Industrial Relations Act 1979

ANNUAL REPORT 2021-22

THE WESTERN AUSTRALIAN
INDUSTRIAL RELATIONS COMMISSION

Letter to the Minister

To the Honourable Bill Johnston MLA,
Minister for Industrial Relations

Dear Minister

I am pleased to provide to you the following report relating to the operation of the *Industrial Relations Act 1979* for the year ended 30 June 2022.

Stephen Kenner
Chief Commissioner
The Western Australian Industrial Relations Commission

ABOUT THIS REPORT

This report is prepared as a requirement under provisions of the *Industrial Relations Act 1979*. It is prepared primarily as a report to the Minister for Industrial Relations on the Western Australian Industrial Relations Commission's activities. This report also provides information for users of the Commission and others with an interest in the Commission.

ENQUIRIES AND FEEDBACK

For enquiries on the report or feedback, please email

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FROM THE CHIEF COMMISSIONER

The 2021-22 year has been an eventful one for the Commission and the work that it does in the community. Significant legislative changes have been introduced including new jurisdiction for the Commission. This new legislation has been supported by the making of new Regulations and the revision of Forms to enable ready access to dispute resolution by employees, employers and others, operating in the State industrial relations system.

During the year the Commission has also embarked on a significant modernising of its Registry service, with the new online client portal going live in March 2022. This is part of the Commission's ongoing Digital Registry Project. The portal enables parties to lodge applications and documents online and access them in real time, with a focus on improved access and user experience. This follows the adoption by the Commission internally of a paperless electronic case file system in September 2021. This has further enhanced the efficiency and effectiveness of the Commission's operations.

I wish to acknowledge Commissioner Damian Matthews, who was appointed a Commissioner on 21 March 2016 and retired on the grounds of ill health effective on 1 July 2022. Commissioner Matthews made a significant contribution to the work of the Commission, and he will be missed.

Finally, I wish to record my gratitude for the excellent efforts of my Commissioner colleagues and all staff of the Commission for their service to the community over the year.

Stephen Kenner
Chief Commissioner

THE COMMISSION AND TRIBUNALS

Structure of the State Industrial Relations System

Under the *Industrial Relations Act 1979* (WA) (IR Act), the following tribunals and courts are established:

- The Western Australian Industrial Relations Commission constituted by:
  - A Commissioner Sitting Alone
  - The Chief Commissioner
  - The Commission in Court Session
  - The Full Bench
- The Public Service Arbitrator and the Public Service Appeal Board
- The Railways Classification Board
- The Industrial Magistrates Court
- The Western Australian Industrial Appeal Court

Additionally, a Commissioner constitutes Tribunals established under other legislation including:

- The Work Health and Safety Tribunal
- The Road Freight Transport Industry Tribunal
- The Police Compensation Tribunal

