



Industrial Relations Act 1979

2020-2021 ANNUAL REPORT

Of the Chief Commissioner of the
Western Australian Industrial Relations Commission



THE HONOURABLE STEPHEN DAWSON MLC,
MINISTER FOR INDUSTRIAL RELATIONS

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 2021.

L.S. (Sgd.) S.J. KENNER

Stephen Kenner
CHIEF COMMISSIONER

24 September 2021

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1 Introduction

The Industrial Relations Act 1979 (IR Act) establishes a number of tribunals and courts, they being:

- (a) The Western Australian Industrial Relations Commission (the Commission) and its constituent authorities. These include the Public Service Arbitrator and the Public Service Appeal Board.
Other legislation, set out in *Appendix 1 – Legislation*, enables the Commission to deal with a variety of other disputes.
- (b) The Full Bench of the Commission hears and determines appeals from decisions of the Commission, the Public Service Arbitrator, the Occupational Safety and Health Tribunal, the Road Freight Transport Industry Tribunal and the Industrial Magistrate's Court.
- (c) The Commission in Court Session hears and determines major industrial matters, including the annual State Wage Order case. Additionally, the Commission in Court Session also deals with the registration and cancellation of registered organisations.
- (d) The Chief Commissioner deals with matters relating to the observance of the rules of registered organisations.
- (e) The Western Australian Industrial Appeal Court (IAC), constituted by three judges of the Supreme Court of Western Australia, hears appeals from decisions of the Full Bench, the Commission in Court Session, and certain decisions of the Chief Commissioner or the Senior Commissioner.
- (f) The Industrial Magistrate's Court, enforces Acts, awards, industrial agreements and orders in the State industrial relations system. The Industrial Magistrate's Court is also an 'eligible State or Territory court' for the purposes of the *Fair Work Act 2009* (Cth) (FW Act). It enforces matters arising under that Act and industrial instruments made under that Act.

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

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

2 Membership and principal officers

Industrial Appeal Court

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

During this reporting period, the 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 Kenneth Martin

Commission

The Commission was constituted by the following members:

Chief Commissioner	S J Kenner (appointed on 5 May 2021) P E Scott (retired on 26 January 2021)
Senior Commissioner	R Cosentino (appointed on 8 June 2021)
Commissioners	T Emmanuel D J Matthews (on extended sick leave from April 2021) T B Walkington

3 Constitution of The Commission

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

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

Current Commission Members



Chief Commissioner
Stephen Kenner



Senior Commissioner
Rachel Cosentino



Commissioner
Toni Emmanuel



Commissioner
Damian Matthews



Commissioner
Toni Walkington

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

Public Service Arbitrators

Senior Commissioner Cosentino was appointed as the Public Service Arbitrator. Her appointment is due to expire 1 July 2023

Chief Commissioner Kenner and Commissioners Emmanuel and Walkington are additional Public Service Arbitrators. Those appointments are due to expire on 1 July 2023

Public Service Appeal Board

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

The Public Service Appeal Board deals with appeals against a range of decisions of public service employers including against dismissals; disciplinary decisions and matters involving the interpretation of public sector legislation affecting employees' terms and conditions of employment.

Railways Classification Board

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

Occupational Safety and Health Tribunal

Commissioner Walkington continued her appointment as constituting the Occupational Safety and Health Tribunal. Commissioner Walkington's appointment operates for the purposes of s 51H of the *Occupational Safety and Health Act 1984* (the OSH Act) and s 16(2A) of the IR Act and will expire on 31 December 2021.

The Occupational Safety and Health Tribunal assist in the resolution of some workplace safety and health issues under Western Australia's occupational safety and health laws. The Tribunal deals with matters referred under the:

- *Occupational Safety and Health Act 1984;*
- *Mines Safety and Inspection Act 1994; and*
- *Petroleum (Submerged Lands) Act 1982.*

Road Freight Transport Industry Tribunal

Senior Commissioner Kenner (as he then was) constituted the Road Freight Transport Industry Tribunal until July 2020. Since that time, Commissioner Emmanuel and Senior Commissioner Cosentino have constituted the Tribunal. The Tribunal is established under the *Owner-Drivers (Contracts and Disputes) Act 2007* (the OD Act).

The Tribunal hears and determines disputes between hirers and owner-drivers in the road freight transport industry. Most disputes referred to the Tribunal involve claims for payment of monies owed under, or for damages for breaches of, owner-driver contracts. The Tribunal also deals with disputes in relation to negotiations for owner-driver contracts and other matters.

4 Ceremonial Sittings

Farewell to Chief Commissioner Scott

A Ceremonial Sitting of the Commission was held on 21 January 2021 to mark the retirement of Chief Commissioner Pamela Scott on 26 January 2021. The Chief Commissioner was appointed to that office in June 2016, and prior was the Acting Senior Commissioner. The Chief Commissioner was one of the longest serving members of the Commission, with 26 years of service, and all of those who spoke at the ceremony referred to her dedication and contribution to industrial relations in this State.

The Minister for Industrial Relation the Honourable Bill Johnston MLA, Mr Whittle representing UnionsWA, Mr Moss representing the Chamber of Commerce and Industry, Mr Cook representing the Australian Mines and Metals Association, Ms Saraceni representing the Law Society, Mr Hammond representing the WA Bar Association, and Mr Harben representing the Industrial Relations Society of WA all acknowledged the Chief



Commissioner’s integrity and diligence. In particular, reference was made to the Chief Commissioner’s modernising and reforming of the practices and procedures of the Commission and that the community had benefited greatly from her service as a Commissioner and as the Chief Commissioner. The Chief Commissioner’s contribution to and support of the Commission’s pro bono scheme, and its impact on access to justice, was particularly acknowledged.

Appointment of Chief Commissioner Kenner and Senior Commissioner Cosentino

On 9 August 2021, The Honourable Justice Rene Le Miere, of the Industrial Appeal Court, presided over a Ceremonial Sitting of the Commission for the presentation of Commission by Chief Commissioner Stephen Kenner and for speeches of welcome for Senior Commissioner Rachel Cosentino.



The Minister for Industrial Relations the Honourable Stephen Dawson MLC, Dr Dymond representing UnionsWA, Mr Moss representing CCIWA, Mr O’Brien representing AMMA, Ms Boujos representing the Law Society and Mr Cuerden SC representing the WA Bar Association, all congratulated the appointees and acknowledged their distinguished careers in the law and industrial relations.

Chief Commissioner Kenner was first appointed to the Commission in 1998 and occupied the position of Acting Senior Commissioner from 2016 and Senior Commissioner from 2018.

Reference was made to the Chief Commissioner’s excellent legal and industrial relations skills and the high level of respect with which he is held in the community. Particularly noted was his reputation of being a considered decision maker and his wealth of experience, as a long standing and valued member of the Commission.

Senior Commissioner Cosentino comes to the Commission from a distinguished legal career and has significant industrial relations experience representing both employees and employers at the Commission and in other jurisdictions. The speakers acknowledged the Senior Commissioner’s voluntary and pro bono work through community legal centres and Law Access and noted her commitment to ensuring equitable access to justice and fairness for vulnerable members of our society.



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

Like the rest of the community, the Commission's operations and the matters that came before it were very significantly affected in 2020 and into 2021 by the COVID-19 pandemic and the efforts of governments to control and contain its spread.

At times when lockdowns have been implemented, the Commission has closed its premises to the public. On these occasions, the Commission and its staff worked remotely. All conferences and hearings were conducted remotely either by telephone or video (Zoom).

Following the initial lockdowns in the first half of 2020, as of 1 July 2020, all Commissioners and staff had returned to the Commission's premises and conducted conferences and hearings at the Commission's premises as normal. Arrangements were put in place from this time, including varying staff working hours and working from home, to enable a smooth transition back into the Commission premises by all staff. When necessary, the Commission's conference and hearing rooms can be arranged to allow for social distancing.

With the further lockdowns in February and April 2021, the Commission again reverted to remote operations.

During the periods of remote working in this reporting year, some hearings involving contentious and complicated matters were delayed either for logistical reasons or at the request of the parties. However, the hearings of other matters which were particularly urgent continued and, in spite of the difficulties related to evidence in dealing with those matters via video facilities, were successfully dealt with. Other matters, including a Full Bench appeal, proceeded on the papers.

The Commission is well prepared to ensure that it can quickly respond to COVID-19 restrictions. I have been very pleased by, and grateful for, the efforts of Commissioners and all staff of the Commission, who have responded very promptly to restrictions when they have been implemented. This has enabled the Commission to continue to meet its obligations under the IR Act. Feedback from the s 50 party representatives, including UnionsWA, the Chamber of Commerce and Industry, and the Department of Mines, Industry Regulation and Safety, in response to measures taken by the Commission in these respects, has been very positive.

COVID-19 General Order and Leave Flexibility General Order revoked

Leave Flexibility General Order

As noted in last year's Annual Report, the Commission issued a General Order (2020 WAIRC 00205) in April 2020 under s 50 of the IR Act that allowed all private sector, State system, employees to take unpaid pandemic leave, annual leave on half pay and annual leave in advance, during the COVID-19 pandemic.

This was done to assist businesses to continue to operate and to preserve employment and the continuity of employment for the benefit of those businesses, their employees, and the economy generally.

