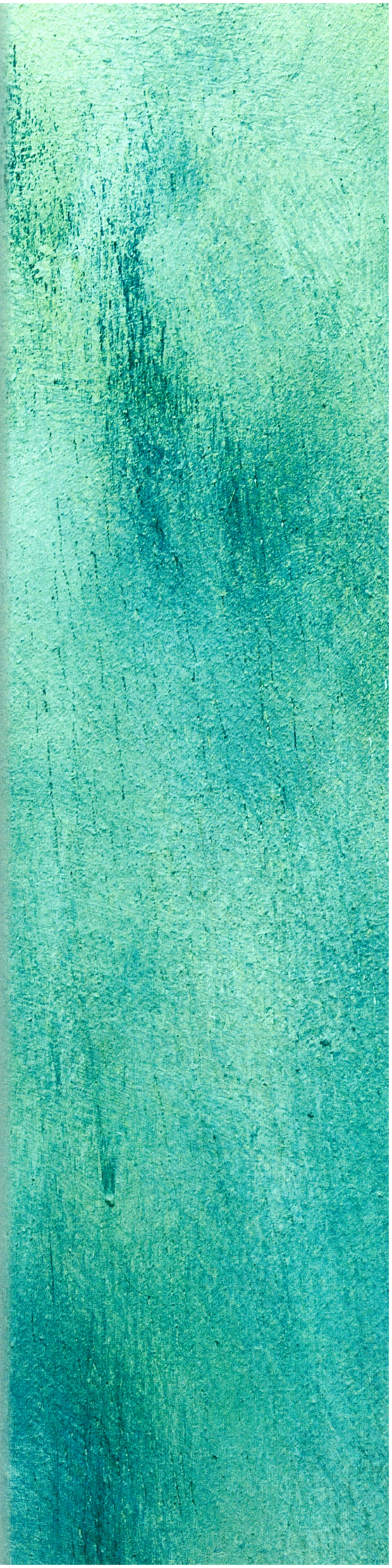
Government of Western Australia
Western Australian Industrial Relations Commission

Industrial Relations Act 1979

Report of the Chief Commissioner of The Western Australian Industrial Relations Commission 2017-18



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

THE HONOURABLE BILL JOHNSTON MLA
MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS

ANNUAL REPORT 2017/18

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 2018.

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

Pamela Scott
Chief Commissioner

28 September 2018

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1 The objects of the *Industrial Relations Act 1979*

The objects of the *Industrial Relations Act 1979* (the Act) include to:

- promote goodwill in industry; and
- to encourage and provide 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 and its constituent authorities. These include the Public Service Arbitrator and the Public Service Appeal Board.

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

(b) The Full Bench of the Commission hears and determines appeals against decisions of the Commission and the Industrial Magistrate's Court.

(c) The Industrial Appeal Court, constituted by three judges of the Supreme Court of Western Australia, hears appeals against decisions of the President, the Full Bench and the Commission in Court Session.

(d) The Industrial Magistrate's Court. In addition to enforcing acts, awards and industrial agreements in the State system, the Industrial Magistrate's Court is an 'eligible State or Territory court' for the purposes of the *Fair Work Act 2009* (Cth). It enforces matters arising under that act and industrial instruments made under that act.

In last year's Annual Report, I described the types of disputes dealt with by the Commission and the roles of various bodies within the Commission. Most matters are initially dealt with by conciliation and a high proportion of disputes are resolved this way. Where they are not resolved by conciliation, the Commission hears and determines them.

Many matters before the Industrial Magistrate's Court are the subject of pre-trial conferences chaired by the Registrar or Deputy Registrar and these conferences, too, often assist in the resolution of either the entire matter or help to narrow the scope of the matters to be determined.

2 Membership and principal officers

During the year to 30 June 2018, the Western Australian Industrial Appeal Court was constituted by the following members:

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

The Western Australian Industrial Relations Commission was constituted by the following members:

President	The Honourable Jennifer Hilda Smith (Acting)
Chief Commissioner	Pamela Elizabeth Scott
Senior Commissioner	Stephen John Kenner (Acting)
Commissioners	Toni Emmanuel
	Damian John Matthews

During this period, Ms Smith was substantively the Senior Commissioner. She has been the Acting President since 17 October 2009. Mr Kenner is substantively a Commissioner, and has been the Acting Senior Commissioner in place of Ms Smith for two years. Their current acting appointments are until 26 December 2018.

For the last year, Ms Smith has also been an acting judge of the Supreme Court of Western Australia. On 27 June 2018, her Honour was formally appointed as a judge of the Supreme Court and resigned her commission as Senior Commissioner. The office of Senior Commissioner is now vacant, although Commissioner Kenner continues to act in it.

2.1 The constitution of the Commission

The Commission now has a President and four 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 judges of the Court of Arbitration from 1901 to 1963.

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

2.2 Public Service Arbitrators

Acting Senior Commissioner Kenner continues his appointment as the Public Service Arbitrator. His appointment is due to expire on 26 June 2020.

Commissioner Emmanuel continues her appointment as an additional Public Service Arbitrator. Her appointment is due to expire on 7 March 2019.

Commissioner Matthews continues his appointment as an additional Public Service Arbitrator. His appointment is due to expire on 20 March 2019.

2.3 Public Service Appeal Board

In addition to the members of the Commission, as Public Service Arbitrators, chairing 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.

2.4 Railways Classification Board

The Railways Classification Board is effectively defunct. There have been no applications 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.

2.5 Occupational Safety and Health Tribunal

Acting Senior Commissioner Kenner 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* (the OSH Act) and s 16(2A) of the Act, and will expire on 31 December 2018.

2.6 Road Freight Transport Industry Tribunal

During this year, the following Commissioners constituted the Road Freight Transport Industry Tribunal:

- Chief Commissioner Scott
- Acting Senior Commissioner Kenner
- Commissioner Matthews

2.7 Industrial Magistrate's Court

During the reporting period, Magistrate G Cicchini, Magistrate M Flynn and Magistrate D Scaddan exercised jurisdiction as Industrial Magistrates. Each of them is a Stipendiary Magistrate appointed to undertake this specialist area of work. During 2017/18, Magistrate Cicchini retired after 24 years of dedicated service as an Industrial Magistrate. He was held in high regard for his work and I express my appreciation to him.

2.8 Registry

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

Registrar	Ms S Bastian	
Deputy Registrar	Ms S Hutchinson	(resigned effective 2 August 2018)
	Ms S Kemp	

3 Summary of main statistics

3.1 The Western Australian Industrial Relations Commission

	MATTERS CONCLUDED			
	2014/15	2015/16	2016/17	2017/18
Industrial Appeal Court:				
Appeals	3	5	2	2
Full Bench:				
Appeals	9	18	15	17
Other matters	5	2	3	5
President sitting alone:				
Section 66 matters (finalised)	0	2	6	0
Section 66 Orders issued	2	3	6	1
Section 49(11) matters	1	0	1	2
Other matters	0	0	0	0
Section 72A(6)	0	0	0	0
Consultations under s 62	5	3	6	3
Commission in Court Session:				
General Orders	2	1	2	2
Other matters	3	1	6	3
Commissioners sitting alone:				
Conciliation conference applications (s 44) [1]	104	88	60	56
New agreements	46	56	41	36
New awards	1	0	1	1
Variation of agreements	0	0	0	0
Variation of awards	41	36	11	11
Other matters [2]	159	130	77	50
Unfair dismissal matters concluded:				
Unfair dismissal claims	146	118	101	91
Contractual benefits claims	113	121	89	73
Public Service Arbitrator (PSA):				
Award/agreement variations	10	11	0	0
New agreements	20	3	4	15
Orders pursuant to s 80E	1	0	1	0
Reclassification appeals	61	86	12	3
Public Service Appeal Board:				
Appeals to Public Service Appeal Board	18	12	21	27
TOTALS	**750**	**696**	**465**	**398**

Table 1 – Matters concluded 2014/15 – 2017/18

3.1.1 Notes to Table 1

[1] CONFERENCE applications include the following:	2014/15	2015/16	2016/17	2017/18
Conference applications (s 44)	48	40	34	30
Conferences referred for arbitration (s 44(9))	12	12	4	1
Public Service Arbitrator conference applications	42	34	18	22
Public Service Arbitrator conferences referred	2	2	4	3
TOTALS	**104**	**88**	**60**	**56**

[2] OTHER MATTERS include the following:	2014/15	2015/16	2016/17	2017/18
Apprenticeship appeals	5	7	7	1
Award applications other than for variation	99	0	0	1
Occupational Safety and Health Tribunal [#]	5	2	2	5
Public Service applications	12	12	2	1
Requests for mediation	15	15	26	18
Road Freight Transport Industry Tribunal [##]	NR	31	31	5
TOTALS	**136**	**67**	**68**	**31**

Notes to Table 1 – Matters concluded 2014/15 – 2017/18.

[#] The Tribunal operates under the OSH Act. This figure records the number of applications to the Tribunal which have been finalised.

[##] The Tribunal operates under the *Owner-Drivers (Contracts and Disputes) Act 2007*. This figure records the number of applications to the Tribunal which have been finalised.

