stephen Wood resigned his commission. Stephen was appointed a Commissioner on 31 January 2000 and in the course of his almost ten years of service, he exercised jurisdiction in most of the industries covered within the Commission's jurisdiction. I record my thanks to him. His calm and thoughtful approach to the many difficult issues which confront Commissioners in their work was much appreciated and will be missed.

Mark Ritter SC, who was appointed Acting President on 17 October 2005, ceased his acting appointment in December 2009. The Commission was fortunate to have his expertise available to it during the period when the jurisdiction of the Commission to deal with matters was first under challenge as a result of the proclamation of the "Work Choices" amendments to the Workplace Relations Act in March 2006. His service at the Commission is much appreciated and I express my thanks to him.

Senior Commissioner Jennifer Smith was appointed Acting President from 16 October 2009 for a period of 12 months. This has reduced the number of members of the Commission to six and has enabled the transfer of the former President's Courtroom to the Department of the Attorney General which represents a further cost saving to the Commission. As a consequence of Jennifer Smith's appointment, Commissioner Pam Scott has been appointed Acting Senior Commissioner from 16 October 2009 for a period of 12 months.

In different circumstances, I would comment in my Annual Report about the undesirability of acting appointments. In a jurisdiction such as the Commission's, which deals significantly with public sector matters, it is undesirable that members of the Commission are, and are seen to be, beholden to the government of the day for the renewal of their appointment. I am aware, however, that these acting appointments have occurred following the decision of the previous government to abolish the position of President and that this intention has been overtaken by the decision of the current government to hold a review into the State industrial relations system given the operation of Commonwealth legislation in relation to the industrial relations of constitutional corporations. I


express the hope that legislation to give effect to the restructure of the Commission in this regard is not too far distant.

The Honourable Justice Rene Le Miere was appointed Acting President on 15 June 2010 for the period necessary to enable the Full Bench to hear and determine an appeal from a decision of the Commission in the case of *The Director General, Department of Education and Training v Liquor, Hospitality and Miscellaneous Union, WA Branch* in respect of which Acting President Jennifer Smith was unable to attend to her duties under the Act. The appeal was heard and determined after the end of this reporting period. I do take this opportunity to express my thanks to His Honour for his preparedness to accept the appointment. I also express my thanks to Honourable Chief Justice W. S. Martin for his assistance in enabling this to occur. It also is an historic occasion for the Commission which should not go unremarked in that it is the first occasion since the creation of the Full Bench in 1980 when it has been constituted by a Justice of the Supreme Court of WA and two Commissioners. It is a model which commends itself for the future given the changes which have occurred to the work of the Commission as a result of the operation of Commonwealth legislation.

The Act has not been amended to take account of these changes. The Commission has endeavored to use sections 40B and 47 of the Act to both remove awards which applied wholly to employers which are constitutional corporations and to commence amending awards which on their face cover both constitutional corporations and non constitutional corporations to reflect the coverage of the latter. However, in the absence of legislative change directed to enabling this to occur efficiently, the process involved in utilising the current legislation involves research into each award or industrial agreement in order for the Commission to be satisfied that they are able to be cancelled on the basis that there is now no longer any employee to whom the award or agreement applies. The numbers of awards and agreements affected is such that the volume of work is in some cases beyond the resources now available to the Commission from the Department of the Registrar given the reduction in the staffing in the Department. In this regard, I note that the number of Commission members has reduced from eight prior to the "Work Choices" amendments to five.

The Act does not permit Commissioners to be dually-appointed to Fair Work Australia, and there are no dual appointments remaining from the former Commonwealth Workplace Relations Act, nevertheless in my respectful view consideration ought be given in the future to amending the Act to realise the potential for the two jurisdictions to more formally co-operate in the future resulting in efficiencies of benefit to the State.

During the course of this reporting period Mr Arthur Wilson, Clerk to the Commission and Clerk to the Industrial Magistrate retired after approximately 38 years service in the Department of the Registrar and its predecessors. Arthur had a wealth of knowledge of the operation of the Act, the Commission and their predecessors. It is appropriate that I record not only my own thanks but the thanks of previous Chief Commissioners, and current and previous members of the Commission, for the friendly help and advice he gave to us all and I wish him all the best for the future.

 (Sgd.) A.R. BEECH

A.R. Beech
Chief Commissioner
13 September 2010