These measures initially operated from 14 April 2020 until 31 July 2020 but were extended until 31 March 2021. The Commission in Court Session reviewed the operation of the General Order and sought the views of the s 50 parties. Having done so and taken into account the parties' views, it was determined by the Commission that there was no need to maintain the terms of the General Order at this time and it ceased to have effect on 31 March 2021.

JobKeeper General Order

As also noted in last years' Annual Report, the Commission issued a General Order (2020 WAIRC 00279) in May 2020 under s 50 Act to provide private sector employers with increased flexibility to manage employment arrangements in a manner that supported the JobKeeper Scheme established under the *Coronavirus Economic Response Package Omnibus (Measures No.2) Act 2020* (Cth).

These measures initially operated until 28 September 2020 and were reviewed by the Commission in September 2020. At that time, the Commission determined that the General Order be further reviewed in mid-March 2021, in light of any changes to the JobKeeper Scheme. This review was undertaken in conjunction with obtaining the views of the s 50 parties. As the JobKeeper scheme came to an end on 28 March 2021, it was determined that the General Order also cease to have effect.

As the Commission informed the parties at the time in relation to the operation of both General Orders, should circumstances arise where similar arrangements need to be put in place again to assist the parties, the Commission will be able to respond promptly.

Other effects of the COVID-19 pandemic

In last year's Annual Report some trends as to changes in types of matters commenced in the Commission were identified, arising from the outbreak of the pandemic in the first half of 2020. It was noted that this included an increase in unfair dismissal claims, some of which raised pandemic related issues. The same trend has not been as apparent in this reporting year.

It is also notable that in this reporting year, there has been a somewhat lower number of s 29 applications in the last quarter of 2020 and the first quarter of 2021. There are always variations in numbers of such claims from year to year. It is not clear why this has been the case in this reporting year, although the widespread take up of the JobKeeper Scheme in the second half of 2020, meaning many employees were supported in their employment, may be a possible explanation. A similar trend was evident in the number of applications filed in the Industrial Magistrates Court, over the same period.

On the other hand, the number of applications relating to the Public Sector was higher over this same period, than in the last reporting year.

Appeals to the Occupational Safety and Health Tribunal relating to hazards in the workplace associated with the COVID-19 pandemic have continued to increase, as was noted last year. With the anticipated commencement of the *Work Safety and Health Act 2020* (WA) (WSH Act) in the first half of 2022, as noted below, it is expected the growth in matters referred to the Tribunal will continue.

There have been no applications to amend awards by unions to deal with the effects of the COVID-19 pandemic. However, several disputes have been referred to the Public Service Arbitrator in relation to the pandemic. One concerned a dispute as to whether it would be appropriate for an employee to use personal leave in order to minimise the risk of a family member contracting COVID-19. Another concerned circumstances in which it would be appropriate for an employer to direct an employee to attend an independent medical examination. Both matters were resolved through conciliation.

Four other applications were made by an employer to remove or reduce its obligation to pay redundancy pay under the relevant award or the MCE Act, in respect of four of its employees. The grounds for the application being the financial impact of the pandemic on the applicant's business. Conciliation proceedings took place and all four of the applications were resolved by agreement. The Commission was able to respond promptly to the situation presented by these matters and an amicable resolution was achieved.

6 Main statistics

	MATTERS CONCLUDED			
	2017-18	2018-19	2019-20	2020-21
IAC				
Appeals	2	3	4	4
Full Bench				
Appeals	17	10	18	9
Other matters	5	12	1	1
Chief Commissioner				
Section 66 matters	2	2	2	6
Section 72A(6) matters	0	0	0	0
Consultations under s 62	4	1	4	1
Chief Commissioner or Senior Commissioner				
Section 49(11) matters	2	2	1	0
Commission in Court Session				
General Orders	2	3	2	6
Other matters	0	0	1	3
<i>Police Act 1892</i> Applications	2	0	0	2
<i>Prisons Act 1981</i> Applications	0	0	1	0
<i>Young Offenders Act 1994</i> Applications	0	0	0	0
Commissioners sitting alone				
Compulsory conference applications (s 44) ¹	61	77	56	70
New Awards	0	0	0	3
Variation of Awards	11	22	6	8
Joinders to Awards (s 38)	1	0	0	1
New Agreements	22	24	15	25
Variation of Agreements	0	1	0	0
Retirement from Industrial Agreements	41	0	0	2
Interpretation of Awards/Agreements	2	2	1	2
Orders as to terms of Agreements (s 42G)	0	0	0	1
Cancellation of Awards/Agreements	5	8	1	1
Other matters ²	46	35	42	54
Section 29 matters				
Unfair dismissal applications	91	95	109	64
Contractual benefits claims	75	84	80	52
Public Service Arbitrator				
New Awards	1	0	0	0
Joinders to Awards	0	0	0	0
New Agreements	15	3	15	5
Variation of Awards/Agreements	0	3	15	19

Interpretation of Awards/Agreements	1	1	1	1
Cancellation of Awards/Agreements	0	0	0	0
Orders as to terms of Agreements (s 42G)	0	0	0	1
Conferences to assist bargaining	0	0	0	0
Enterprise orders (s 42I)	0	0	0	0
Orders pursuant to s 80E	0	0	0	0
Retirement from Industrial Agreements	0	0	0	0
Reclassification appeals	3	24	17	11
Unspecified grounds	0	0	3	0
Public Service Appeal Board				
Appeals to Public Service Appeal Board	29	27	29	33
Totals	440	439	424	385

Table 1 – Matters concluded 2017-18 to 2020-21

Notes to Table 1

¹ CONFERENCE applications include the following:	2017-18	2018-19	2019-20	2020-21
Conference applications (s 44)	32	42	27	34
Conferences referred for arbitration (s 44(9))	2	4	3	3
Public Service Arbitrator conference applications (s 44)	24	28	24	29
Public Service Arbitrator conferences referred for arbitration (s44(9))	3	3	2	4
Totals	61	77	56	70

Table 2 – Notes to Table 1

² OTHER MATTERS include the following:	2017-18	2018-19	2019-20	2020-21
Apprenticeship appeals	1	0	1	2
Public Service applications	12	6	3	6
Requests for mediation	19	19	18	21
Occupational Safety and Health Tribunal	7	2	7	15
Road Freight Transport Industry Tribunal	4	6	6	3
Review of decisions of the Construction Industry Long Service Leave Payments Board	2	1	2	2
Conferences to assist bargaining	0	0	1	0
Enterprise Orders (s 42I)	1	0	0	1
Orders arising from s 27	0	1	0	0
Exemptions (awards)	0	0	1	4
Unspecified Grounds	0	0	3	0
Totals	46	35	42	54

Table 3 – Further notes to Table 1

Awards and agreements in force under the IR Act

Year	Number as at 30 June
2017	1,395
2018	1,178 [#]
2019	610 [#]
2020	609
2021	613

Table 4 – Awards and agreements in force

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

7 The Full Bench

Appeals – heard and determined from decisions of the:

Commission – s 49	5
Industrial Magistrate – s 84	3
Public Service Arbitrator – s 80G	0
Road Freight Transport Industry Tribunal – s 43 <i>Owner-Drivers (Contracts and Disputes) Act 2007</i>	0
Occupational Safety and Health Tribunal – s 51 <i>Occupational Safety and Health Act 1984</i>	1

Table 5 – Appeals to the Full Bench heard and determined

8 Matters dealt with by the Chief Commissioner or Senior Commissioner

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

Applications lodged	1
Applications finalised	0

Table 6 – Section 49(11) applications lodged and finalised

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

Applications lodged	4
Applications finalised	6

Table 7 – Section 66 applications lodged and finalised

Consultations

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

Consultations by the Registrar regarding amendments to rules of registered organisations	1
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Table 8 – Consultations pursuant to s 62

9 The Commission in Court Session

General Orders issued	2
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Table 9 – General Orders issued

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

State Wage Order

Section 50A of the IR Act requires that, before 1 July in each year, the Commission is to make a General Order setting the minimum weekly rates of pay for adults, apprentices and trainees under the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) and to adjust the rates of wages paid under awards. The State Wage General Order affects 218 awards.

The application for the 2021 State Wage Order was created on the Commission's own motion. The Commission advertised the proceedings and received written submissions from the Honourable Minister for Industrial Relations, the Chamber of Commerce and Industry of Western Australia, UnionsWA, the Western Australian Council of Social Services Inc, and Professor Alison Preston of the Department of Economics, the University of Western Australia. In addition, evidence was given by Mr David Christmas, Director of Economic and Revenue Forecasting Division, Department of Treasury.

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

The Commission in Court Session delivered its reasons for decision on 24 June 2021 ([2021] WAIRC 00173; (2021) 101 WAIG 459). The Commission's decision increased the minimum wage for award covered employees and award-free employees covered by the MCE Act by 2.5%, to \$779.00 per week from 1 July 2021. In its decision, the Commission had regard to the strong rebound in the Western Australian economy and that it had returned to a growth path more quickly than anticipated.

The Commission concluded, having regard to these factors, that it was not appropriate to delay the increases on this occasion. The Commission also noted that the statutory scheme under the IR Act did not permit the Commission to stagger increases over different operative dates, for different categories of awards, as is the case for the Fair Work Commission under the FW Act 2009 (Cth).