3.2 Awards and agreements in force under the Act – totals

Year	Number at 30 June
2014	2,570
2015	2,458

Year	Number at 30 June
2016	1,505
2017	1,395
2018	1,178 ###

Table 2 – Awards and agreements in force

###The total number of agreements and awards in force has fallen during 2017/18 because the Commission has been reviewing existing agreements to cancel those that are defunct, to ensure that its records are up to date.

3.3 Award and agreement changes

Nature of application	Number of awards/agreements affected
State Wage Case General Order	218
Location Allowances General Order	82
New industrial agreements (general)	21
New industrial agreements (public sector)	15
Agreements – retirements from	5
Agreements – cancelled	160

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

3.4 Western Australian Industrial Appeal Court

Decisions issued during this period	1
Orders issued during this period	6

3.5 Full Bench matters

3.5.1 Appeals – Heard and determined from decisions of the:

Commission – s 49	11
Industrial Magistrate – s 84	6

3.5.2 Organisations – Cancellation/suspension of registration of organisations pursuant to s 73:

Applications	4
Orders issued	2

3.6 President – Matters before the President sitting alone

3.6.1 Stay of operation of a decision appealed against pending the determination of the appeal pursuant to s 49(11)

Applications made	1

3.6.2 Regarding union rules pursuant to s 66

Applications made	2
Applications finalised	1

3.6.3 Consultations

The Registrar is required to consult with the President regarding matters set out in s 62.

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

3.7 Commission in Court Session

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

3.7.1 State Wage Order

Pursuant to s 50A, to determine the increases to rates of pay for the purposes of the *Minimum Conditions of Employment Act 1993* (the MCE Act) and awards.

3.7.2 Location Allowances General Order – s 50

See 6 – Location Allowances General Order below.

3.7.3 Equal remuneration principle

Application for the creation of a Principle dealing with claims for equal remuneration for men and women for work of equal or comparable value.

The first sitting of the Western Australian Industrial Commission, chaired by Chief Commissioner E R Kelly, with Commissioners D E Cort and F Schnaars.

3.8 *Police Act 1892*

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

No new appeals were filed during 2017/18. Two appeals lodged in 2015 and 2017 respectively were finalised during 2017/18. One appeal was dismissed and the other was upheld and compensation was awarded. The Commissioner of Police appealed to the Industrial Appeal Court against the Commission's decision to award compensation. That appeal was discontinued on 30 August 2017. One further appeal, lodged in 2016, was adjourned pending related criminal proceedings.

3.9 *Prisons Act 1981*

No appeals of this nature were referred to the Commission or dealt with during 2017/18.

3.10 *Young Offenders Act 1994*

No appeals of this nature were referred to the Commission or dealt with during 2017/18.

3.11 Claims by individuals – section 29

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

3.11.1 Applications made

	2014/15	2015/16	2016/17	2017/18
Unfair dismissal	116	114	113	87
Denial of contractual benefits	121	110	103	75
TOTAL	**237**	**224**	**216**	**162**

Table 4 – Section 29 applications lodged

3.11.2 Applications finalised

	2014/15	2015/16	2016/17	2017/18
Unfair dismissal	144	118	101	91
Denial of contractual benefits	110	121	89	73
TOTAL	**254**	**239**	**190**	**164**

Table 5 – Section 29 applications finalised

3.11.3 Applications lodged compared with all matters lodged

	2014/15	2015/16	2016/17	2017/18
All matters lodged	1,632	1,075	1,046	984
Section 29 applications lodged	237	224	216	162
TOTAL (%)	**15%**	**21%**	**21%**	**16%**

Table 6 – 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.

3.11.4 Matters – method of resolution

	Unfair dismissal	Contractual benefits	Total	%
Arbitrated claims in which order issued	10	14	24	15%
Settled or withdrawn without arbitration	81	59	140	85%
Total finalised in 2017/18	**91**	**73**	**164**	**100%**

Table 7 – Section 29 applications method of resolution

3.12 Employer-employee agreements

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

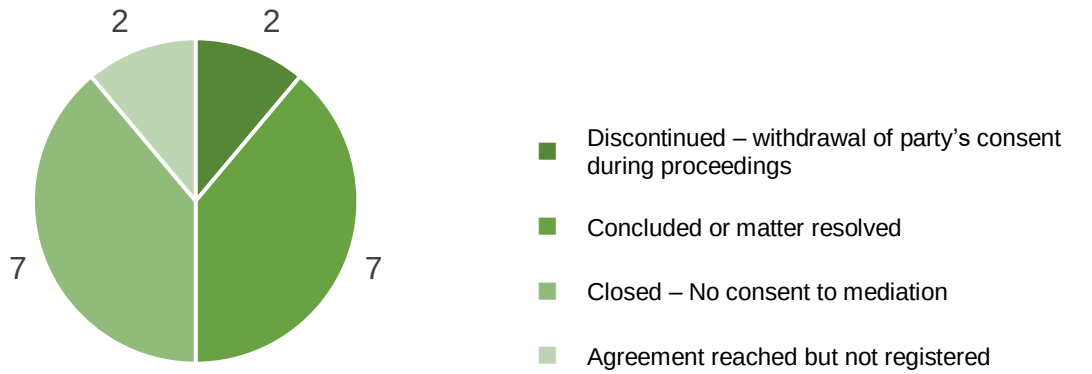
There were no such agreements lodged this reporting year.

3.13 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. This is wider than an 'industrial matter' under the Act.

During the reporting period, 13 mediation applications and one referral of an employment dispute were lodged.

Eighteen matters were finalised during 2017/18:



The EDR Act has been utilised by parties to industrial disputes which are not within the jurisdiction of the Commission pursuant to the Act.

3.14 Boards of Reference

There have been no Boards of Reference during this reporting period.

3.15 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).

During the reporting period, two new industrial agents were registered, one of which is an individual and the other is a body corporate.

Total number of agents registered as body corporate	22
Total number of agents registered as individuals	15
Total number of agents registered as at 30 June 2018	**37**

Table 8 – Industrial agents registered as at 30 June 2018

3.16 Industrial organisations

3.16.1 Registered as at 30 June 2018

	Employee organisations	Employer organisations
Number of organisations	40	16
Aggregate membership	180,294	5,355

Table 9 – Industrial organisations registered as at 30 June 2018

3.16.2 Rule variations by Registrar

Variation of organisation rules by the Registrar	3

3.16.3 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:
    - *Industrial Relations Act 1979*;
    - *Long Service Leave Act 1958*;
    - *Minimum Conditions of Employment Act 1993*;
    - *Occupational Safety and Health Act 1984*;
    - *Mines Safety and Inspection Act 1994*;
    - an award;
    - an order of the Commission;
    - an industrial agreement; or
    - an employer-employee agreement that applies to any relevant employee.

The Registrar issues right of entry 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.

This year, authorisations were issued to representatives of the organisations listed in Appendix 3 – Right of entry authorisations by organisation.

Authorisations issued:

Since 8 July 2002 (gross total)	1,881
During 2017/18	94
Number of people who presently hold an authorisation	348
Number of authorisations that are current*	348
Number of authorisation holders who have had their authorisation revoked or suspended by the Commission in the current reporting period	0

* Authorisations issued in previous years, unless revoked or suspended, remain valid.

3.17 Prosecution jurisdiction

The Industrial Magistrate's Court Registry received a total of 224 claims in the Industrial Magistrate's Court's general jurisdiction. A breakdown of those matters is set out below:

Claims lodged	224
Resolved (total)	218

Resolved (lodged in the period under review)	141
Resolved but lodged in another financial period	77
Pending	118
Total number of resolved applications with penalties imposed	7
Total value of penalties imposed	$13,630
Total number of claims/complaints resulting in disbursements	11
Total value of disbursements awarded	$3,511
Claims/complaints resulting in awarding wages	26
Total value of wages of Magistrate matters resolved during the period	$338,322

Table 10 – Industrial Magistrate's Court prosecutions jurisdiction statistics

4 Access to justice

The Commission is very conscious that individual employees and small business employers who are involved in matters before the Commission are not familiar with the ways of tribunals and may find the process and the experience quite daunting. The Commission has established a number of opportunities for those self-represented people to obtain external support.

4.1 Commission's pro bono scheme

The Commission established a pro bono scheme in 2014. This scheme has expanded in the last year with the addition of DLA Piper. 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

A total of 12 applicants were referred to the pro bono scheme during the year. Half of those were employees claiming payment of benefits under their contracts of employment and one-quarter were claiming to have been unfairly dismissed. All but one were employees.

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

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.

Four applicants for pro bono assistance did not receive assistance in 2017/18 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;

(c) no pro bono provider was available or willing to provide assistance; and/or

(d) the coordinator was currently ascertaining the availability of a pro bono provider.

4.2 Employment Law Centre and John Curtin Law Clinic

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.

4.2.1 Employment Law Centre information sessions

In 2018, the Commission extended its relationship with the ELC as a means of making the Commission more accessible. The Commission facilitates information sessions for applicants and respondents to claims of unfair dismissal and denied contractual benefits. These sessions are 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 able to attend in person or they may elect to attend by video-link.

Sessions were held on 30 April, 15 May, 11 and 26 June 2018. A further one-on-one session was held on 25 June to accommodate a party who needed an interpreter.