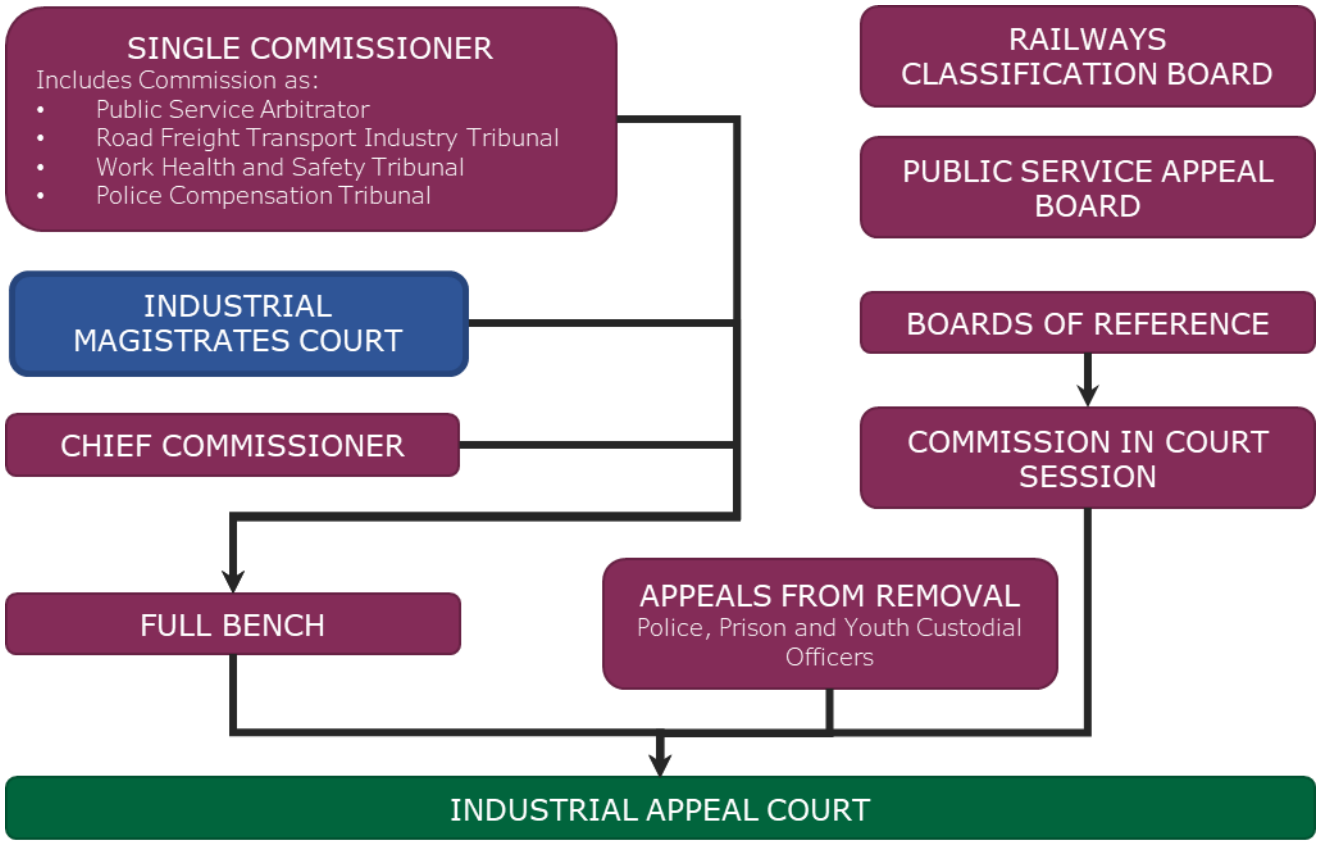

Figure 1. Structure of the State Industrial Relations System

Membership and Principal Officers

The Commission

Over the reporting year the Commission was constituted by the following members:

Chief Commissioner	S J Kenner
Senior Commissioner	R Cosentino
Commissioners	T Emmanuel
	D J Matthews *On extended sick leave from April 2021 to retirement on 1 July 2022*
	T B Walkington

The Registry

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

Registrar	Ms S Bastian
Deputy Registrar	Ms K Hagen *Resigned on 13 May 2022*
	Ms S Kemp *Appointed on 2 June 2022*

Industrial Appeal Court

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

During this reporting year, 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 *Retired 26 February 2022*
	The Honourable Justice Kenneth Martin
	The Honourable Justice Jennifer Smith *Appointed 10 June 2022*

Industrial Magistrates

During the reporting year, the Industrial Magistrates Court was constituted by the following Magistrates:

- Industrial Magistrate J Hawkins
  Served until 17 December 2021
- Industrial Magistrate E O'Donnell
  Commenced on 28 July 2021
- Industrial Magistrate B Coleman
  Commenced on 9 March 2022

NEW DEVELOPMENTS

Legislation

Significant legislative reform affecting the Commission's jurisdiction has been made in this reporting year. The *Work Health and Safety Act 2020* and accompanying Regulations came into effect on 31 March 2022. This is a significant legislative reform, which replaces the *Occupational Safety and Health Act 1984* and the work health and safety aspects of existing mining and petroleum legislation. The new legislation renames the Occupational Health and Safety Tribunal as the Work Health and Safety Tribunal and expands the Tribunal's jurisdiction.