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

The State Wage Order also ordered that the minimum weekly rate of pay applicable under s 14 of the MCE Act to an apprentice who has reached 21 years of age will increase to \$665.60 per week.

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

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

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

Location Allowances General Order – s 50

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

In accordance with the Commission's usual practice, the Commission in Court Session initiated a review of the prices components and issued a General Order to adjust the prices component ([2021] WAIRC 00167; (2021) 101 WAIG 455). They increased by 2.01% to reflect the increase in the Consumer Price Index for Perth (excluding housing) for the year to March 2021. The increase was effective from 1 July 2021.

The Location Allowances General Order affects 82 awards.

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

Within this reporting period, the Registrar undertook investigations concerning the status of a number of registered organisations. These investigations considered various factors, including whether those organisations were meeting their reporting obligations under the IR Act, whether there were current financial members or whether the organisations, on the face of it, appeared to have become defunct. The status of seven organisations, six by application of the Registrar and one at the instigation of the organisation concerned, remain under investigation as at 30 June 2021.

In January 2021, the Commission in Court Session cancelled the registration of three organisations under s 73 of the IR Act, they being:

- The Printing and Allied Trades Employers' Association of Western Australia (Union of Workers)
- The Western Australian Branch of the Commonwealth Steamship Owners' Association, Industrial Union of Employers (Fremantle)
- Seaman's Union of Australia, West Australian Branch

These three organisations had ceased to operate as registered organisations and were defunct.

Police Act 1892

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

Two new appeals were filed during 2020-21. Both appeals are in the process of being dealt with. Appeals lodged in previous years are often adjourned at the request of the appellant in circumstances where the officer is the subject of criminal charges and those charges are dealt with prior to the appeal against removal. This often means lengthy delays before the appeals to the Commission may be resolved.

Prisons Act 1981

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

No appeals of this nature were referred to the Commission during the reporting period.

Young Offenders Act 1994

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

No appeals of this nature were referred to the Commission during 2020-21.

10 Commissioners sitting alone

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

Claims by individuals – s 29 of the IR Act

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

Applications lodged

	2017-18	2018-19	2019-20	2020-21
Unfair dismissal	85	92	115	56
Denial of contractual benefits	74	87	57	41
Totals	159	179	172	97

Table 10 – Section 29 applications lodged 2017-18 to 2020-21

Applications finalised

	2017-18	2018-19	2019-20	2020-21
Unfair dismissal	91	95	109	64
Denial of contractual benefits	73	84	80	52
Totals	164	179	189	116

Table 11 – Section 29 applications finalised 2017-18 to 2020-21

Applications lodged compared with all matters lodged

	2017-18	2018-19	2019-20	2020-21
Section 29 applications lodged	162	184	172	97
All matters lodged	440	439	424	385
Total (%)	36.8%	41.9%	40.6%	25.2%

Table 12 – Section 29 applications lodged compared with all matters lodged 2017-18 to 2020-21

Table 12 illustrates the decrease in section 29 applications compared to all application types lodged in this reporting period. This is due to the skewed effect of the COVID-19 pandemic on application types, which I have commented on above in relation to the impact of COVID-19 on the work of the Commission.

Construction Industry Portable Paid Long Service Leave Act 1985

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

Two such matters were decided during this reporting period.

Occupational Safety and Health Tribunal

Applications lodged by referral from the following:

<i>Occupational Safety and Health Act 1984</i>	9
<i>Mines Safety and Inspection Act 1994</i>	1
<i>Petroleum (Submerged Lands) Act 1982</i>	0
Total	10

Table 13 – Occupational Safety and Health Tribunal applications lodged

Applications finalised by referral from the following:

<i>Occupational Safety and Health Act 1984</i>	14
<i>Mines Safety and Inspection Act 1994</i>	1
<i>Petroleum (Submerged Lands) Act 1982</i>	0
Total	15

Table 14 – Occupational Safety and Health Tribunal applications finalised

During the reporting year, the matters referred to the Tribunal included reviews of improvement and prohibition notices issued by inspectors and affirmed by the WorkSafe Commissioner; claims for payment of wages or salary lost for refusal to work under s 26 of the OSH Act, and reviews of decisions of the WorkSafe Commissioner to refuse to issue licences regulated by the Occupational Safety and Health Regulations to individuals. The improvement and prohibition notice referrals concerned matters including construction methods and materials; obligations of designers; personal protective equipment; and psychosocial hazards. Licensing reviews concerned asbestos removal; high risk work; demolition of structures; and registration as an assessor.

Employer-employee agreements

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

No employer-employee agreements were lodged in the 2020-21 financial year. There have been no employer-employee agreements lodged since 2016.

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

The *Employment Dispute Resolution Act 2008* (EDR Act) provides that the Commission may mediate or otherwise resolve any question, dispute or difficulty that arises out of or in the course of employment by way of a voluntary mediation process. The scope of this is wider than an 'industrial matter' as defined under the IR Act. The EDR Act has been utilised by parties to industrial disputes which are not within the jurisdiction of the Commission pursuant to the IR Act, including parties to Fair Work Commission agreements. A number of mediation applications were made in conjunction with appeals to the Public Service Appeal Board. Given the Appeal Board has no jurisdiction

to conciliate appeals, the Commission's mediation jurisdiction under the EDR Act provides a useful avenue to attempt to resolve such matters at an early stage.

During the reporting period, 21 mediation matters were lodged.

The trend of the number of matters that the Commission has dealt with under the EDR Act over the last ten years is shown in Figure 1. This demonstrates an increasing trend in the commencement of mediation applications since the commencement of the EDR Act.

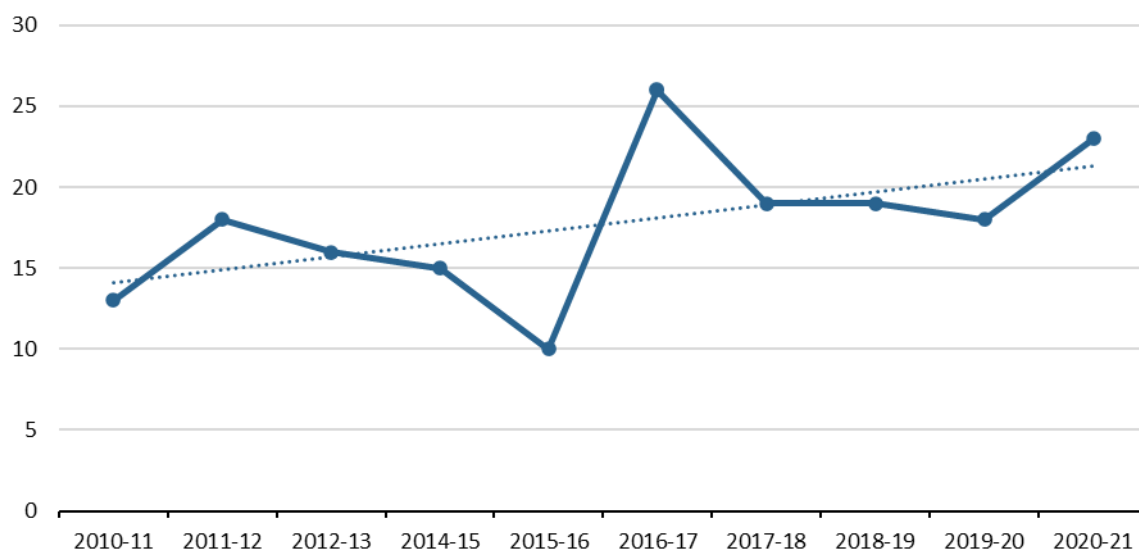


Figure 1 – Trend of mediation matters concluded from 2010-11 to 2020-21

Boards of Reference

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

11 The Registry

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

Registrar	Ms S Bastian
Deputy Registrar	Ms K Hagen (appointed on 24 May 2021) Ms S Kemp (resigned on 5 March 2021)

Industrial agents registered by Registrar

The IR 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).

In previous Annual Reports, issues have been raised regarding the limited criteria for registration of industrial agents and concerns about the conduct and competency of some industrial agents. As also previously noted, the

Ministerial Review of the State Industrial Relations System – Final Report dealt with the issue of the registration of industrial agents and made recommendations for reform. It has also been mentioned previously that the regulations which deal with the registration and conduct of industrial agents, the *Industrial Relations (Industrial Agents) Regulations 1997*, are inadequate to deal with the issues that arise.

I do not propose to comment further on these matters other than to re-affirm that more stringent requirements for registration, possibly including a character test, as well as a process for the Commission to deal with complaints about those agents, as recommended, are needed.

During the 2020-21 financial year, one new industrial agent was registered.

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 2021	37

Table 15 – Industrial agents registered as at 30 June 2021

Industrial organisations

Registered as at 30 June 2021

	Employee organisations	Employer organisations
Number of organisations	33	10
Aggregate membership	174,113	3,499

Table 16 – Industrial organisations registered as at 30 June 2021

Rule alterations by Registrar

Alterations to rules lodged with the Registrar and finalised during this reporting period	3
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Table 17 – Alteration to rules lodged with Registrar in 2020-21

Right of entry authorities issued

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

- hold discussions with employees who wish to participate in discussions; and
- request inspection and copies of relevant documents, and inspect a worksite or equipment, for the purpose of investigating any suspected breaches of:
 - the IR Act; or
 - the *Long Service Leave Act 1958*; or
 - the MCE Act; or
 - the OSH Act; or
 - the *Mines Safety and Inspection Act 1994*; or
 - an award or order of the Commission; or
 - an industrial agreement; or

- an employer-employee agreement.