4.2.1.1 Feedback from information sessions

At the end of each session, participants are asked to provide feedback. More than two-thirds of those who provided feedback gave the session the highest rating for its level of information and overall rating. Nearly one-third gave the second highest rating.

One participant reported that she had 'never found a government body to be so immediately responsive before', that she could not 'say enough positive comments re WAIRC'. Another said that it 'provides a great base for non-lawyers'.

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

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. In addition to being of great benefit to the parties concerned, it is of considerable assistance to the Commission in dealing with the matter. 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.

4.3 Legislation

On 1 May 2018, the *Fair Work Amendment (Christmas Island and Cocos (Keeling) Islands) Regulations 2018* (Cth) came into effect. This enabled application of the *Industrial Relations Act 1979* (WA) and the *Minimum Conditions of Employment Act 1993* (WA) to Western Australian public sector employees working on Cocos (Keeling) Island and Christmas Island.

4.3.1 Industrial Relations Commission Regulations 2005

4.3.1.1 Amendments

The *Industrial Relations Commission Regulations 2005* (the Regulations) were amended effective from 12 January 2018, to enable standing warrants to be registered with the Commission. This means that organisations which regularly represent parties in matters before the Commission do not have to obtain or file a fresh warrant to appear as agent with each new matter (*Industrial Relations Commission Amendment Regulations 2018,* Western Australian Government Gazette, 12 January 2018, 116-117).

4.3.1.2 Review

I commenced a review of the Regulations this year. As part of that process, 62 stakeholders who regularly deal with the Commission were invited to make comments. A number of very useful submissions were received. At the same time, the forms incorporated into the Regulations have been rewritten. I anticipate that by the beginning of 2019, the revised Regulations, along with the completely revamped forms, will be issued. The new Regulations and forms aim to make the Commission's processes easier to understand and more accessible.

I record my thanks to those who gave time and thought to responding to this review.

4.3.2 Industrial Relations (General) Regulations 1997

There have been no amendments to these regulations during 2017/18.

5 State Wage Case

On 13 June 2018, the Commission in Court Session delivered its reasons for decision in the 2018 State Wage Case pursuant to s 50A of the Act ([2018] WAIRC 00363; (2018) 98 WAIG 263). 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 MCE Act to adults, apprentices and trainees and to adjust rates of wages paid under awards.

The application for the 2018 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 and Industrial Relations (the Minister), UnionsWA, the Chamber of Commerce and Industry of Western Australia Inc (CCIWA), the Western Australian Council of Social Service (WACOSS), the Australian Hotels Association and three individuals. The Minister, UnionsWA, CCIWA and WACOSS appeared in the proceedings and also made oral submissions.

After hearing submissions and considering the evidence, the Commission issued a General Order that increased the minimum wage for award covered employees and award-free employees covered by the MCE Act to $726.90.

The operative date was from the first pay period on or after 1 July 2018.

The Statement of Principles was amended to provide clearer information for employers and employees and better reflect the contemporary safety net that currently exists.

As at 30 June 2018, there were 233 awards in force. Of those awards, 218 were varied as a result of the 2018 State Wage Order.

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

In preparation for the State Wage Case, I invited the s 50 parties to review the Statement of Principles attached to the State Wage Order and make submissions on whether any amendments were necessary.

The Commission also raised with the parties making submissions to the State Wage Case whether it ought to establish a principle within the Statement of Principles to deal with equal remuneration for work of equal value. The parties were agreeable to this and the Commission is currently in the process of facilitating discussions between those parties with a view to agreement being reached on the terms of such a principle and for it to be incorporated into the Statement of Principles at the next State Wage Case. If no agreement is reached, the Commission in Court Session will hear and determine the matter.

5.1 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 shall be $621.10 on and from the commencement of the first pay period on or after 1 July 2018.

5.2 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.

Apprentices and trainees under the MCE Act refers to the classes of apprentice and trainee, respectively, to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into. It was ordered that the minimum weekly rate of pay for apprentices and trainees are to be the rate of pay determined by reference to apprentices' rates of pay and the minimum weekly rate of pay at the relevant industry/skill level for trainees respectively, based on the *Metal Trades (General) Award*. The date of operation was the commencement of the first pay period on or after 1 July 2018.

6 Location Allowances General Order

The Location Allowances General Order prescribes allowances to compensate employees employed at specified locations for the cost of living, isolation and climate associated with those locations. Each year, of its own motion, the Commission reviews the prices component of the allowances and adjusts them by the Perth Consumer Price Index. Such a review was again undertaken at the Commission's own motion, and the allowances contained in 82 awards were adjusted from 1 July 2018 ([2018] WAIRC 00353; (2018) 98 WAIG 415).

7 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). 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.

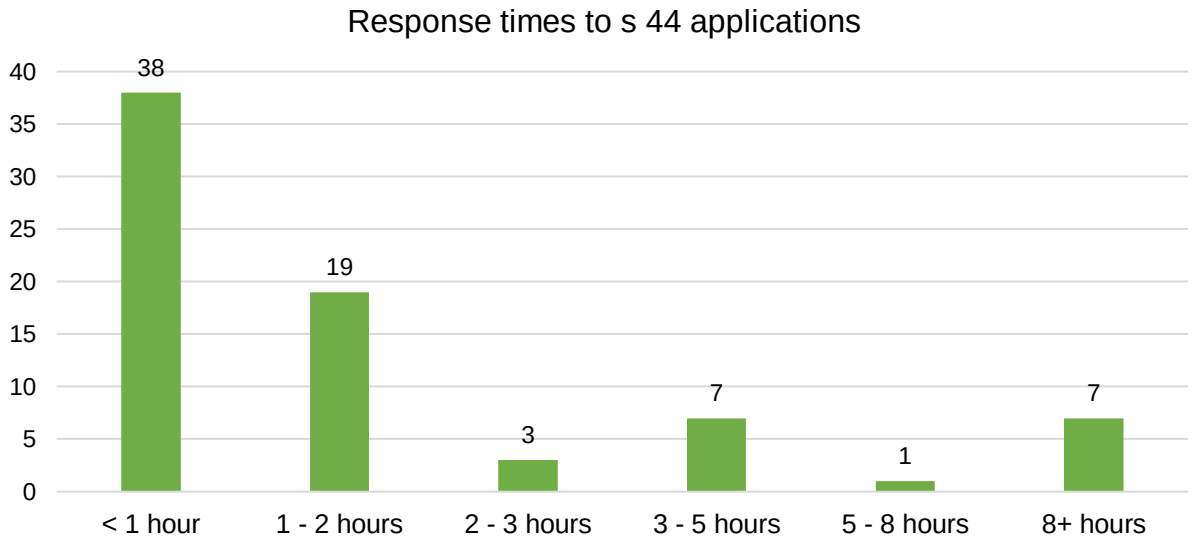
7.1.1 Compulsory conferences

Section 44 of the Act allows a union or employer to apply for a compulsory conciliation conference. Under this section, the Commission 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. The Commission contacts the applicant to ascertain the urgency of the application and when it will be

served on the respondent. In over half of all s 44 applications, this occurs within an hour of the application being filed. In around 90% of applications, the applicant is contacted the same day.

In cases where an application appears to not be particularly urgent, or the applicant is uncontactable, the matter may be dealt with the following business day.

The Registry



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

	Number of matters	Avg. time (days) to conference
Within 48 hours	2	1
Within a week	27	9
Within a fortnight	9	12
Within a month	7	16
Less urgent than a month	0	0

	Number of matters	Avg. time (days) to conference
Did not stipulate - for Commission to decide	14	20

7.2 More than one conference per application

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.

Other matters, though, require more than one conference.

7.2.1 Conferences convened in s 44 matters

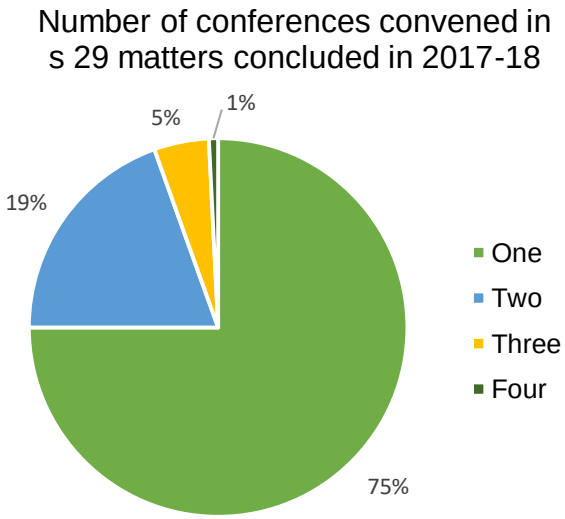
Of the 41 conference applications made under s 44 of the Act concluded in this year without being referred for hearing and determination, 24 required only one conference. However, others required more.

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 scheduling of 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. Only then can a final hearing and determination occur.

7.2.2 Conferences convened in s 29 matters

In 2017/18, 164 applications made by individuals claiming either unfair dismissal or denied contractual benefits were resolved by the Commission. The Commission convened a conference in 128 of those matters, and convened more than one conference in 25% of those matters.