The *Industrial Relations Legislation Amendment Act 2021* came into effect on 20 June 2022. This legislation, responsive to the 2018 Ministerial Review of the State Industrial Relations System conducted by former Acting President of the Commission Mark Ritter SC and the 2019 Inquiry into Wage Theft in Western Australia conducted by former Chief Commissioner Tony Beech, has made substantial changes to the *IR Act* including:

- Expanding the definition of 'employee'
- Enabling the Commission of its own motion to review the scope clauses of private sector awards
- Introducing new requirements in relation to employment records and pay slips
- Introducing a new stop bullying and sexual harassment jurisdiction for the Commission
- Enabling the Commission to make equal remuneration orders
- Enabling qualified Commissioners to be concurrently appointed as Industrial Magistrates
- Making provision for local government to be declared not national system employers and to move into the State industrial relations system, with transitional arrangements
- Significant increases in penalties for contraventions of industrial instruments and new compliance mechanisms in the Industrial Magistrates Court
- Introducing new employee rights protections enforceable in the Industrial Magistrates Court

The *Police Amendment (Compensation Scheme) Act 2021* came into effect on 1 January 2022. The legislation has amended the *Police Act 1892* to introduce a compensation scheme for police officers and Aboriginal Police Liaison Officers who have been medically retired due to a work related injury. The legislation has established a new Police Compensation Tribunal, constituted by a Commissioner, to deal with disputes arising from the scheme, in relation to degrees of permanent impairment; failure to qualify for compensation for permanent total incapacity; and the amount of compensation for permanent total incapacity.

In addition to the above, the *Owner-Drivers (Contracts and Disputes) Amendment Bill 2022* was introduced into the Parliament in June 2022. This *Bill* proposes significant changes to the jurisdiction and powers of the Road Freight Transport Industry Tribunal. Amongst other things, the *Bill,* if passed in its current form:

- Introduces statutory minimum notice periods or payment in lieu of notice of termination for all owner-driver contracts
- Expands the Tribunal's powers in relation to unconscionable conduct and misleading and deceptive conduct by hirers or owner-drivers
- Enables the Tribunal to consider whether guideline rates are paid, in determining whether a party has engaged in unconscionable conduct
- Introduces right of entry provisions to enable the investigation of suspected breaches of the legislation
- Enables the Tribunal to facilitate collective negotiations for owner-driver contracts between hirers and owner-drivers

A significant amount of work has been done to make new Regulations and revise Commission Forms and procedures, to support this new legislation.

Digital Registry

To reflect the need to provide easy access to the Commission's jurisdiction in the modern digital age, a new Form submission portal was recently built using modern website architecture to create interactive and intuitively styled Forms. The submission portal has since been expanded into a client portal, where parties and representatives can securely create and manage their own unique account, easily lodge Forms and documents online, save and resume Forms prior to lodgement, as well as review Forms and documents filed or served through the Digital Registry. In the future it is intended that parties will be able to monitor the progress of their matter as it proceeds through the Commission.

The Digital Registry also provides an avenue for registered organisations to create an organisational profile, with key officers of each organisation assigned as administrators. Administrators will be able to manage the approvals of organisation portal members, providing them with access to matters for their organisation whilst administrators have an overview of all active matters for the organisation.

The first stage of the new Digital Registry service, providing an improved online portal for matters before the Commission, launched on 30 March 2022. It marks a substantial shift into the digital era, with a focus on improved access and user experience. It is anticipated that a similar online

portal for the Industrial Magistrates Court and the Industrial Appeal Court will be developed for the Digital Registry.

Digital case files

As foreshadowed in last year's Annual Report, the Commission has for some time been developing a paperless case file management system, as a part of the overall digitisation project. This has involved a significant upgrade to the Commission's file management software. It is pleasing to report that the new system was introduced in September 2021. Not only does this represent a further step in modernising the Commission's case file management, but it has also involved significant efficiencies in the management of cases by the Commission, after lodgement.

Pandemic related matters

Through the publication of regular Special Procedures Notes, appropriate procedures for parties appearing before the Commission have been implemented in response to State Government restrictions arising from the pandemic. During the reporting year, these initiatives have included mask wearing, social distancing, and the need to provide proof of vaccination status on entering the Commission premises. As of April 2022, those requirements have been removed, although mask wearing in proceedings is encouraged, at the discretion of a presiding Commissioner. The co-operation of all parties appearing before the Commission has been appreciated, in their willing adoption of these procedures. Apart from these requirements, the Commission has been largely operating on a normal face to face basis for conferences and hearings for most of the reporting year.

There has been a noticeable number of matters before the Commission and the Public Service Arbitrator and Appeal Board, concerning challenges to disciplinary proceedings taken in response to the mandatory vaccination policies of the State Government. Of these, a number have been resolved following conciliation, some have been discontinued, and relatively few have been referred for hearing and determination.