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

During the 2020-21 financial year, authorisations were issued to representatives of the organisations listed in Appendix 3 – Right of entry authorisations by organisation.

Authorisations:

Issued during 2020-21	73
Number of people who presently hold an authorisation	338
Number of authorisation holders who have had their authorisation revoked or suspended by the Commission in the current reporting period	77

Table 18 – Right of entry authorisations as at 30 June 2021

12 Industrial Magistrate's Court

Magistrate M Flynn and Magistrate D Scaddan, both Stipendiary Magistrates, undertook this specialist area of work during this reporting period, until August 2020 and January 2021 respectively. From September 2020, Magistrate J Hawkins undertook work in this jurisdiction.

The Industrial Magistrate's Court Registry received a total of 271 claims that fell within the Court's general jurisdiction during the reporting period.

Those claims were comprised of:

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

Claims lodged	271
Resolved (total)	269
Resolved (lodged in the period under review)	178
Pending	79
Total number of resolved applications with penalties imposed	9
Total value of penalties imposed	\$141,140.60
Total number of claims resulting in disbursements	5
Total value of disbursements awarded*	\$6,808.00
Claims resulting in wages being ordered	46
Total value of wages in matters resolved during the period	\$661,647.03

Table 19 – Industrial Magistrate's Court statistics

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

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

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

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

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

During this reporting period, 96 claims proceeded to at least one pre-trial conference. Fifty three claims were settled at a pre-trial conference or prior to a trial.

13 Access to justice

Given the nature of the Commission's private sector jurisdiction, the small business sector is substantially represented in matters that come before the Commission. Employees of these small firms, who very frequently represent themselves, often find the procedures of the Commission unfamiliar and challenging. External support, through various initiatives, has assisted these parties navigate their way through the Commission's jurisdiction.

Commission's pro bono scheme

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

- Ashurst Australia
- Clayton Utz
- DLA Piper
- Jackson McDonald
- John Curtin Law Clinic
- Kott Gunning Lawyers
- Mare Lawyers / Workwise Advisory Services
- MDC Legal
- MinterEllison
- Norton Rose Fulbright

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.

A total of five applicants were referred to the pro bono scheme during the year. Two were employees claiming to have been unfairly dismissed, two were employees claiming contractual benefits, and one related to an appeal matter.

The overall responses of those taking part in and receiving the benefit of the pro bono scheme, has been very positive.

A minor change to the eligibility criteria for pro bono assistance was made during the reporting year. This involved removing the criterion of the “impecuniosity of the unrepresented litigant” and incorporating reference to the financial situation of an applicant in the criterion dealing with the “particular vulnerability of the unrepresented litigant”. This change brings the pro bono scheme eligibility more in line with those in other jurisdictions.

Circle Green Community Legal and JCLC

During the reporting period, with the assistance of Circle Green and the John Curtin Law Clinic (JCLC), the Commission has been able to provide vulnerable people with guidance.

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

Circle Green information sessions

The Commission facilitates information sessions for applicants and respondents to claims of unfair dismissal and denied contractual benefits. These sessions are usually conducted at the Commission's premises and are presented by Circle Green. They provide information about threshold issues in s 29 applications and demystify the conciliation process. Parties are usually able to attend in person or they may elect to attend by video link or telephone link. This year, due to the ongoing COVID-19 pandemic and the Employment Law Centre’s merger to form Circle Green Community Legal, there were less sessions conducted than usual.

Four sessions were held over the 2020/2021 year, with a total of seven attendees, five attending in person, and two attending via telephone link.

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

Feedback from information sessions

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

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

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

Several participants commented that the session was helpful and informative, with one stating the information helped reduce some stress and anxiety about the process. One participant said the session answered all the questions they had whilst another advised that even though they had a Union lawyer who had taken them through the process they still found the information session very beneficial.

14 Legislation

The most significant legislative development in the reporting year was the passage through the Parliament of the WHS Act, which was assented to on 10 November 2020. The new legislation, to commence on a date to be fixed by proclamation, anticipated to be in early 2022, will substantially reform the State’s occupational health and safety legal framework. The new WHS Act adopts most of National Occupational Health and Safety Model Law, with changes adapted to the Western Australian context. Industrial manslaughter offences have also been introduced. The existing occupational health and safety legislation will largely be replaced and separate regulations will apply to different industry sectors. The legislation will also involve an expanded role for the Occupational Health and Safety Tribunal and the range of matters that may be referred to the Tribunal.

Additionally, as part of the Commission’s modernisation of its procedures, a new suite of Practice Notes was introduced in the reporting year. These Practice Notes supplement the Commission’s procedural regulations, and deal with a range of subject matter to guide parties commencing proceedings and appearing before the Commission.

15 Conciliation and case management

It is an object of the IR Act in s 6(b), for the Commission to prevent and settle disputes through amicable agreement by conciliation. The Commission is required to endeavour to resolve matters by conciliation as a first step, unless satisfied that this is not likely to assist (s 32 of the IR Act). Conciliation is usually undertaken by bringing the parties face-to-face in a conference chaired by a Commissioner. The majority of disputes and industrial matters referred to the Commission, are resolved through conciliation rather than formal determination. The IR Act provides two means for conciliation. These are applications under s 44 of the IR Act for a compulsory conference. These matters can generally only be brought before the Commission by a union or an employer. The second is under s 32 of the IR Act, in respect of all other matters referred to a single Commissioner.

Compulsory s 44 conferences

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

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

In the last financial year, the Commission received the following urgent s 44 conference applications:

- Of 7 conferences requested within 24 hours, 86% of those conferences were held within the requested timeframe.
- Of 17 conferences requested within 72 hours, 88% of those conferences were held within the requested timeframe.

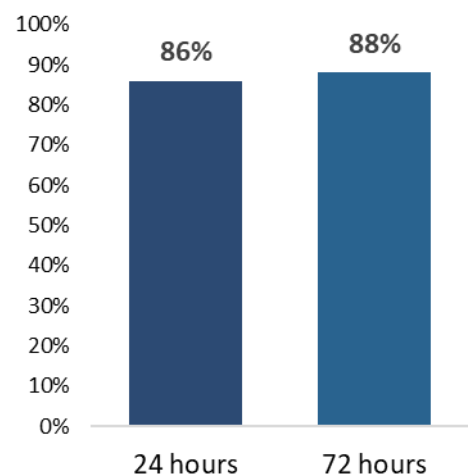


Figure 2 – Urgent s 44 conference response times

The number of conciliation conferences convened depends on the nature of the matter referred to the Commission. Some matters may require only

one conciliation conference and others may involve many conciliation conferences. These matters include larger industrial disputes over bargaining for an industrial agreement, for example.

The below chart shows s 44 compulsory conference applications by industry. From the chart, it can be seen that the majority of the s 44 conference applications over the reporting year have been in the areas of health care and social assistance, education and training and State Government administration.

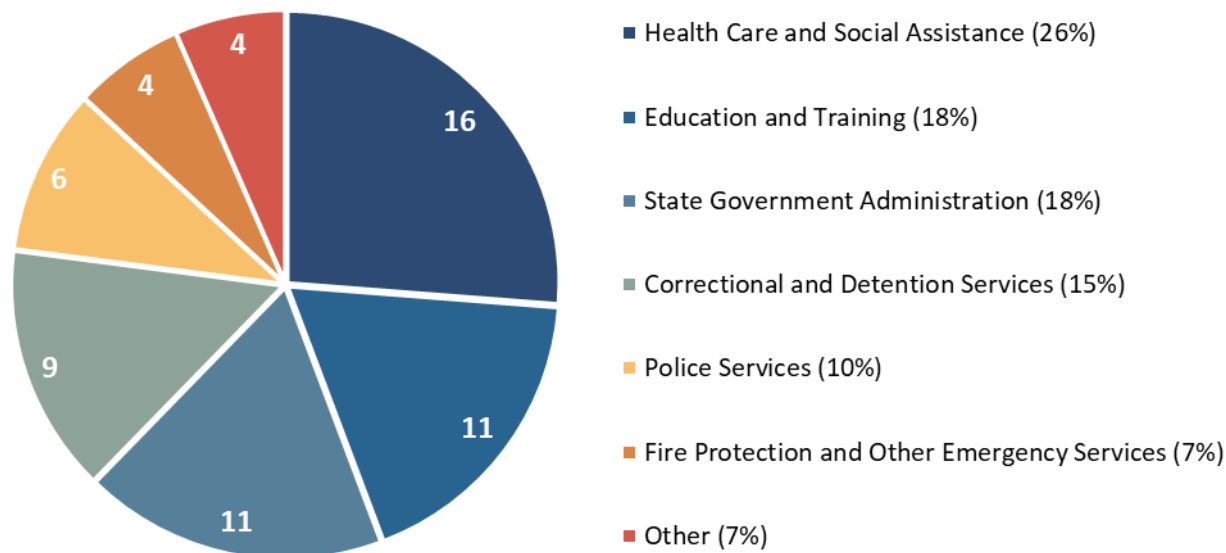


Figure 2 – Industry breakdown of s 44 applications lodged

Section 32 conciliation conferences

The second form of conciliation conference, are those convened in claims for unfair dismissal and denied contractual benefits, brought under s 29 of the IR Act. Given the Commission's obligation to endeavour to resolve disputes amicably by agreement where possible, s 32 conferences play an important role in bringing the parties together in such matters at an early stage. Whilst most claims can be settled after convening one conciliation conference, a minority require two or more to reach final resolution or the matter progresses to arbitration and determination.