7.3 Case studies

The following examples from the last year demonstrate those circumstances where more than one conference was required and the need for the Commission to manage the process to keep the parties moving towards resolution. The Commission adopts an active case management approach, taking the initiative to bring matters on.

7.3.1 The union and employer disputes

7.3.1.1 *Western Australian Police Union of Workers v Commissioner of Police* – PSAC 13 of 2017

From mid-2017, the Commission dealt with a dispute between the Western Australian Police Union of Workers and the Commissioner of Police in relation to a new industrial agreement for police officers. The parties had been in discussions about the Union's log of claims since earlier in the year. A significant issue in the dispute was the application of the Government's new wages policy and Union allegations that the Commissioner of Police had given commitments in negotiations under the former wages policy. The Union commenced a work to rule campaign.

The Commission convened numerous compulsory conferences. Some progress was made, however, the major sticking point remained the Government's wage offer.

In September 2017, there was a significant deterioration in industrial relations. The Union called for members to respond to urgent matters only. The Commissioner of Police issued a direction to police officers under the *Police Force Regulations 1979* to ensure that public safety was not put at risk.

The Commissioner of Police put his final offer for a new industrial agreement to the Union on Friday, 22 September 2017. The Union's Board formally rejected the offer after its meeting on 11 October 2017.

At an urgent compulsory conference convened by the Commission pursuant to s 44 of the Act, the Commissioner of Police sought orders from the Commission that all present industrial action cease and that further possible options for resolution of the present dispute be explored.

The Commission held concerns about the impact of the ongoing industrial campaign, the cost to the community and the public interest, and so it issued orders on 27 September 2017 requiring the Union and its police officer members to cease all industrial action by 12.00 p.m. Thursday, 28 September 2017. In response to an application made by the Union, the Commission also made orders restoring access by senior officers of the Union to the police computer and communications system so that the Union could continue to communicate with its members during the bargaining process.

The Commission also ordered that the parties further confer and report back to the Commission by no later than 6 October 2017 on the prospect of a replacement industrial agreement, and recommended that other steps be taken to explore possible agreed outcomes to resolve the dispute.

The Commission presided over further intensive discussions that led to a new industrial agreement being registered on 14 February 2018.

7.3.1.2 Transfer of a union member

This was an application made by a union under s 44 of the Act, and involved a question of the terms of reference for obtaining expert medical specialist advice regarding an employee's fitness to work.

The conference was adjourned for six months for the employee to undertake a trial at a new workplace, and further delays occurred when the parties did not update the Commission as they had undertaken to do. Four conferences were held over a period of more than 16 months.

7.3.1.3 Roster dispute

A union and employer were in dispute about the introduction of a mandatory on-call roster. Four conferences were held between December 2017 and 30 June 2018. The application is still on-going because the parties are trialling different rostering options.

7.3.1.4 Denied contractual benefits claim

The applicant claimed that he had been denied benefits arising under his contract of employment. Over a period of nine months from the date the application was filed, the Commission held two conferences to assist the parties to reach agreement. A further conference was scheduled but the applicant's agent failed to attend, explaining later that he had mistaken the time. This conference then had to be rescheduled at a time convenient to all the parties, which was complicated by the respondent's manager being on leave and out of the country.

This matter was further complicated by:

- the applicant being outside of Australia and difficult to contact. He had left the country after his dismissal in circumstances where his visa was linked to his employment;
- the respondent not being represented initially the but then engaging a representative;
- the applicant's agent failing on no less than four occasions to provide the Commission with updates and status reports, requiring the Commission to regularly make enquiries of the applicant's representative;
- the applicant having a related claim in another jurisdiction; and
- the respondent seeking the return from the applicant of intellectual property.

At the second conference, the parties reached an in-principle agreement to resolve all matters related to the employment, including the matter in the other jurisdiction and the intellectual property dispute. However, given the complications already referred to, two

months after the agreement was reached, the parties had still not brought it to fruition. The Commission called the matter on for hearing, eventually issuing a formal order requiring the applicant to take certain steps to bring the matter to a conclusion.

7.4 Conferences by telephone and video-link

During 2017/18, a total of 332 conferences were convened by the Commission in respect of s 29 and s 44 applications. 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 and so the conference may be conducted by telephone or video.

Conferences convened by telephone	47
Conferences convened by video-link	1

Members of the Commission and the parties prefer telephone-links to video-links for conciliation because they are easier to set up, do not require the external party to have additional infrastructure and are more reliable. The Commission is investing in improved soundproofing and acoustic treatments in conference rooms to improve audio quality for the significant number of conferences convened by telephone.

The Commission is also adopting new video-link technology. The new technology is more user friendly. It is being adopted with the aim of making video-links a more reliable option. This will reduce operation and support costs, while making the Commission's services more available and accessible for parties and stakeholders.

8 Awards and agreements – records updated

8.1 Industrial agreements

In September 2017, I instigated a review of a large number of registered industrial agreements, with a view to determining whether they were defunct. As a result, 160 agreements were cancelled during the year and as at 30 June 2018 a further 747 industrial agreements were under consideration with a prospect of cancellation.

9 Private Sector coverage

Last year, I reported that unions in the private sector in the State system had negligible involvement with matters before the Commission. I noted that:

Unions:

1 Made no applications for new awards;

2 Made no applications to vary awards to improve wages or conditions of employment;

3 Brought two applications for conciliation and arbitration on behalf of individual members or groups of members at particular workplaces. Both of these matters related to not for profit organisations. This constituted 3.3% of applications for conference pursuant to section 44 of the Act.

4 Made 53 applications for registration of industrial agreements. 33 of these relate to independent schools, and the remainder relate to not for profit organisations including political parties and community and legal centres. Three relate to one particular unincorporated private hospital.

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I also noted that:

> In respect of enforcement matters in the State jurisdiction brought to the Industrial Magistrate's Court against private sector employers this year, of the 29 matters referred, only one was brought by a union, 69 were brought by individuals and four were brought by the industrial inspectors of the Department of Commerce (now the Department of Mines, Industry Regulation and Safety).
>
> ...
>
> In these circumstances, the statistics show that by 2017, employees in the private sector covered by the State industrial system, other than those in larger not for profit organisations, have extremely limited opportunities to bring to an independent body for resolution issues relating to their employment and they are largely unrepresented in the system. This is in stark contrast with national system employees who may refer a broad range of claims that their employer has taken adverse action against them. Adverse action includes dismissal, refusal to employ, alterations to their position to their detriment, discrimination, and many others (see *Fair Work Act 2009* (Cth) s 342). Public sector employees in Western Australia may refer a broader range of matters to the Commission in its Public Service Arbitrator and Public Service Appeal Board jurisdiction than may private sector employees.
>
> Private sector employees' rates of pay and conditions of employment, apart from those covered by the *Minimum Conditions of Employment Act 1993*, are set out in the safety net provided by awards which have not been reviewed for many years and do not reflect current circumstances. Otherwise it is those matters brought on at the Commission's own initiative which provide for private sector employees to have their minimum rates of pay and location allowances kept up to date.

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Following these comments, the UnionsWA Industrial Officers and Lawyers Network invited the Commission to address its Annual Conference regarding amending awards. On 2 November 2017, A/Senior Commissioner Kenner addressed the conference on awards and the need for them to be kept current. He also gave guidance on the process for award amendments.

On 8 May 2018, I addressed the same group on the wage fixing principles, drawing attention to some aspects of those principles and how they may be used to ensure that awards are updated.

However, private sector unions have again made no applications to amend awards to which they are a party. Some of the major awards apply to a large number and very broad range of employees covered by the State system.

During the State Wage Case, it was suggested to us that certain awards require amendment to ensure that they comply with the MCE Act. The Commission has initiated applications to review those matters.

One submission to the State Wage Case noted the comment in the Interim Report of the *Ministerial Review of the State Industrial Relations System* (the Ministerial Review) that there were potentially large numbers of award-free employees. It was suggested to us that the Commission might initiate applications of its own volition to vary the scope provision of a number of awards to bring those currently award-free employees within the scope of existing awards. However, the Commission does not have the power to do so, as, according to s 40 of the Act, an application to amend the scope of an award may be made only by a party to the award.

The parties who were once the initiators of new awards, and who regularly sought to amend them, no longer attend to those awards. This role seems now to be expected of the Commission. Yet in submissions to the Ministerial Review a number of parties expressed the view that the Commission should not be given power to create new, modern awards or to properly update existing awards.

10 Impediments to effective and efficient operation of the Commission and the Ministerial Review

In last year's Annual Report, I noted the continuing impediments to the Commission's effective and efficient operation brought about by:

1. The Chief Commissioner not being able to be a Public Service Arbitrator (see s 80D(3) of the Act). Given that a significant proportion of the Commission's work is now related to the public sector, the removal of this limitation would enhance the Commission's flexibility and efficiency.
2. The difficulties associated with the Public Service Appeal Board's jurisdiction.

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Those difficulties remain. A means of overcoming both of those difficulties would be the abolition of the constituent authorities of the Commission, such as the Public Service Arbitrator and the Public Service Appeal Board, and for those jurisdictions to be absorbed into the Commission's general jurisdiction as occurred in respect of the Government School Teachers' Tribunal. This has been recommended by a number of reviews of the Commission over many years.