It is of note too that several Appeal Board applications have been accompanied by applications that the proceedings be stayed, pending the outcome of WA Supreme Court challenges to vaccination mandates. These stay applications and related appeals of decisions to dismiss employees have not been able to be dealt with in a timely way, because of the delays forming the Appeal Boards.

THE WORK OF THE COMMISSION

Statistics Snapshot

Total Matters

	2020-21	2021-22	Variance
Initiated	610	588	-22 (-4%)
Concluded	662	532	-130 (-20%)

Matters Concluded by Jurisdiction/Area

	2020-21	2021-22	Variance
Mediation	21	16	-5 (-24%)
Commissioner sitting alone	212	214	2 (1%)
Public Service Arbitrator	71	41	-30 (42%)
Public Service Appeal Board	33	47	14 (42%)
Appeals from Removal - Police, Prison and Youth Custodial Officers	2	5	3 (150%)
Police Compensation Tribunal	-	0	-
Road Freight Transport Industry Tribunal	3	3	0 (0%)
Occupational Health and Safety Tribunal/Work Health and Safety Tribunal	15	9	-6 (-40%)
Railways Classification Board	0	0	0 (0%)
Boards of Reference	0	0	0 (0%)
Chief Commissioner	7	9	2 (29%)
Commission in Court Session	10	6	-4 (-40%)
Full Bench	9	12	3 (33%)
Industrial Appeal Court	8	1	-7 (-88%)
Industrial Magistrate	271	169	-102 (-38%)

Awards and Agreements in force under the *Industrial Relations Act 1979*

	2021-22
Awards	233
Industrial Agreements	376
Total	609

Conciliation and case management

Central to the Commission's jurisdiction, is the resolution of disputes through conciliation. This is a core object of the IR Act. Most disputes and industrial matters referred to the Commission, are resolved through conciliation rather than formal determination. Two types of conciliation are contained in the IR Act. The first is in respect of the referral of industrial matters to a single Commissioner. The second is applications for a compulsory conference, generally only commenced by a union or an employer. The time taken to resolve disputes by conciliation varies considerably. Larger, collective disputes under s 44 of the IR Act, may involve multiple compulsory conferences over an extended period. On the other hand, individual disputes, in relation to termination of employment for example, may be resolved more quickly.

Conciliation – on time matter processing

	Concluded within 90 days	Concluded within 180 days
Unfair dismissal applications – s 32	61%	83%
Denial of contractual benefits applications – s 32	43%	80%
Compulsory conferences – s 44	59%	85%

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

- Of 3 conferences requested within 24 hours, 100% of those conferences were held within the requested timeframe.
- Of 19 conferences requested within 72 hours, 95% of those conferences were held within the requested timeframe, except where parties were unavailable on the dates offered.

Mediation

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, with some measure of success.

Mediation – total matters

	2020-21	2021-22	Variance
Matters lodged	20	13	-7 (-35%)
Matters concluded	21	16	-5 (-24%)

Commissioners Sitting Alone

A significant amount of the work of the Commission is undertaken by Commissioners sitting alone, dealing with industrial matters such as unfair dismissal and denied contractual benefits. Other substantial areas of work include convening compulsory conferences under s 44 of the IR Act, in relation to industrial disputes between unions and employers. These matters are often dealt with on an urgent basis.

Commissioners Sitting Alone – total matters

	2020-21	2021-22	Variance
Matters lodged	183	244	63 (34%)
Matters concluded	212	214	2 (1%)

Commissioner Sitting Alone – matters concluded

	2020-21	2021-22	Variance
Unfair dismissal applications	65	95	30 (46%)
Denial of contractual benefits claims	53	35	-18 (-34%)
Conference applications (s 44)	34	39	5 (15%)
Conferences referred for arbitration (s 44(9))	3	1	-2 (-67%)
Apprenticeship appeals	0	0	0 (0%)
Public Service applications	6	6	0 (0%)
Review of decisions of the Construction Industry Long Service Leave Payments Board	2	3	1 (50%)
Conferences to assist bargaining	0	0	0 (0%)
Enterprise Orders (s 42I)	1	0	-1 (-100%)
Orders arising from s 27	0	1	1 (100%)
Exemptions (awards)	4	0	-4 (-400%)
Order to suspend or revoke authority of rep s 49J(5)	0	1	1 (100%)
Unspecified Grounds	0	0	0 (0%)