16 Award reviews

As reported in last year's Annual Report, the review of awards in the private sector in accordance with s 40B of the IR Act, which commenced in 2020, continued throughout the reporting year. Section 40B authorises the Commission to review awards to:

- (a) to ensure that the award does not contain wages that are less than the minimum award wage as ordered by the Commission under section 50A;
- (b) to ensure that the award does not contain conditions of employment that are less favourable than those provided by the MEE Act;
- (c) to ensure that the award does not contain provisions that discriminate against an employee on any ground on which discrimination in work is unlawful under the *Equal Opportunity Act 1984*;
- (d) to ensure that the award does not contain provisions that are obsolete or need updating;
- (e) to ensure that the award is consistent with the facilitation of the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises

A selection of five major awards are the first awards to be reviewed. These include:

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

A strong interest from industrial organisations representing unions, union members and employers has been welcomed by the Commission. It is recognised that many organisations experienced significant demands on their resources as a result of the measures implemented to arrest the spread of the COVID-19 virus and the need to support and assist their members increased during this time. The logistics for progressing discussions and consideration of issues raised in the review process has also been challenging in this environment.

The Department of Mines, Industry Regulation and Safety has assisted the award review process through the provision of discussion papers to facilitate the identification of those award provisions that require updating. It was agreed that where issues common to the five awards were identified, sample model clauses would be provided to the parties to the awards and the peak industrial organisations for their consideration. The issues include annual leave, bereavement leave, carer's leave, parental leave, public holidays and sick leave.

The s 50 parties and relevant award parties commenced work on drafting amendments to the Metal Trades (General) Award. It is expected that amendments will be finalised soon. Methods to adjust allowances and clauses concerning the forfeiture of wages have been identified as matters that are common to many private sector awards and require greater consideration. It is intended to progress these two matters separately from the agreed amendments.

17 Impediments to the effective operation of the Commission

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

In addition to the jurisdictional issues are the practical and administrative difficulties. As previously mentioned, it takes much longer for a hearing of the Public Service Appeal Board to be listed than for other matters before the Commission. The types of problems encountered by the Public Service Appeal Boards in the last year have included the same issues that have led to delays in previous years, and which have been specifically commented on in previous Annual Reports. This includes the unavailability of Board members for appointment and the need for the replacement of Board members during the course of dealing with an appeal. In one case, it took the relevant Union four weeks to find a replacement member, which substantially delayed the hearing of the appeal.

18 Community engagement

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

Consultation Group

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

As reported in last year's Annual Report, during the early stages of the COVID-19 pandemic, Senior Commissioner Kenner, as he then was, corresponded with the Consultation Group on matters relating to the Commission's response to the COVID-19 pandemic. In this reporting year, the Commission's revised and new Practice Notes were circulated to members of the Consultation Group for comment, before they were introduced. A number of organisations responded to this process. The Consultation Group continues to be a useful conduit for the exchange of information between the Commission and those who regularly appear in the jurisdiction.

Work experience at the Commission

The Commission regularly provides opportunities for students to undertake familiarisation and work experience at the Commission. Under the supervision of a Commissioner, they attend hearings and conferences, undertake research and receive inductions through various parts of the Commission, the Registry and the Industrial Magistrate's Court.

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

Additionally, the Registrar provides an opportunity for graduates to obtain work experience in the Registry and in other areas of the Commission, through the graduate trainee programme conducted by the Government Sector and Private Sector Labour Relations Divisions of the Department of Mines, Industry Regulation and Safety.

Other events supported by the Commission

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

19 Professional development and training

Due to pandemic restrictions, professional development opportunities for Commissioners were limited during the reporting year. However, some professional development was undertaken including on telephone conciliation, and the 2021 Council of Australian Tribunals National Online Conference also took place. This included a range of topics such as court procedures; time management for tribunal members; writing techniques; leadership; dealing with objections from parties; and digital tribunals.

Commissioners also took part in a number of other online programmes and courses over the reporting year, including the National Judicial College of Australia "Writing Better Judgments" course and the Resolution Institute webinars and online programmes, amongst others.

20 Future developments

Website

The Commission's new website, foreshadowed in last year's Annual Report, was launched on 18 January 2021. This has involved a complete review and rewrite of all of the material on the website, with a focus on ease of understanding and accessibility.

Feedback from the new website thus far received, has been very positive. The Commission's website is subject to a continuous improvement process, which includes taking into account feedback from external users.

Portal

It was reported in last year's Annual Report, that the Commission is now looking to expand the forms website into a "Client Portal", where parties and their representatives can gain access to the forms they have lodged. This will enable parties to have "real time" access to, and enable modification of, the documents they have lodged in their cases. This will also enable parties to closely monitor and track the progress of a case through its various stages in the Commission.

The development of the Portal is ongoing.

Paperless Commission

As also reported last year, the Commission is in the process of implementing a paperless file management system. This will include upgrades to the Commission's file management software. The implementation is scheduled for late September 2021.

21 Website access

Access to the Commission's website is actively monitored. Google Analytics indicates that there was a 19% increase in the number of hits on the website during the reporting period which continues to demonstrate the use made of the Commission's online resources. Further, since the launch of the Commission's new website on 18 January 2021, there has been a 33% increase in average views per day with the total user count remaining static. This shows that the new website is seeing a higher level of engagement from users. It follows the positive feedback the Commission has received about the increased usability of the website and the new resources available for both the general public and industrial practitioners.

22 Conclusion

I wish to thank my Commissioner colleagues and Chambers staff, the Registrar and all of the staff of Department of the Registrar, for their work in supporting the Commission over the reporting year, especially given the challenges due to the pandemic.

23 Disputes and decisions of interest

Disputes of interest

Fire and Emergency Services

A dispute was notified to the Commission in December 2020 regarding the relocation of a Canning Vale Fire Station 3-4 Bush Fire Fighting appliance from the Canning Vale Fire Station to the new Cockburn Fire Station. Several compulsory conciliation conferences took place in an endeavour to resolve the dispute. On the application of the United Professional Firefighters Union of Western Australia (Union), the Commission issued an interim order to stay the relocation of a 3-4 Urban Tanker Firefighting Appliance (Urban Tanker) to Cockburn Career Fire and Rescue Station (Cockburn) and consequential transfer of staff to enable the parties to resolve a dispute concerning the industrial impacts of the relocation of the Urban Tanker through conciliation.

The construction of Cockburn is anticipated to be completed soon and once commissioned, the Department of Fire and Emergency Services (DFES) wishes to move the Urban Tanker to Cockburn along with at least 12 firefighters to crew the appliance.

The applicant, the Union, contended that the DFES has not engaged in genuine consultation and challenged the merits of the decision to relocate the Urban Tanker. The applicant also challenged the management of associated employment and industrial matters arising from the decision. It submitted that the flawed consultation process can be cured by providing a further period of time for further consultation, conciliation or arbitration.

Commissioner Walkington found that the FES Commissioner had made a definite decision in October 2020 that the Urban Tanker would be relocated to Cockburn and that he would not reconsider this decision. She found that the respondents' responses to issues raised by the Union thereafter were cursory, dismissive and flawed.

Walkington C also found that documentation of the outcomes of the consultation and of industrial relations considerations were almost non-existent, and those which exist were dismissive of the Union's concerns. She noted that there was a deterioration of industrial relations between the Union and the respondents. Walkington C concluded that the consultation process to date has been flawed and the management of industrial issues, including the impact on firefighters, have not been adequately considered. She found that further discussions, conciliation or arbitration would assist in the resolution of the matters in question and prevent the further deterioration of the relationship between the parties.

An interim order has been issued in the terms above. Following the issuance of the interim order by the Commission, further conciliation and consultation has taken place before the Commission and by the parties. Progress is being made in resolving the dispute.

Education

A number of disputes have been referred to the Commission under s 44 of the IR Act, concerning fitness for work and the return to work of teachers and administration staff. Other disputes have involved processes for dealing with internal grievances.

Apprentices

Several disputes have been referred to the Commission in relation to whether an apprentice, who is subject to an apprenticeship under the *Vocational Education and Training Act 1996* (WA), not ended in accordance with s 60G(4), can bring an unfair dismissal application before the Commission. This issue has not yet been finally determined as the relevant disputes were resolved through conciliation.

Decisions of interest

Industrial Appeal Court appeals

Industrial Appeal Court dismisses appeal of substandard teacher

Dixon v Director General, Department Of Education [2020] WASCA 176; (2020) 100 WAIG 1423

The IAC dismissed an appeal against the decision of the Full Bench of the Commission on the basis that the Full Bench made no error in the construction or interpretation of the *Teacher Registration Act 2012* (WA) or the *Public Sector Management Act 1984* (WA) (PSM Act).