I am encouraged by the initiation of the Ministerial Review, and to date, the issuing of the Interim Report and proposed recommendations. This review and any consequential legislation provide a once in a generation opportunity to bring the system, the Commission and industrial instruments in particular, up to date. This is after many years where a

number of reviews have been conducted but none has resulted in the necessary legislative change.

This has been at a time when the federal system has undergone enormous change, including increased access to a tribunal by individual employees. I look forward, with much optimism, to necessary changes.

11 Education and professional development of members of the Commission

A number of members of the Commission attended a joint industrial relations commissions conference with the Industrial Relations Commissions of New South Wales and Queensland in Queensland in March 2018.

The conference provided a rare and valuable opportunity for Commissioners to receive education and professional development in a range of subjects relevant to their work.

The subjects dealt with included:

(a) hearing room control and conduct by presiding tribunal members;

(b) the growth and significance of self-represented parties to the use of resources, case management and other issues;

(c) aspects of memory and its effect on the assessment of witness evidence;

(d) issues relating to the assessment of expert evidence;

(e) dealing with stress and mental health issues;

(f) the appropriate use of and preparations for oral judgments; and

(g) working with interpreters.

The sessions were conducted by senior judicial officers and experts, including senior academics.

In addition to the educational aspects of this conference, the senior member of each of the tribunals provided an overview of their jurisdiction and their experiences on particular issues and current matters.

Members of the Commission also benefitted greatly from the opportunity to meet and share experiences, information and ideas with members of other industrial tribunals.

12 Community engagement

Members of the Commission have participated in a number of events throughout the year aimed at providing the community generally and stakeholders in the industrial relations system in particular with information about the Commission and its processes.

12.1 Meet the Commission

The Commission hosted a function for the Industrial Relations Society of Western Australia, titled 'Meet the Commission' on 27 September 2017. Each of the members of the Commission gave a brief presentation about some aspect of the Commission's jurisdiction and their own role in it.

12.2 Information sessions

Training and orientation sessions have been provided to unions and employers by Chief Commissioner Scott, Registrar Bastian, Deputy Registrar Kemp and Acting Associate to the Chief Commissioner, Thomas Klaassen.

These were delivered to:

- the Department of Education – 26 October 2017;
- United Voice – 2 February 2018;
- the Department of Health – 23 February 2018; and
- the Australian Nursing Federation – 24 April 2018.

12.3 Papers presented by members

Papers were also presented by members of the Commission as follows:

- Australian Policing Industrial Relations Group – 2017 Annual Conference, 20 October 2017 by Chief Commissioner Scott;
- UnionsWA Industrial Officers and Lawyers Network Annual Conference, 2 November 2017 by A/Senior Commissioner Kenner;
- Chamber of Commerce and Industry of Western Australia, Industrial Relations Conference: The Future of Work, 12 April 2018 by Chief Commissioner Scott;
- UnionsWA Industrial Officers and Lawyers Network – 2018 Annual Conference, 8 May 2018 by Chief Commissioner Scott; and
- Department of Mines, Industry Regulation and Safety Labour Relations, The Employment Dispute Resolution Act, 20 June 2018, Chief Commissioner Scott.

12.4 Other events supported by the Commission

A number of members of the Commission attended the 'Women in Industrial Relations' breakfast held on 24 October 2017 conducted by the Industrial Relations Society of Western Australia.

Commissioner Matthews attended the School Law WA seminar presented by LawSense.

In addition, members of the Commission attended functions at the invitation of employee and employer organisations.

13 Occupational Safety and Health – Ministerial Advisory Panel

The Minister announced the formation of an expert panel, the Ministerial Advisory Panel, to advise on the development of an integrated work health and safety Act across all industries in Western Australia. The intention is that the new legislation will be based on the model work health and safety acts already applying in other jurisdictions. Acting Senior Commissioner Kenner, who constitutes the Occupational Safety and Health Tribunal, addressed a meeting of the Ministerial Advisory Panel on 16 February 2018 on relevant issues that may impact on the Tribunal, arising from proposed harmonised legislation.

14 Website

14.1 New search facility

At the commencement of 2018, the Commission's website search function was upgraded to enable the general public and stakeholders to more readily undertake research into decisions of the Commission and other matters.

Access to the Commission's website has increased on trend from 1 July 2017 to 30 June 2018 from approximately 6,000 hits per week to approximately 7,600 hits per week, demonstrating the use made of this important resource.

14.2 New website

The Commission is in the process of redesigning its website. The objective is to make the website more easily accessible by stakeholders and the general public. It will provide greater opportunity for electronic filing and, together with the revised Regulations and forms, will provide better, more targeted, information aimed at the particular stakeholder groups.

15 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 service to the Commission and 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 JCLC.

16 Decisions of Interest

16.1 Industrial Appeal Court

16.1.1 Jurisdictional limits

The Industrial Appeal Court unanimously held that an appeal to the Industrial Appeal Court against a decision of the Full Bench can only be brought on the basis that:

- the Full Bench made an error in the construction or interpretation of the law;
- the appellant was denied a right to be heard; or
- the Full Bench made a decision that is not within its jurisdiction.

The appellant said there were typographical and other minor errors in the Full Bench's decision and in the transcript. Their Honours found that the errors were minor and did not indicate that the appellant had been denied his right to be heard.

Robert Kinneen v Whelans Australia Pty Ltd
[2018] WAIRC 00429; (2018) 98 WAIG 420

16.2 Full Bench and President matters

The Full Bench deals with:

(a) appeals against decisions of a single Commissioner and the Industrial Magistrate's Court; and

(b) matters relating to the regulation of industrial organisations.

In relation to appeals against decisions of a single Commissioner, the following are decisions of particular significance as they set out or consider important issues of jurisdiction, power, procedure or merit.

16.2.1 Interpretation of Industrial Agreement

The Full Bench upheld an appeal by The Australian Rail, Tram and Bus Industry Union of Employees against decisions of the Commission in relation to the interpretation of the *Public Transport Authority/ARTBIU (Transperth Train Operations Rail Car Drivers) Industrial Agreement 2016.*

The dispute between the parties was the method of calculating payment of an allowance to rail car drivers when they are required to commence work at a depot other than their home depot. The parties were in dispute about whether the ability to use public transport to travel to and from the other depot is to be assessed from the employee's home depot or place of residence.

The Western Australian Industrial Gazette has reported the decisions of the State's industrial courts and tribunals since 1921.

The employer had applied to the Commission for an interpretation of the provision in the industrial agreement. However, it did not act to have the issue determined.

In the meantime, the Union applied to the Industrial Magistrate's Court seeking to enforce what it said was the proper interpretation of the same allowance under the industrial agreement. This was listed for hearing in the Industrial Magistrate's Court.

When the employer sought to have the interpretation application proceed before the Commission, the Union objected, saying the matter was part of what the Industrial Magistrate's Court had to decide.

The Full Bench found that the Commission at first instance erred in rejecting the Union's application and in finding that part of the Commission's role in declaring the true interpretation of an industrial instrument under s 46 of the Act, which binds all courts, was to provide guidance to the Industrial Magistrate's Court.

The Full Bench held that the matter before the Industrial Magistrate's Court was not a complete answer to the employer's application for interpretation.

It also found that, given the matter before the Commission related only to the factual circumstances of a particular employee's claim before the Industrial Magistrate's Court and that such a claim is an enforcement matter in relation to which the Industrial Magistrate's Court has exclusive jurisdiction, the learned Commissioner erred. He ought to have granted the Union's application to dismiss the employer's application and allow the matter to be dealt with by the Industrial Magistrate's Court.

The decisions of the Commission were quashed and the substantive application dismissed.

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia
[2017] WAIRC 00830; (2017) 97 WAIG 1689

16.2.2 Public Service Arbitrator has no jurisdiction to judicially review

The Full Bench held that the Public Service Arbitrator does not have the power to judicially review decisions affecting employment, except to the extent that the Arbitrator is required to deal with the validity of a decision or action by an employer to deal with the 'industrial matter'.

The Union's claim before the Arbitrator was commenced against the Housing Authority to challenge the use of fixed term contracts by the Housing Authority. The Housing Authority was affected by the 2017 Machinery of Government changes; all employees were moved to the Department of Communities. By the time the matter came before the Arbitrator, the Housing Authority no longer had any employees affected by its fixed term contract practices, and there was no evidence that the Department of Communities had engaged in the practices complained of. Therefore, the Arbitrator dismissed the application.

Employees of the Housing Authority had been moved to the Department of Communities by a 'Disposition Notice' issued by the Public Sector Commissioner. The Full Bench found the Disposition Notice was to be presumed valid until it is found to be invalid by a court of

competent jurisdiction. Neither the Arbitrator nor the Full Bench has jurisdiction to review such an instrument because it was not a decision of the employer the subject of the industrial matter before the Arbitrator.

The Civil Service Association of Western Australia Incorporated
v Director General, Housing Authority
[2018] WAIRC 00184; (2018) 98 WAIG 143

16.2.3 The Commission's role regarding unrepresented parties having a fair hearing

An employee appealed against a Commissioner's decision saying that the Commissioner at first instance did not provide him with assistance to conduct his case and pressured him to reach agreement in respect of some of his claim. He argued that this meant he did not get a fair hearing.