Commissioner Sitting Alone - awards - matters concluded

	2020-21	2021-22	Variance
New Awards	3	0	-3 (100%)
Variation of Awards	8	10	2 (25%)
Joinders to Awards (s 38)	1	0	-1 (-100%)
Interpretation of Awards	0	1	1 (100%)
Cancellation of Award	0	0	0 (0%)

Commissioner Sitting Alone - agreements – matters concluded

	2020-21	2021-22	Variance
New Agreements	25	17	-8 (-32%)
Variation of Agreements	2	0	-2 (-200%)
Retirement from Industrial Agreement	2	5	3 (150%)
Interpretation of Agreement	2	0	-2 (-200%)
Orders as to terms of Agreement (s 42G)	1	0	-1 (-100%)
Cancellation Agreement	0	0	0 (0%)

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.

Section 29 matters – matters lodged

	2020-21	2021-22	Variance
Unfair dismissal	56	108	52 (93%)
Denial of contractual benefits	41	35	-6 (-15%)
Total	**97**	**143**	**46 (47%)**

Section 29 matters – matters concluded

	2020-21	2021-22	Variance
Unfair dismissal	65	95	30 (46%)
Denial of contractual benefits	53	35	-18 (-34%)
Total	**118**	**130**	**12 (10%)**

Public Service Arbitrator and Appeal Board

The Public Service Arbitrator and the Public Service Appeal Board are constituent authorities of the Commission, and they hear and determine a range of disputes and matters referred to them in the public sector. The Arbitrator's jurisdiction under s 80E of the IR Act is exclusive and extends to dealing with all industrial matters relating to a government officers, a group of government officers or government officers generally.

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.

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.

Difficulties continue with the availability of nominees for membership of Appeal Boards which can lead to delays in matters being able to be listed for hearing promptly. Chambers staff have had to follow up with both unions and employers about providing nominees. The Commission is regularly informed that it is difficult to find nominees who have sufficient understanding of industrial relations matters and who have enough time to attend hearings and give matters consideration. The Civil Service Association of Western Australia Incorporated, despite its best endeavours, has had difficulties finding nominees. In some cases, it has taken between four to nine weeks for nominations to the Appeal Board, despite regular follow up from chambers.

This year, multiple Appeal Board applications have been accompanied with applications that the proceedings be stayed pending the outcome of WA Supreme Court challenges to vaccination mandates. These stay applications and related appeals of decisions to dismiss employees have not been able to be dealt with in a timely way, because of the delays forming the Appeal Boards.

In Previous Annual Reports, comments have been made about the complexities of the Appeal Board's procedures. Ongoing problems have been identified, arising from the confusing and complex jurisdiction of the constituent authorities, which has continued to have practical implications for parties and the Commission. There have been many occasions over the reporting year where employees have either filed applications challenging the termination of their employment in both the Appeal Board's and the Commission's jurisdiction, to 'cover their bases' or, have filed in one jurisdiction, and then had that jurisdiction challenged. In the latter category, employees often concede the jurisdictional objection, but by the time the objection is taken, they are out of time for filing an application in the correct jurisdiction. The need to obtain an extension of time can cause additional costs to the parties and delays in resolution of matters.

The conclusion that the witness summons procedure is not available in Appeal Board proceedings (*Spasojevic v Speaker of the Legislative Assembly* PSAB 31 of 2020 – see commentary in Decisions of interest below) has undesirable consequences. Apart from the obvious limitation this places on the Appeal Board in determining matters on their merits, it has further practical implications in the conduct of hearings. If a witness attends a hearing to give evidence voluntarily, and it emerges from their evidence that they are in possession of documents which are relevant to the appeal, they cannot be compelled to produce those documents. The position also has implications for how the Appeal Board should apply the rules in *Brown v Dunn* and *Jones v Dunkel*, complicating how the Appeal Board is to assess the evidence before it in the process of making factual findings.

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 1 – Members of the Public Service Appeal Board* have served as members of Appeal Boards on the nomination of a party under s 80H of the IR Act.