The appellant, a teacher, was dismissed from his employment by the Director General of the Department of Education, on the ground that his performance as a teacher was substandard.

At first instance the appellant applied to the Commission claiming that he had been harshly, oppressively or unfairly dismissed. He claimed that the process followed to determine that he was performing at a substandard level was flawed and that, in any event, he was not a substandard teacher. Matthews C found the applicant's performance to be substandard regardless of whether he had considered him to be a 'proficient' or 'graduate' teacher in relation to the AITSL standards.

On appeal the Full Bench unanimously found that Matthews C identified the correct statutory requirements under s 79(2) PSM Act and had, in the application of the PSM Act, considered the appellant's performance in terms of both standards. The Full Bench concluded that there was sufficient evidence that the appellant's performance was substandard.

On further appeal, the IAC found that it was not necessary for the Full Bench to decide whether the s 79(2) PSM Act required the respondent to assess the appellant's performance at the 'graduate' level. The IAC determined that this was because the Full Bench did not rule that the appellant could be assessed at the 'proficient' level, but instead that it was open to Matthews C to make findings based on the evidence and to conclude that the appellant's performance was substandard. The IAC concluded that the relevant finding of the Full Bench did not disclose an error in the construction or interpretation of the *Teacher Registration Act* or the PSM Act. The appeal was dismissed.

Industrial Appeal Court finds Full Bench correctly interpreted IR Act

Director General, Department Of Education v State School Teachers' Union [2021] WASCA 14; (2021) 101 WAIG 85

The IAC dismissed an appeal against the decision of the Full Bench of the Commission on the basis that the Full Bench did not err in its construction or interpretation of s 23 of the IR Act. The IAC concluded that s 23(3)(a) of the IR Act, regarding procedures for filling a vacancy in a public sector position, did not preclude and order for an employee to be employed in a case of a refusal to employ by an employer.

At first instance Senior Commissioner Kenner found that a teacher had been unjustly dismissed it was unfair for the Director General to have refused to employ the teacher and he made orders requiring the Director General to offer the teacher a contract of employment as a schoolteacher, and to pay the teacher an amount reflecting the salary and benefits he would have otherwise earned if he had remained employed.

On appeal the Full Bench found no error in Kenner SC's decision regarding the non-applicability of s 23(2a) of the IR Act. The Commission's jurisdiction was not excluded because the circumstances of this case did not relate to the filling of a vacancy as covered by the Employment Standard. The Full Bench, by majority, also held that Kenner SC was correct in concluding the Commission had power to award compensation to the teacher.

On appeal, the IAC found that it was not satisfied that the Full Bench erred. It emphasised that the Employment Standard applies to filling a vacancy, yet there was not vacancy to fill in the circumstances. The IAC found that the Full Bench made no error in construing s 23(2a) of the IR Act. The IAC also held that the Commission does have the power to award compensation for the unfairness of the refusal to employ a person under s 23(1) of the IR Act.

Industrial Appeal Court finds retail pharmacy employees covered by State Shop Award

The Shop, Distributive And Allied Employees' Association Of Western Australia v Samuel Gance T/A Chemist Warehouse Perth [No 2] [2021] WASCA 76; (2021) 101 WAIG 343

The IAC has upheld an appeal against a decision of the Full Bench of the Commission and found that *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* (the Award) remains applicable to workers and employers in the retail pharmacy industry.

At first instance the Shop Distributive and Allied Employees' Association of Western Australia applied to the Commission and sought a declaration under s 46(1)(a) of the IR Act to the effect that the Award applied to workers and employers in the retail pharmacy industry, despite the industry of retail pharmacies being removed from the award by order of the Commission under s 47 (2) of the IR Act.

Commissioner Emmanuel made a declaration that the Award continued to apply to the retail pharmacy industry in WA because certain steps required to occur under s 29A of the IR Act were not complied with.

On appeal to the Full Bench, a majority dismissed the appeal and found that the Award had ceased to cover workers and employers in the retail pharmacy industry during 1995. The majority also found that the removal of the last-named respondent engaged in the retail pharmacy industry in 1995 had the effect of removing that industry from the scope of the Award at that time. They concluded that the requirements of s 29(A)(2) of the IR Act were not applicable to the striking out order issued by the Commission in 1995 under s 47(2) of the IR Act, as they found that the application to remove the named respondents from the Award was made by the Commission acting on its own motion.

The IAC, on appeal, rejected the conclusion that the removal of the last-named respondent of the retail pharmacy industry to the Award 'had the effect of removing that industry from the scope of the Award from that time'. The s 47 power to strike out a party to an award did not change the scope of an award. A ***Glover*** clause is a drafting technique that expressed an award's coverage as being applicable to all workers within an industry or industries that were then the industries in the schedule of respondents to the award.

Full Bench appeals

Appeal against dismissal of Deputy Principal for past serious misconduct dismissed as no appealable error found

Parnell v The Roman Catholic Archbishop of Perth [2021] WAIRC 00102; (2021) 101 WAIG 186

The Full Bench dismissed an appeal against a decision of the Commission on the basis that no appealable error had been made out to quash the decision at first instance that found that the dismissal of a deputy principal for misconduct was not harsh, oppressive, or unfair. The appellant was employed as Deputy Principal at Lumen Christi College. In 2019, the appellant was dismissed for serious misconduct following an investigation into historical sexual assault allegations made against him by a former student. He denied the allegations. The appellant made an unfair dismissal application to the Commission. He claimed that the investigation process was flawed, the investigators had insufficient expertise, the evidence was contaminated, and that the expert psychologist's report did not substantiate the allegations.

At first instance Senior Commissioner Kenner dismissed the application. He was satisfied that the investigators had regard to the appropriate principles in approaching the workplace investigation and noted that the standard of proof and approach to the inquiry was necessarily different to that of a criminal investigation. Kenner SC determined, based on the material, it was open for the respondent, after a sufficient inquiry, to hold an honest and genuine belief, based on reasonable grounds, that the misconduct occurred.

On appeal to the Full Bench, it was held that Kenner SC applied the proper test to determine whether the appellant's dismissal was unfair and the appropriate standard of proof, given the seriousness of the allegations. The Full Bench also found that Kenner SC did not err in the way he dealt with the circumstantial evidence, or by accepting hearsay evidence in preference to the appellant's sworn, first-hand evidence. Also, the investigation was conducted in a fair and proper manner.

Full Bench unanimously upholds meaning of "site" in the construction industry

Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board [2020] WAIRC 00758; (2020) 100 WAIG 1300

The Full Bench dismissed an appeal and upheld a decision of the Commission relating to an application for a review of a decision of the Construction Industry Long Service Leave Payments Board (the Board) that required the appellant to register as an employer under the CIPPLSL Act.

Chief Commissioner Scott concluded that the work performed by the appellant's employees, engaged in maintenance services at mines and processing plants, was performed "on a site" within the definition of "construction industry" and therefore covered by the CIPPLSL Act. Scott CC rejected the appellant's principal contention that "on a site" and "on site", where used in the CIPPLSL Act, means a "building site" or a "construction site". She held that on its proper construction, the words "on a site" means the site at which the activities in the first part of the definition (e.g. construction, erection, installation) are performed on the buildings, works, roads etc. that follow in sub pars (i) to (vxiii).

On appeal, the Full Bench considered the legislative history, the rules of statutory interpretation, the process undertaken by Scott CC in reaching her conclusion as to the meaning of "site" and applied relevant legal principle and case law to the facts. The Full Bench found that no error had been demonstrated in terms of the conclusion reached by Scott CC. It found that Scott CC had regard to the context and purpose of the CIPPLSL Act, and correctly concluded that the statutory text must prevail in the case of any inconsistency.

The matter has gone on appeal to the IAC.

Jurisdiction of Full Bench to review federal decisions of Industrial Magistrate

Manescu v Baker Hughes Australia Pty. Limited [2020] WAIRC 00683; (2020) 100 WAIG 116

The Full Bench has dismissed an appeal against a decision of the Industrial Magistrates Court (IMC) exercising jurisdiction under the FW Act. It found that it had no power to review a decision of the IMC exercising such jurisdiction.

The appellant's claims before the IMC sought to enforce entitlements alleged to arise from an award issued under the FW Act and entitlements under the National Employment Standards. He also suggested that one of the matters he pursued related to an employer-employee agreement and therefore fell under the IR Act.

The Full Bench found that it does not have the power to review a decision of the IMC exercising jurisdiction under the FW Act, whether for the purpose of examining whether procedural fairness applied or for any other purpose.

Commission at First Instance

Private Sector Matters

Claim for alleged breach of implied terms of contract dismissed

Wehr v Qube Ports Pty Ltd [2020] WAIRC 00402; (2020) 100 WAIG 12

The Commission has dismissed a claim for a denied contractual benefit by an employee of a stevedoring company who contended that by standing him down, the company had breached the implied terms of his contract of employment.

The applicant contended that by standing him down between 1 April and 17 May 2019, the respondent breached the implied terms of the applicant's contract and was liable for any loss or damage suffered by him. The applicant argued that:

1. it was an implied term of his contract that the respondent had to cooperate with him;
2. the respondent had a general duty of good faith towards him; and
3. it was an implied term of his contract that the respondent would provide him with the opportunity to work and earn remuneration and would not act in a manner to deprive him of the benefit of his contract.