The Full Bench held that the Commission is required to provide the parties with a fair opportunity to be heard. This includes self-represented parties. In those circumstances:

(a) the Commission has a duty to do no more than is required to diminish their disadvantage;

(b) self-represented parties are subject to the same rules as all other parties before the Commission, however the Commission may be more lenient in the standard of compliance;

(c) the Commission will not deprive a represented party 'one jot' of their lawful entitlement simply because they are represented and the other party is not;

(d) the Commission may explain to the unrepresented party substantive and procedural rights to ensure the party is not unfairly disadvantaged by their ignorance of those rights;

(e) the Commission cannot advise a party how they should exercise their rights; and

(f) the assistance required will depend on the particular party.

One of the employee's complaints was that he did not have an opportunity to bring evidence through a number of witnesses. However, the Commissioner had asked the employee whether he wanted to call evidence other than his own evidence, and he said 'no'. The Full Bench said that having regard to that, the Commissioner was under no duty to inform the employee that he could ask for an adjournment to call other witnesses.

The Full Bench noted that the Commissioner had encouraged the employee to state his case fully and explained matters of law raised by the employer. In the circumstances, the Full Bench was satisfied that the Commission at first instance conducted a fair hearing.

Mr Chris Kiosses v Presidian Management Services Pty Ltd
[2018] WAIRC 00330; (2018) 98 WAIG 295

16.2.4 Dismissal valid despite non-compliance with law

The Full Bench upheld an appeal by the Shire of Denmark against a decision of the Commission to find that its former Director of Infrastructure Services, Mr Whooley, was invalidly dismissed and award him almost $44,000.

The Commission at first instance found that the purported dismissal of Mr Whooley by the Shire's CEO was invalid because such a decision ultimately rests with the Shire's Council. The Commission found that the Shire owed Mr Whooley his salary and allowances until he resigned months after the dismissal, because the dismissal was invalid.

Mr Whooley had previously disputed his dismissal in the Fair Work Commission and the parties reached in-principle agreement to settle that matter. The Commission found that, because the dismissal was invalid, there was nothing for an agreement to settle a claim of unfair dismissal to fasten upon; there was no dismissal. The agreement was therefore of no effect and could not prevent Mr Whooley from bringing his claim for denied contractual entitlements.

By majority, the Full Bench held that the dismissal was valid. They also held that the agreement to compromise the unfair dismissal proceedings in the Fair Work Commission between the Shire and Mr Whooley was not void, and therefore was a bar to proceedings before the Commission.

The majority found that the terms of the *Local Government Act 1995* were simply a direction to submit a recommendation to the Shire Council to dismiss. It is a principle of law that if Parliament intends to make a contract void in certain circumstances, the Act must say so. They observed that this is in contrast to other provisions in the *Local Government Act 1995* which deem other decisions of the CEO to have no effect. Therefore, the decision to dismiss was not invalid simply because a directive provision of the governing Act was not complied with.

The majority also found that the agreement reached to settle a claim of unfair dismissal was valid and could be an effective bar to proceedings. They observed that the law in this area is not settled and went on to conclude that Mr Whooley would have to satisfy the Commission that there was a misrepresentation or fraud about the validity of the dismissal at the time the agreement was struck, or that because of the invalidity of the dismissal, the agreement would be impossible to perform. The majority were not convinced that either of these tests were satisfied. Therefore, even if the dismissal was invalid, the agreement was a bar to proceedings in any event.

Shire of Denmark v Robert Whooley; *Robert Whooley v Shire of Denmark*
[2017] WAIRC 01010; (2017) 98 WAIG 1

16.2.5 Jurisdiction and costs

An employer had two matters before the Commission:

- an appeal to the Full Bench against an interlocutory decision of the Industrial Magistrate's Court; and

- an application to the President sitting alone to stay the operation of the order of the Industrial Magistrate's Court.

Shortly after the application for a stay of the interlocutory order was filed, the Hon A/President informed the employer of an authority in which it was found that there is no power to stay the operation of an order of the Industrial Magistrate's Court. The employer then sought to discontinue the application for a stay.

The employer subsequently sought to discontinue the appeal as research by the employer revealed a binding line of authorities that determined that an appeal to the Full Bench can only be made in respect of a final determination of a substantive matter.

The respondent in each matter, the employee, sought orders for costs.

There are three sections of the Act that may provide for costs in relation to these matters. The A/President, in the matter before her, found that the stay application was not brought under s 84, and therefore the power of the Full Bench to award costs under s 84 did not apply. The application for a stay was not provided for by the Act and therefore could not be found to have been brought under s 84 of the Act. Further, the employee's costs of legal representation could not be awarded under s 27(1)(o) of the Act as s 27(1)(o) did not confer a separate power to award costs from s 27(1)(c). That left the general power of the Commission to award costs under s 27(1)(c).

The A/President held that the employee's application for costs was too vague.

In dealing with the application for costs of the appeal, the Full Bench held that the Commission only has power to order an unsuccessful party pay the costs of the services of a legal practitioner of a successful party if it is satisfied that the proceedings have been instituted or defended 'frivolously or vexatiously', that is without reasonable grounds, purely to cause trouble, annoyance or embarrassment or for an ulterior motive, not for the purpose of having the dispute adjudicated.

If one of these elements is proved, the Commission's discretion to award costs is enlivened. The Commission will then consider whether to award costs, taking account of the relative informality of proceedings before the Commission and the general policy of not awarding costs.

Even though there was no jurisdiction for each matter, the A/President in dismissing the application for costs in the stay application and the Full Bench in dismissing the application for costs of the appeal, were satisfied that the employer acted properly and abandoned both applications as soon as the jurisdictional issues were drawn to its attention. Further, the Full Bench was also of the opinion that the appeal was not one of those rare cases where a costs order should be made.

G&R Rossen Pty Ltd v Peta Buchanan
[2018] WAIRC 00334; (2018) 98 WAIG 305

16.2.6 Alleged breaches of union rules

The President dismissed an application by Mr Bebich, an officer of the WA Branch of the Transport Workers' Union (TWU) and its counterpart national body, alleging that the Union had breached its rules.

Disciplinary action was taken against Mr Bebich pursuant to the rules of the National body and he was expelled from the Union. By this application, Mr Bebich sought:

- to be reinstated; and
- an order that the Union abide by Rule 16, requiring it to call a Special Meeting in relation to a petition by members regarding alleged misconduct by other officers.

The Hon A/President examined the structure of national and state organisations and the effect of dual registration and separate corporate organisations. Her Honour also considered the power to enforce a petition pursuant to s 66 of the Act where officers hold office pursuant to s 71(5) and the requirement of particulars of alleged breaches of union rules. Her Honour dismissed the application to enforce the rules of the WA Branch of the TWU.

The A/President noted that officers of the State registered TWU are elected to their positions pursuant to the rules of the nationally registered TWU. That is because a 'Section 71 Certificate' operates, allowing the state organisation's positions to be filled by the people elected to fill the corresponding positions in the nationally registered TWU.

The A/President found that the WA Branch of the TWU and the nationally registered TWU are separate legal entities, bound to follow different rules. Her Honour observed that the Western Australian Industrial Relations Commission only has jurisdiction to enforce the rules of the State organisation. The rules of the national body are incorporated into the State body, but only to the extent that there is no inconsistency with the State rules. The rules of the State organisation only deal with expulsion of members pursuant to its own rules, not the national body's rules. The A/President could not deal with the matter of Mr Bebich's expulsion because he was expelled pursuant to the national body's rules, which afforded him his status in the WA Branch of the TWU because of the Section 71 Certificate.

In respect of the Special Meeting sought to be ordered by Mr Bebich, it was alleged that officers of the State organisation had misappropriated its funds in relation to the purchase of motor vehicles and payment of car allowances. Under the rules, there is a process for 'charges' to be laid to deal with officers of the State organisation who have breached their duties to the organisation. Her Honour found that the charges alleged by Mr Bebich lacked detail, such as a date when the breach is alleged to have occurred. Therefore, the charge did not establish a relationship in time between the responsibilities of the current management committee and the alleged misconduct. The A/President found that it appeared that the charge was being used to gather information from the officers as to

what occurred when the vehicles were purchased and the car allowances were paid. Such a purpose is not consistent with the object and purpose of the State union's Rule 16.

Mark Bebich v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch
[2017] WAIRC 00970; (2017) 97 WAIG 1828

16.3 Police Appeal

16.3.1 Unfair removal

The WAIRC had held that Mr Ferguson, a police officer, was unfairly removed from the Police Force. However, it found that he could not be reinstated because after his removal he had sent inappropriate emails to the Commissioner of Police and other officers. Those actions led the WAIRC to unanimously conclude that the Commissioner of Police had no confidence in the appellant, and therefore reinstatement was impracticable. The WAIRC decided, instead, that it was appropriate that the appellant be compensated for loss and injury suffered as a result of the unfair removal.