Public Service Arbitrator – total matters

	2020-21	2021-22	Variance
Matters lodged	74	109	35 (47%)
Matters concluded	104	88	-16 (-15%)

Public Service Arbitrator – matters concluded

	2020-21	2021-22	Variance
Conference applications (s 44)	29	19	-10 (-34%)
Conferences referred for arbitration (s 44(9))	4	3	-1 (-25%)
Appeals to the Public Service Appeal Board	33	47	14 (42%)
Reclassification appeals	11	4	-7 (-64%)
Conferences to assist bargaining	1	3	2 (200%)
Enterprise orders (s 42I)	0	0	0 (0%)
Orders pursuant to s 80E	0	0	0 (0%)
Unspecified grounds	0	0	0 (0%)

Public Service Arbitrator - awards - matters concluded

	2020-21	2021-22	Variance
New Awards	0	0	0 (0%)
Variation of Awards	19	0	-19 (-100%)
Joinders to Awards (s 38)	0	0	0 (0%)
Interpretation of Awards	1	0	-1 (-100%)
Cancellation of Awards	0	0	0 (0%)

Public Service Arbitrator - agreements - matters concluded

	2020-21	2021-22	Variance
New Agreements	5	11	6 (120%)
Variation of Agreements	0	0	0 (0%)
Retirement from Industrial Agreement	0	0	0 (0%)
Interpretation of Agreement	0	1	1 (100%)
Orders as to terms of Agreement (s 42G)	1	0	-1 (-100%)
Cancellation of Agreements	0	0	0 (0%)

Occupational Safety and Health Tribunal and Work Health and Safety Tribunal

The Work Health and Safety Tribunal (WHS Tribunal) commenced operation on 31 March 2022 under the *Work Health and Safety Act 2020.* It replaced the former Occupational Safety and Health Tribunal (OSH Tribunal) established under the *Occupational Safety and Health Act 1984.*

Commissioner Walkington was appointed to constitute the OSH Tribunal under s 51H of the *OSH Act* and s 16(2A) of the *IR Act* until 31 March 2022. Since 1 April 2022, Commissioner Emmanuel has constituted the WHS Tribunal, under Schedule 1 clause 27(1) of the *WHS Act* and s 16(2A) of the *IR Act.* Her term continues until 31 March 2023.

The WHS Tribunal assists in the resolution of workplace safety and health issues under Western Australia's occupational safety and health laws. With the above legislation, new jurisdiction and an increased ability to conciliate disputes has been established. An example of new matters that the Tribunal now deals with is applications to extend the deadline for WorkSafe inspectors to decide a work health and safety issue under s 82A of the WHS Act. Section 82 of the WHS Act sets a deadline of two days for a WorkSafe inspector to decide a work health and safety issue, several of these applications have been made to the Tribunal.

Occupational Safety and Health Tribunal – total matters

	2020-21	2021-22	Variance
Matters lodged	10	9	-1 (-10%)
Matters concluded	15	7	-8 (-53%)

Occupational Safety and Health Tribunal – matters concluded by referral from the:

	2020-21	2021-22	Variance
Occupational Safety and Health Act 1984	14	7	-7 (-50%)
Mines Safety and Inspection Act 1994	1	0	-1 (-100%)
Petroleum (Submerged Lands) Act 1982	0	0	0 (0%)

Work Health and Safety Tribunal – total matters

	2020-21	2021-22	Variance
Matters lodged	-	3	-
Matters concluded	-	2	-

Work Health and Safety Tribunal – matters concluded

	2020-21	2021-22	Variance
Disqualification of health and safety representatives – s 65(1)	-	0	-
Extension of deadline for making decision resolving issue – s 82A	-	2	-
Issue about continuity of engagement of worker – s 89A	-	0	-
Civil proceedings in relation to discriminatory or coercive conduct – s 112	-	0	-
Application for external review – s 229	-	0	-

Police Compensation Tribunal

The Tribunal is established under the *Police Act 1892*, and is constituted by a Commissioner, to deal with disputes arising from the scheme, in relation to degrees of permanent impairment; failure to qualify for compensation for permanent total incapacity; and the amount of compensation for permanent total incapacity for police officers and Aboriginal Police Liaison Officers who have been medically retired due to a work related injury.

No applications of this nature were made to the Tribunal during the reporting year.

Road Freight Transport Industry Tribunal

The Tribunal is established under the *Owner-Drivers (Contracts and Disputes) Act 2007* (the OD Act). It 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.