Senior Commissioner Kenner rejected the applicant's claims, distinguished several authorities advanced by the applicant, and noted that the contract was not of a kind where the applicant was to be afforded the opportunity to work, as in the case of an actor or entertainer. Kenner SC found that there was nothing in the contract to suggest that the employer would be under any contractual duty to do other anything other than pay the employee under the contract and the Agreement. Kenner SC also found that even if an implied term of good faith did apply to the applicant's contract, it was not evident how a stand-down (on pay) whilst the employer investigated a workplace safety incident, would breach such a term.

Jurisdictional objection to hear application dismissed as WA Police Union not national system employer

Mason v Western Australian Police Union of Workers [2021] WAIRC 00090; (2021) 101 WAIG 263

The Commission has dismissed a jurisdictional objection to the Commission hearing and determining an unfair dismissal matter. It found that as the WA Police Union was not a trading corporation and therefore not a national system employer, the Commission has jurisdiction to hear and determine the matter.

The Union objected to the Commission hearing and determining the application because it said that the Union is a trading corporation and therefore a national system employer. It argued that its Rules 'contemplate that trading and financial activities will make up a substantial endeavour and purpose' of the Union. It also contended that its largest source of income, membership fees, has trading characteristics.

The applicant agreed that the Union engages in some trading activities but contended that those activities are insufficient to justify the Union being characterised as a trading corporation. She argued that the Union's purpose is to protect and further the industrial interest of its members and that charging membership fees is not a trading activity. The applicant also said that trade unions are not ordinarily, by their nature, trading corporations and the Union had not established that it was an exception. She argued that the jurisdictional objection should be dismissed.

Commissioner Emmanuel considered the evidence and concluded that the Union is not a trading corporation. The receipt of income (mostly in membership fees) by the Union without adequate explanation or identification of the trading or commercial character of the Union's activities, did not mean the Union was a trading corporation. Emmanuel C found that the sale of memberships lacks a commercial or business character and is not a trading

activity. Instead, she found that receiving membership fees is an industrial advocacy activity, carried on with a view to improving the industrial interests of members. Emmanuel C also found that other trading activities engaged in by the Union, including receiving income in exchange for rental accommodation and selling advertising space and watches, did not form a sufficiently significant proportion of the Union's overall activities to characterise the Union as a trading corporation.

No contractual agreement for employee to receive 2.5% of employer's profit in addition to salary

Medcraft v Metlabs Australia Pty Ltd [2021] WAIRC 00048; (2021) 101 WAIG 158

The Commission has dismissed a claim for a denied contractual benefit as it found that there was no contractual agreement to vary an employee's contract so that the employee would receive 2.5% of his employer's profits in any year, in addition to his salary.

The employee worked for his employer from June 2013 to July 2018. At various times over the course of his employment, his employer paid him money over and above his ordinary salary. The employee said that the amounts were paid to him pursuant to an oral agreement, having contractual effect, made between him and the employer's managing director in early 2015.

The employee said that the exact term of the agreement was that he would receive, in addition to his ordinary salary, a sum equating to 2.5% of the employer's profit in any year, where a profit was made. The employee claimed that for the 2017-18 financial year, he was denied that contractual benefit.

Commissioner Matthews received evidence from the employee, as well as from the employer's managing director, general manager and administration manager. Matthews C found that there was no evidence that a contractual agreement had been made to vary the employee's contract so that he would receive 2.5% of any profits made into the future. Matthews C's view was that the employer liked to give his employees some money from time to time. There was nothing predictable or formal about this and it was certainly not contractual in nature.

Claim for acting royalties dismissed as applicant not employee

Stern v Tony's Auto Auctions Pty Ltd [2020] WAIRC 00796; (2020) 100 WAIG 1341

The Commission has dismissed a claim for denied contractual benefits, which sought the payment of royalties related to a piece of acting the applicant did for the respondent. The Commission found that there was no employment relationship between the parties.

The applicant said he did a television commercial for the respondent in 2014, which was played on television from 2014 to 2019. The applicant received royalties in the years up to 2017 but said he had not been paid royalties for the years 2018 and 2019. The applicant asserted that he was an employee of the respondent and that his entitlement to royalties may be enforced as an incident of his employment contract. While he was not able to produce a written employment contract, the applicant said the Commission could infer that he was employed based on the evidence.

Commissioner Matthews found that there was no document or letter passed between the parties of a contractual nature that suggested employment, nor was there any evidence that the applicant was controlled by the respondent in the relevant way.

Public sector

WA Police Officers to receive two additional rest days a year on full pay

Western Australian Police Union of Workers v Commissioner of Police [2021] WAIRC 00047; (2021) 101 WAIG 334

The Public Service Arbitrator issued an order that the *Western Australia Police Force Industrial Agreement 2020* contain a new clause providing for two Rest Days per annum, on full pay, for each police officer.

An application was made by the WA Police Union (applicant) for an enterprise order under s 42I of the IR Act. Further discussions and proceedings between the applicant and the Commissioner of Police (respondent) followed, which led the parties to reach agreement except on one matter only. The matter in respect of which the parties had not reached agreement was the applicant's claim for five days "Additional Leave".

The Arbitrator, Senior Commissioner Kenner, considered the evidence provided by the parties as to the state of the WA economy and concluded that the most recent economic data on the performance of the State economy was encouraging. However, Kenner SC noted the severe impact of the COVID-19 pandemic on the State's economy and the need to approach the present matter with some caution.

Kenner SC also considered witness evidence of police officers from both parties. He accepted the evidence that the work that police officers perform is demanding, stressful and may be corrosive to their health and wellbeing. He also accepted the evidence as to the hyper-vigilance that accompanies being a police officer and the uniqueness of policing work. In terms of offending, Kenner SC concluded that there has been no appreciable overall increase in offending against property and persons over the last five years and property offences have fallen substantially. Domestic violence incidents have substantially increased. Whilst the use of methamphetamine has increased in the community, there has not been an increased rate of violent offending resulting from methamphetamine usage.

Kenner SC also considered evidence on the impact of leave on an officer's mental health and wellbeing. He noted that a major issue was the absence of a definite research link between more leave and better mental health and wellbeing. However, Kenner SC considered there were two significant learnings from this case:

1. Firstly, he was satisfied on the evidence that *how* leave for rest and recreation is taken is important. He noted the evidence pointed to more regular, but shorter, breaks as being beneficial; and
2. Secondly, is the need for some *control* by a police officer over when leave is taken. That is, leave being taken at a time when an officer considers that they most need a short break.

The Arbitrator concluded, on consideration of the evidence above, that he was not persuaded that an additional week's leave should be granted. He concluded, however, that in recognition of the unique nature and corrosive impact of policing work, an order should be made that the Industrial Agreement contain a new clause providing for two Rest Days per annum, on full pay, for each police officer. Kenner SC noted that the Rest Days are intended to be available to a police officer, at their election and at a time nominated by them, in order that they have a short break from the rigours of police work, when necessary.

Correct interpretation of dispute resolution clause of industrial agreement declared

Western Australian Prison Officers' Union of Workers v Minister for Corrective Services [2020] WAIRC 00430; (2020) 100 WAIG 117

The Commission has declared that the correct interpretation of the dispute resolution provisions set out in the *Department of Justice Prison Officers' Industrial Agreement 2018* (Agreement) is that they are limited to disputes about the meaning and effect of the Agreement or the MCE Act.

The applicant, the Western Australian Prison Officers' Union of Workers, and the respondent, the Minister for Corrective Services, are parties to the Agreement. The applicant contended that the dispute resolution provisions of the Agreement, including the key provision of cl 176.2, should be constructed broadly to apply to *all* questions

or disputes arising between the parties. The respondent argued that the provisions are limited to those disputes about the meaning and effect of the Agreement or the MCE Act.

Senior Commissioner Kenner found that on a strict interpretative basis, even applying a generous approach, taking the language used in cl 176, he preferred the position adopted in the respondent's submissions. Kenner SC found, in its ordinary and natural meaning, the words in cl 176.2 that "Any question or dispute that arises between the parties regarding the *meaning and effect of this Agreement... will be resolved*" are narrow in scope and only seek to confine matters that are the subject of formal dispute resolution processes.

Applications by scientists for conversion from fixed term contract to permanent employment dismissed

Civil Service Association of Western Australia Incorporated v Director General, Department of Biodiversity, Conservation, and Attractions [2021] WAIRC 00002; (2021) 101 WAIG 58

The Public Service Arbitrator has dismissed applications for the conversion of two fixed-term contract employees to permanency on the basis that the employees did not meet the requirements of cl 2.1(a) and cl 11 of *Public Sector Commissioner's Instruction No. 23* (CI 23).

Commissioner Emmanuel noted that CI 23 provides the pre-conditions that must be met for conversion of employees on fixed term contracts. The employees are research scientists and have been employed by the Director General, Department of Biodiversity, Conservation and Attractions for over seven years on a series of fixed-term contracts, with the latest both due to expire in mid-2021.