The WAIRC considered issues including whether the removal of a police officer is a 'particular fall from grace', and whether the unfair removal of a police officer, in and of itself, warrants a 'tariff'. It found that it did not. However, an amount of $2,000 was awarded for the injury which was established, including 'stress and insecurity associated with his removal'.

As to compensation for lost earnings, the WAIRC agreed that the appellant should receive $5,241, being the difference between the income he earned since his removal and the amount he would have earned if he had not been removed. Since his removal, the appellant mitigated his loss by setting up a business.

This decision also dealt with whether the appellant could claim the full costs of setting up that business or only that part of those costs which he no longer held in assets.

Shane Michael Ferguson v The Commissioner of Police
[2017] WAIRC 00805; (2017) 97 WAIG 1609

16.4 Denied contractual benefits claims

16.4.1 Cook's annual leave claim upheld

The Commission upheld an employee's claim for accrued annual leave but found that a claim for overtime was not made out.

The Commission found that the employee took no annual leave whilst working for the respondent as a cook and did not receive any payment for accrued annual leave when the employment ended. He ordered payment of annual leave in the sum of $3,204 nett.

However, the Commission found that although the terms of the written contract of employment provided for the possibility of overtime being worked, the parties had not agreed on the rate to be paid. The relevant clause in the contract constituted an

agreement to agree and no agreement was reached. Accordingly, it found the term was not enforceable.

The Commission noted that depending on the respondent's business structure, either the *Restaurant, Tearoom and Catering Workers Award* or the *Hospitality Industry (General) Award 2010* would have covered the employment. Therefore, the contract of employment would need to be read along with the relevant award obligations relating to overtime. A further term as to a rate of pay for overtime could not be implied into the contract, as it would not be necessary for the effective operation of the contract. The employee's claim for overtime was refused.

Quoc Minh Tran v Hoang Trang Family Trust and Phi and Mai Family Trust Trading as Lido Restaurant
[2018] WAIRC 00085; (2018) 98 WAIG 128

16.4.2 Damages for denied contractual benefits

The Commission upheld two employees' claims for denied contractual benefits of notice, annual leave and unpaid wages, awarding one employee more than $120,000 and the other employee almost $15,000.

The employer dismissed one employee in December 2016. Although the employer did not tell the other employee she was dismissed, the Commissioner found that the employer's conduct amounted to constructive dismissal because it:

- failed to pay the employee's wages after November 2016;
- it failed to respond to her questions about when she would be paid;
- told its business partners that it had stopped operating; and
- failed to pay its suppliers, including its landlord.

The employees said they were dismissed without notice, in breach of their employment contracts, and were not paid out their annual leave. The employer's accountant confirmed the employees' evidence.

The Commission found that the employer did not have the right to dismiss the employees without notice. Under their employment contacts, the employees were entitled to 12 months' notice. The Commissioner distinguished a debt owed under a contract from a claim for damages for breach of contract. Because the employer could choose to give notice or pay an amount in lieu of notice, the employees' claims for notice were effectively claims for damages. Consequently, the employees needed to take reasonable steps to mitigate their losses.

The employee who was awarded the lower amount was able to find another job after she was dismissed. The employee who was awarded the higher amount was unable to find another job for a range of reasons, including changes in Australian visa rules. In the circumstances, the Commissioner found she was entitled to damages in the amount of 12 months' pay.

The Commission heard and determined this matter in the absence of the respondent, who did not file answers to these claims, did not respond to the Commission's correspondence and did not appear at the hearing.

Yi Zhang; Rong Zhang v Enjoy Going (Australia) Pty Ltd
[2017] WAIRC 00835; (2017) 97 WAIG 1639

16.5 Public sector matters

16.5.1 Ongoing employment or fixed term contract

The Commission issued an order and declaration that a vascular surgeon employed by the East Metropolitan Health Service (EMHS) is an ongoing employee, despite the industrial agreement providing that appointments will be for a maximum term.

The surgeon was appointed in writing in 1997 and 2000 as a permanent employee and there was no basis on which to find he was offered, and accepted, a contract for a maximum term ending in 2017. Because the 1997 and 2000 appointments were complete documents that included a start date, no maximum term, a probationary period and the ability to terminate the contact with three months' notice, it was clear the parties had reached an agreement that the surgeon was employed on an ongoing basis.

The Commission found that the surgeon was not appointed on a series of five-year maximum term contracts as argued for by the employer, nor was he appointed on a maximum term contract by operation of law. Under the relevant industrial agreements, EMHS may have had an obligation to offer the surgeon a five-year maximum term contract in 1997 and 2000 when he was appointed, but that is not what happened. Instead it offered the surgeon an ongoing employment contract, which he accepted. That an employer may not have complied with the industrial agreements in this regard does not mean that the surgeon must have been or was employed on a series of five-year maximum term contracts.

The Commission found that the surgeon has been continuously employed by EMHS for over 20 years, first on an ongoing contract formed in 1997 and then on an ongoing contract formed in 2000.

Australian Medical Association (WA) Incorporated v
The East Metropolitan Health Service
[2018] WAIRC 00329; (2018) 98 WAIG 336

16.5.2 Jurisdiction of the Public Service Arbitrator

The Commission dismissed an unfair dismissal claim made to the Commission's general jurisdiction by a casual security officer who was employed at a public hospital on the basis that he was a government officer, and came within the exclusive jurisdiction of the Public Service Arbitrator.

The Commission found that the security officer was employed on the respondent's salaried staff because of the type of work he performed and the way in which he was paid. Much of the work he performed was 'professional and administrative in nature,

rather than manual, mechanical or menial'. Additionally, the Commission found that the security officer received a salary because he was paid at regular intervals by the respondent for the services he rendered under his contract of employment, computed by time.

As he was employed on the salaried staff of a public authority, he was therefore a government officer and subject to the Public Service Arbitrator's jurisdiction not the Commission's general jurisdiction.

Michael Mirosevich v East Metropolitan Health Service
[2018] WAIRC 00220; (2018) 98 WAIG 176

16.6 Teacher dismissals

16.6.1 Interim order for reinstatement

The Commission dismissed a school teacher's application for re-employment on an interim basis, pending the final hearing and determination of his substantive claim.

The Commission originally dismissed the teacher's application in May 2017, concluding that even if s 44(6)(bb)(i) of the Act supported the making of an interim order, it would not have exercised it in favour of the teacher as the teacher was facing criminal charges arising out of an incident involving a young student at the primary school where he was teaching.

In June 2017, the criminal charges against the teacher were discontinued. The applicant refreshed the application for an interim order of reinstatement or re-employment.

In this latter case, the Commission dismissed the application for interim orders on the basis that the Commission has no power under s 44(6)(bb)(i) of the Act to make the interim orders sought. A further argument put by the respondent that the Commission could not hear the substantive claim because the matter before the Commission concerned the Public Sector Employment Standard and s 23(2a) of the Act ousted the Commission's jurisdiction, was also dismissed.

The State School Teachers' Union of W.A. (Incorporated)
v The Director General, Department of Education
[2017] WAIRC 00737; (2017) 97 WAIG 1497

16.6.2 Teacher's physical contact with student

Following the remittal to the Commission by the Full Bench, the Commission upheld a claim of unfair dismissal by a teacher who was dismissed after he made physical contact with a student who sprayed him with compressed air.

The Commission found that compressed air is dangerous, and being sprayed with compressed air caused the teacher to fear for his life. This provoked the teacher to instinctively and impulsively grab and push the student. These circumstances were exculpatory of, or a complete excuse for, the teacher's physical contact with the student.

The Commission noted that not every instance of physical contact with a student will warrant dismissal. The context of the conduct and the circumstances of the individual have to be considered.

The Commission ordered that the teacher be reinstated.

Barry Landwehr v Ms Sharyn O'Neill, Director General, Department of Education
[2018] WAIRC 00320; (2018) 98 WAIG 327

16.6.3 Teacher's altercation with student

The Commission found a teacher had misconducted himself but that the penalty initially imposed by the Department of Education was too harsh.

The Department originally found that the teacher had misconducted himself by making a comment to a student, and in the physical altercation and restraint that ensued, he punched the student in the head.

The Commission found that contemporaneous reports had not clearly mentioned the punch and the teacher's evidence provided a reasonable alternative. In the circumstances, the Department's finding that the teacher punched the student in the head was not safe, fair or reasonable.

The Commission found the teacher made a comment to the student using the words to the effect, 'If you are going to hit me make it your best shot because you won't get a second chance.'

The Commission rejected the teacher's submissions that in considering the comment the Department had not considered all the circumstances, being that he had made the comment instinctively and without thinking.

The Commission found that the evidence and submissions of the teacher demonstrated the comment was made as a strategy, that the comment led to the altercation and restraint of the student, and that in all the circumstances the teacher had misconducted himself by making the comment.

As the teacher was found to have misconducted himself, but no longer was found to have punched the student, the Commission imposed a reduced penalty of a reprimand and a fine of one day's pay.

Shane Jamieson v The Director General, Department of Education
[2018] WAIRC 00255; (2018) 98 WAIG 235

16.7 Public Service Appeal Board

16.7.1 Youth custodial officer

The Public Service Appeal Board dismissed an appeal by a youth custodial officer against his dismissal. Evidence emerged early in the hearing that the appellant had offered inducements and threatened an eye-witness to his alleged misconduct to pressure her into retracting her statement.