Commissioner Emmanuel and Senior Commissioner Cosentino have constituted the Tribunal over the reporting year.

As a significant example of the work of the Tribunal, for the past 18 months, the Tribunal has been assisting with the resolution of a complex dispute about the calculation of flagfall rates in accordance with a series of owner-driver contracts between 28 applicants and one respondent.

The applicants have identical contracts in place with the respondent and many have had similar contracts in place with the respondent for at least the last ten years. The applicants argue that across the 28 applications, the applicants have been paid the incorrect flagfall rate, resulting in underpayments of nearly $4 million. The respondent agrees that it paid the applicants a flagfall rate that was lower than that set out in the contracts, but the respondent says that it paid a higher amount in relation to the other components of the overall rate paid to the applicants. The respondent argues that the applicants have not been underpaid but rather they have collectively been paid $7 million more than what they are entitled to under the owner-driver contracts.

The Tribunal has been facilitating negotiations between the parties through conferences and correspondence. The parties have indicated that they anticipate that further negotiation and assistance from the Tribunal may enable them to reach a resolution.

Road Freight Transport Industry Tribunal – total matters

	2020-21	2021-22	Variance
Matters lodged	32	1	-31(-97%)
Matters concluded	3	3	0 (0%)

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 reporting year. There have been no employer-employee agreements lodged since 2016.

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.

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.

Appeals from Removal - Police Officers, Prison Officers and Youth Custodial Officers

Appeals from Removal – total matters

	2020-21	2021-22	Variance
Matters lodged	3	5	2 (67%)
Matters concluded	2	5	3 (150%)

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 either the Chief Commissioner or the Senior Commissioner. If the Commission finds the officer's removal to be harsh, oppressive or unfair, the Commission may order the removal to be of no effect. Alternatively, an order of compensation may be made.

No new appeals were referred to the Commission during the reporting year.

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*. The appeal provisions under the *Prisons Act* are very similar to those for police officers under the *Police Act*.

Five new appeals were referred to the Commission during the reporting year.

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*. The appeal provisions and the Commission's powers are the same as those under the *Prisons Act*

No appeals of this nature were referred to the Commission during the reporting year or in any other reporting year.

The Chief Commissioner

As well as being able to exercise the jurisdiction of a Commissioner, preside on the Full Bench and the Commission in Court Session, the Chief Commissioner has jurisdiction to deal with matters relating to the observance of the rules of registered organisations. The Chief Commissioner is also responsible for the overall administration of the Commission and administrative matters concerning Commissioners.

Chief Commissioner – total matters

	2020-21	2021-22	Variance
Matters lodged	5	11	6 (120%)
Matters concluded	7	9	2 (33%)

Chief Commissioner - matters concluded

	2020-21	2021-22	Variance
Organisation rules – s 66	6	4	-2 (-33%)
Employee organisations, orders as to whom they represent – s 72A(6)	0	0	0 (0%)
Registrar consultations – s 62	1	5	4 (400%)

The Commission in Court Session

The Commission in Court Session hears and determines major industrial matters, including the annual State Wage Order case. Additionally, the Commission in Court Session deals with the registration and cancellation of registered organisations, and certain applications to amend the rules of an organisation.

Commission in Court Session - total matters

	2020-21	2021-22	Variance
Matters lodged	9	6	-3 (-33%)
Matters concluded	10	6	-4 (-40%)

Notable Commission in Court Session matters in the reporting year comprised 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 Commission in Court Session handed down its decision in the 2022 State Wage Case on 23 June 2022. The Commission increased the State Minimum Wage by $40.90 per week, which brings the State Minimum Wage to $819.90 per week from 1 July 2022. The Commission also increased award rates up to the C10 classification rate by $40.90 per week, and increased rates of pay for award classifications at the C10 classification and above by 4.65%. In its decision, in balancing the various factors required to be considered, the Commission in Court Session noted the significant increase in the cost of living and the impact of this on the low paid.

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 ([2022] WAIRC 00259; (2022) 102 WAIG 427). They increased by 5.05% to reflect the increase in the Consumer Price Index for Perth (excluding housing) for the year to March 2022. The increase was effective from 1 July 2021.

The Location Allowances General Order affects 82 awards.