The Director General considered whether the employees were eligible to be converted to permanency under the terms of CI 23, and decided they were not eligible for two reasons:

1. the reason for the employees' engagements on a fixed term contract is a circumstance mentioned in the relevant industrial agreement, the *Public Service and Government Officers CSA General Agreement* (namely, they are working on projects with finite lives), and thus the requirement in cl 2.1(a) of CI 23 was not satisfied; and
2. the external funding for the employees' roles could not reasonably be expected to continue beyond the current funding arrangements, and thus the requirement in cl 11(b) was not satisfied.

Emmanuel C found that the employees were each engaged on a fixed term contract to work on projects with a finite life that were funded only until 2023 or 2024. She found that, as the reason the employees were engaged on a fixed term contract was a circumstance mentioned in the industrial agreement, the requirement in cl 2.1(a) was not satisfied. Emmanuel C also found that there was no proper basis to ground an expectation that external funding for the roles held by the employees will continue beyond the current funding arrangements, and as such, the requirement in cl 11(b) was not met either.

Public Service Appeal Board

Hutchinson v WA Country Health Service [2020] WAIRC 00977; (2020) 100 WAIG 1574

The appellant was employed by the WA Country Health Service (Health Service) as a Patient Assistant Travel Scheme Regional Officer. She appealed what she says was a decision to dismiss her to the Public Service Appeal Board (Board). The appellant argued that she was dismissed because she raised concerns about her manager. She understood that she was dismissed because of an administrative form completed by her manager that said the reason for her employment ending was dismissal.

The respondent objected to the Board hearing and determining the appellant's appeal because it said she was not dismissed and her employment ended by the effluxion of time. It argued that the administrative form was completed in error.

The Board found that the appellant was employed on a contract with an agreed end date, and that her employment ended by the effluxion of time in accordance with what the parties had agreed. However, the Board observed that nobody from the respondent had properly explained to the appellant that the use of 'dismissed' on the administrative form was a mistake for many weeks. The Board expressed its view that the lack of clear and frank communication by the Health Service about that matter led the appellant to believing she had been dismissed.

Picks v WA Country Health Service [2020] WAIRC 00806; (2020) 100 WAIG 1400

The appellant was employed by the respondent as a security officer at Bunbury Hospital. In July 2019. The appellant was convicted of assault occasioning bodily harm in relation to an incident with a member of his extended family. The appellant did not notify the respondent of his conviction and he was dismissed.

The appellant appealed to the Public Service Appeal Board (Board), arguing that the Chief Executive did not adequately consider his excellent work history, the isolated nature of the offence and all the circumstances of the incident. The respondent argued that the nature of the appellant's role and conduct meant that dismissal was appropriate.

The Board found that 'a real injustice' had been done to the appellant and that the decision to dismiss him was a disproportionate response and should be adjusted. The Board accepted the appellant's evidence that his conviction arose in unique circumstances and was 'the culmination of provocation in the context of long-running, complex, cultural family tension' and the stress of his wife's recent, problematic kidney transplant. The Board accepted that assault occasioning bodily harm is a serious matter but it was satisfied that the continued employment of the appellant did not pose an unacceptable risk to the respondent.

Occupational Safety and Health Tribunal

Tribunal affirms WorkSafe Commissioner's decision to not grant registration as a High Risk Work Licence Assessor

Steven Rossi v WorkSafe Western Australia Commission [2021] WAIRC 00206; (2021) 101 WAIG 594

The Occupational Safety and Health Tribunal has affirmed a decision of the WorkSafe Commissioner to not grant the applicant registration as a High Risk Work Licence Assessor in a number of classes.

In May 2019, the applicant applied to the Department of Mines, Industry Regulation and Safety, WorkSafe Division, for registration as an assessor for licences to perform high risk work in five different classes. In November 2019, the applicant was advised that his experience in relation to two classes was sufficient and he was invited to undertake the assessors' examinations for those classes.

In December 2019, an officer of WorkSafe advised the applicant that he did not have sufficient experience to qualify for the remaining three licences, as the experience he provided was not industry operational experience in operating the relevant cranes. The applicant was advised that the experience must be a minimum of three years, recent, relevant, and varied operational industry experience. On 6 December 2019, the applicant requested the WorkSafe Commissioner to 'overturn' the decision of the officer. In January 2020, The WorkSafe Commissioner advised the applicant that his experience in a training environment or in the commissioning of equipment, was not considered industry operational experience.

Commissioner Walkington accepted the WorkSafe Commissioner's submissions concerning the requirement to ensure that assessor registration only be granted to people with sufficient demonstrated and evidenced operational experience. She found that, in the context of a training environment, the absence of specific

information that records the details of the activities undertaken, and the environment, noting any hazards or risks, cannot demonstrate that the requirements of reg 6.22 of the OSH Regulations have been met.

Walkington C found that the experience cited by the applicant was expressed in general terms and not verified or confirmed by the RTO. Also, the description of the work undertaken was not of varied activities. The Commissioner also found that the photographs of the equipment, facilities and sites on which the applicant conducted training of persons for high risk work licences, did not provide the detail required to assess the task being performed, did not show the nature of the environment and that it was not possible to identify the skills necessary by reviewing the photographs. Commissioner Walkington concluded that the applicant's description of his experience was not detailed enough and did not meet the requirements of the OSH Regulations.

Construction Industry Portable Paid Long Service Leave

Employee not entitled to portable long service leave scheme as not employed in construction industry

Wallis v The Construction Industry Long Service Leave Payments Board [2020] WAIRC 00791; (2020) 100 WAIG 1331

The Commission has dismissed an application to review a decision of the Construction Industry Long Service Leave Payments Board that decided that the applicant was ineligible to accrue benefits to long service leave under the CIPPLSL Act, because he was not employed in the "construction industry".

The applicant worked as a mechanical fitter performing maintenance work and repairs to track maintenance machines used by Rio Tinto to maintain its railway. The applicant argued that his work was "maintenance of or repairs to railways" under the definition of "construction industry" set out in s 3(1) of the CIPPLSL Act. The respondent disputed this contention and submitted that such work performed by the applicant did not involve, of itself, maintaining or repairing railways. Instead, the respondent argued that the work engaged in by the applicant was the maintaining and repairing of equipment used in maintaining railways.

Senior Commissioner Kenner noted that the meaning of "construction industry" was considered by the Full Bench in the recent decision of *Programmed Industrial Maintenance v Construction Industry Long Service Leave Payment Board* [2020] WAIRC 00758. Kenner SC pointed out that work performed "on site" means work performed away from an employer's own premises but does not necessitate that work be performed on a "construction site" or a "building site".

Kenner SC found, on the evidence, that the applicant's work was to a substantial degree, work involving "on site" work. However, Kenner SC determined that the applicant was not engaged on work involving "the maintenance or of repairs to...railways...". Instead, Kenner SC found that the applicant was engaged in work better described as maintaining and repairing machines that are used to repair or maintain railways. Therefore, the applicant's work was not work in the "construction industry" for the purposes of the CIPPLSL Act.

24 Appendices

Appendix 1 – Legislation

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

Appendix 2 – Members of the Public Service Appeal Board

Name	Party nominating the member
Ms Josephine Auerbach	Australian Medical Association of Western Australia
Mr Michael Aulfrey	Hospital Support Services
Ms Sherina Bhar	Department of Health
Ms Kellie Blyth	South Metropolitan Health Service
Ms Louise Brick	North Metropolitan Health Service
Mr Charlie Brown	The Civil Service Association of Western Australia Incorporated
Mr George Brown	The Civil Service Association of Western Australia Incorporated
Mr Peter Byrne	Department of Communities
Ms Kendall Carter	Department of Communities
Mr Joshua Chapman	Main Roads Western Australia
Ms Bethany Conway	The Civil Service Association of Western Australia Incorporated
Mr Tony DiLabio	Department of Transport
Mr Warren Edwardes	Australian Medical Association (WA) Incorporated
Mr Matthew Hammond	Department of Premier and Cabinet
Mr Dan Hill	Health Services Union of Western Australia (Union of Workers)
Mr Michael Jozwicki	Department of Premier and Cabinet
Ms Amanda Kaczmarek	Australian Medical Association (WA) Incorporated
Mrs Lois Kennewell	The Civil Service Association of Western Australia Incorporated
Mr Bruce Kirwan	East Metropolitan Health Service
Mr John Lamb	The Civil Service Association of Western Australia Incorporated
Mr Greg Lee	The Civil Service Association of Western Australia Incorporated
Ms Julie Love	East Metropolitan Health Service
Mr Piers McCarney	Rail, Tram and Bus Industry Union of Employees, West Australian Branch
Mr Jamie McDiarmid	Public Transport Authority
Mr John O’Brien	Department of Justice
Ms Helen Redmond	Western Australian Police
Mr Gavin Richards	The Civil Service Association of Western Australia Incorporated
Ms Karen Roberts	Department of Justice
Ms Rebecca Sinton	Path West Laboratory Medicine WA
Mr Damien Stewart	Department of Biodiversity, Conservation and Attractions
Ms Jenny Stone	Department of Justice
Mr Grant Sutherland	The Civil Service Association of Western Australia Incorporated
Mr Mark Taylor	Department of Justice
Ms Val Tomlin	Department of Communities

Name	Party nominating the member
Ms Donna Townsend	Department of Communities
Ms Jane van den Herik	North Metropolitan Health Service
Mr Robert Warburton	Department of Transport

Appendix 3 – Right of entry authorisations by organisation

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

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