Due to this conduct, the Board found that the appellant was disqualified from being reinstated as he was ill-suited to have power over vulnerable young people or play an important role in the administration of justice. The improper conduct was also found to interfere with the proper processes of the Board.

Richard Brown v Commissioner, Department of Corrective Services
[2017] WAIRC 00714; (2017) 97 WAIG 1393

16.7.2 Senior manager's appeals upheld – disciplinary action and termination quashed

The Public Service Appeal Board upheld a senior manager's appeals against decisions of the Commissioner, Department of Corrective Services to take disciplinary action and subsequently terminate her employment.

The Board quashed the decisions to formally reprimand and transfer the appellant to a level 8 position, and to dismiss her, and ordered that the appellant receive a formal reprimand for using foul language during a telephone conversation with an employee of the respondent.

Deborah Harvey v Commissioner for Corrections, Department of Corrective Services
[2017] WAIRC 00728; (2017) 97 WAIG 1525

16.8 Road Freight Transport Industry Tribunal

Pursuant to the *Owner-Drivers (Contracts and Disputes) Act 2007* (OD Act), the Commission constitutes the Road Freight Transport Industry Tribunal.

16.8.1 Unconscionable conduct and rates of pay

The Road Freight Transport Industry Tribunal has upheld in part an owner-driver's claim of breach of contract and unconscionable conduct.

The respondent terminated the owner-driver contract summarily without notice for breach. The reasons for the summary termination were disputed by the owner-driver.

The Tribunal found that the negotiations for the contract between the owner-driver and the respondent were not unconscionable. However, the Tribunal concluded that the failure to provide the owner-driver with a copy of the Guideline Rates published by the Road Freight Industry Council was unconscionable for the purposes of s 30(2)(g) of the OD Act.

The Tribunal was not satisfied on the evidence that the respondent was able to rely on the owner-driver's failure to work Saturdays as a ground to find there was a breach of contract and to terminate it. The Tribunal was satisfied that the owner-driver was in default of the contract by proceeding to take extended leave, contrary to the respondent's revised policy. However, the respondent did not give notice to the owner-driver under the contract of the alleged default or give him an opportunity to remedy it.

The Tribunal also found the removal of a lifter by the respondent was plainly a breach of the contract. The respondent took unfair advantage of the situation and removed the lifter in a deceptive way. Such conduct was found to be unconscionable.

The owner-driver alleged that the respondent's allocation of work and the distribution of runs was unconscionable, however the Tribunal was not satisfied the owner-driver made out its case.

Finally, the Tribunal found the rates of payment to the owner-driver under the contract were not safe and sustainable rates for the purposes of the OD Act and the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*.

The parties were directed to confer as to the quantum of damages and any sum in respect of safe and sustainable rates.

Ram Holdings Pty Ltd, Michael Italiano v Kelair Holdings Pty Ltd [2018] WAIRC 00156

16.8.2 Tribunal's jurisdiction requires 'heavy vehicle'

The Tribunal found that unless the terms of the contract between the parties provide for the use of a heavy vehicle as defined in s 3 of the OD Act, then the resulting contract is not one amendable to the Tribunal's jurisdiction.

The Tribunal dismissed an applicant's claim for wrongful termination of contract and unconscionable conduct on the basis that the agreement between the parties did not constitute an 'owner-driver contract' as there was no requirement under the agreement and no business requirement for the applicant to use a heavy vehicle.

The Tribunal held that while the respondent would have been aware the applicant was considering obtaining a larger vehicle to perform the services, that is not the same as constituting an agreement that the applicant use a heavy vehicle for the purposes of the OD Act.

The application was dismissed for want of jurisdiction.

Deliver2U (WA) Pty Ltd v GD Mitchell Enterprises Pty Ltd t/as Lite n' Easy Perth [2018] WAIRC 00217; (2018) 98 WAIG 242

This decision is the subject of an appeal to the Full Bench.

16.9 Industrial Magistrate's Court

The Industrial Magistrate's Court is established under the Act. It deals with enforcement of State awards and industrial agreements. It is also a court of competent jurisdiction for a number of other purposes, including the enforcement of modern awards made under the *Fair Work Act 2009* (Cth).

16.9.1 Casual or part-time

The Industrial Magistrate's Court dismissed an employee's claim under the *Fair Work Act 2009* (Cth) for annual leave because she was a casual employee.

The employee was employed in 1997 as a casual clerk. That role evolved into a sales position, which continued until the employee resigned in 2016. In some of the employer's documents, the employee was referred to as 'part time'. However, the parties never discussed whether the nature of the employment had changed from casual. The circumstances of the employment also supported a conclusion that the employment remained casual: the number of hours worked varied from week to week, there was no pattern of hours worked and the employee did not take sick leave or annual leave. His Honour Industrial Magistrate Cicchini found that '[o]n any objective analysis, the claimant was … a casual employee.'

Under the relevant modern award, the *Commercial Sales Award 2010*, casual employees are not entitled to annual leave. For that reason, the employee's claim failed.

Sandra Lewington v Tyson Holdings Pty Ltd trading as IMPACT PUBLICATIONS
[2017] WAIRC 00782; (2017) 97 WAIG 1452

16.9.2 Tax withheld from judgement debt taken to have been paid to claimant

The Industrial Magistrate's Court amended its order to clarify whether a judgment debt was satisfied by the respondent paying to the claimant the judgment debt net of income tax and remitting the balance to the Australian Taxation Office (ATO).

The Industrial Magistrate's Court had previously issued an order for payment to an employee of $10,576.21 owed by the employer. The employer paid the employee $8,971.21 and remitted $1,605 to the ATO. The employee commenced enforcement proceedings in relation to the $1,605 not paid to her.

Flynn IM found that the Industrial Magistrate's Court has an implied power to correct orders 'to avoid unintended consequences'. His Honour observed that orders should be interpreted against a background of compliance with taxation and other legislation.

Any money withheld by the employer and remitted to the ATO in accordance with taxation requirements would be regarded as having been paid to the claimant for the purposes of compliance with the orders.

His Honour amended the order by making the total amount due subject to any amount to be withheld by the employer to remit to the ATO.

Christine Dorothy Zeeb v Kalhaven Holdings Propriety Limited
[2018] WAIRC 00046; (2018) 98 WAIG 45

17 Appendices

17.1 Appendix 1 – Other legislation providing jurisdiction to the Commission

Construction Industry Portable Paid Long Service Leave Act 1985
Employment Dispute Resolution Act 2008
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
Police Act 1892
Prisons Act 1981
Public Sector Management Act 1994
Vocational Education and Training Act 1996
Young Offenders Act 1994

17.2 Appendix 2 – Members of the Public Service Appeal Board

Name	Party nominating the member
Mr Simon Bibby	Australian Medical Association (WA) Incorporated
Mr Charlie Brown	The Civil Service Association of Western Australia Incorporated
Mr George Brown	The Civil Service Association of Western Australia Incorporated
Mr Nick Cinquina	Department of the Attorney General
Mr Lee Clissa	Department of Corrective Services
Ms Bethany Conway	The Civil Service Association of Western Australia Incorporated
Mr Dean Ellis	Health Services Union of Western Australia (Union of Workers)
Mr Hayden Falconer	Department of Education
Mr Darian Ferguson	Department of Education
Mr Steve Gregory	North Metropolitan Health Service
Ms Lesley Heath	Zoological Parks Authority
Mr Dan Hill	Health Services Union of Western Australia (Union of Workers)
Ms Stacey Kannis	Department of Finance
Mrs Lois Kennewell	The Civil Service Association of Western Australia Incorporated
Mr Andrew Lee	Department of Transport
Mr Greg Lee	The Civil Service Association of Western Australia Incorporated
Ms Elizabeth McAdam	Western Australian Police
Ms Jane Nicolson	East Metropolitan Health Service

Name	Party nominating the member
Ms Yvonne Prout	South Metropolitan Health Service
Mr Gavin Richards	The Civil Service Association of Western Australia Incorporated
Mr David Shaw	Health Services Union of Western Australia (Union of Workers)
Mr Damien Spivey	Department of Corrective Services
Mr Grant Sutherland	The Civil Service Association of Western Australia Incorporated
Mr Mark Taylor	Department of Justice
Ms Carole Theobald	Department of Transport
Ms Jane van den Herik	Department of Health
Mr Marshall Warner	East Metropolitan Health Service
Ms Toni Watson	Department of Premier and Cabinet
Ms Teresa Williams	Department of Mines, Industry Regulation and Safety

17.3 Appendix 3 – Right of entry authorisations by organisation

Australian Medical Association (WA) Incorporated
Electrical Trades Union WA
Health Services Union of Western Australia (Union of Workers)
Independent Education Union of Western Australia, Union of Employees
The Australian Nursing Federation, Industrial Union of Workers Perth
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 Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers
The Shop, Distributive and Allied Employees' Association of Western Australia
The State School Teachers' Union of W.A. (Incorporated)
United Voice WA
Western Australian Municipal, Administrative, Clerical and Services Union of Employees
Western Australian Police Union of Workers

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Government of Western Australia
Western Australian Industrial Relations Commission