Organisations matters

The Commission in Court Session, on the application of the Registrar, issued an order cancelling the registration of the Electrical and Communications Association of Western Australia (Union of Employers) on the grounds that it was defunct. Under s 73(12) of the IR Act, the Commission in Court Session must cancel the registration of an organisation, if it is satisfied that certain criteria are met. On the evidence before the Commission these requirements were satisfied in this case.

COVID-19 General Order

In response to the COVID-19 outbreak in Western Australia, the Commission in Court Session issued an order reinstating provisions of the 2020 COVID-19 General Order, in relation to the taking of unpaid leave, with amendments to reflect the changed isolation requirements.

In April 2020, the Commission in Court Session issued the COVID-19 Flexible Leave Arrangements General Order under s 50 of the *Industrial Relations Act 1979* (WA). The 2020 General Order

contained provisions for unpaid pandemic leave, as well as provisions for the taking of annual leave at half pay. The 2020 General Order ceased to have effect on 31 March 2021.

On 2 March 2022, in anticipation of increasing COVID-19 cases in WA, the Honourable Minister for Industrial Relations made an application for a new General Order to apply to private sector employees. The Minister sought to reinstate the unpaid pandemic leave provisions contained in the 2020 General Order. The reasons for the Minister's application included:

- Seeking to address the regulatory gap for private sector State system employees who are required to isolate due to COVID-19 and may lack access to suitable leave entitlements;
- Supporting public health objectives; providing clarity for many employers, and protection for employee entitlements; and to be consistent with the entitlement to unpaid pandemic leave for national system employees covered by certain modern awards.

The Minister proposed amendments to the provisions of the 2020 General Order, the effect of which enables an employee to take up to two weeks' unpaid pandemic leave, as a cumulative entitlement, over more than one period, subject to the total period of unpaid pandemic leave taken not exceeding two weeks. An amendment was also made to make it clear that the leave available under the proposed General Order is 'unpaid pandemic leave'.

The Commission in Court Session considered that reinstatement of the provisions with amendments was consistent with the objects of the IR Act. A General Order was issued and will operate until 30 September 2022. It may be extended on application by a party or at the Commission's initiative.

The Full Bench

The Full Bench is the appellate bench of the Commission. The Full Bench hears and determines appeals from decisions of the Commission, the Public Service Arbitrator, the Work Health and Safety Tribunal, the Road Freight Transport Industry Tribunal, the Police Compensation Tribunal and the Industrial Magistrates Court.

It is very pleasing to note the finalisation rate of all appeals, of nearly 90% within six months. This period includes the time from filing an appeal, procedural steps in filing appeal books, listing the appeal for hearing, the determination of any interlocutory applications, hearing the appeal and delivering the decision.

Full Bench – total appeals

	2020-21	2021-22	Variance
Appeals lodged	8	14	6 (75%)
Appeals concluded	9	8	-1 (-11%)

Full Bench - on-time matter processing of appeals

	2020-21	2021-22
Appeals finalised within 6 months	66%	88%
Appeals finalised between 6 and 12 months	33%	12%
Appeals finalised >12 months	0%	0%

Full Bench – appeals concluded from decisions of the:

	2020-21	2021-22	Variance
Commission – s 49	5	4	-1 (-20%)
Industrial Magistrate – s 84	3	3	0 (0%)
Public Service Arbitrator – s 80G	0	0	0 (0%)
Road Freight Transport Industry Tribunal – s 43 *Owner-Drivers (Contracts and Disputes) Act 2007*	0	0	0 (0%)
Occupational Safety and Health Tribunal – s 51I *Occupational Safety and Health Act 1984*	1	1	0 (0%)
Work Health and Safety Tribunal – s 29 *Work Health and Safety Act 2020*	-	0	-
Police Compensation Tribunal – s 33ZZD *Police Act 1892*	-	0	-

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

	2020-21	2021-22	Variance
Matters lodged	1	4	3 (300%)
Matters concluded	0	4	4 (400%)

The Industrial Appeal Court

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

Industrial Appeal Court – total appeals

	2020-21	2021-22	Variance
Appeals lodged	3	3	0 (0%)
Appeals concluded	8	1	-7 (-188%)

Industrial Magistrates Court

The Industrial Magistrates Court enforces Acts, awards, industrial agreements, and orders in the State industrial relations system. The Industrial Magistrates 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 Industrial Magistrates Court Registry received a total of 169 claims that fell within the Court's general jurisdiction during the reporting year.

Industrial Magistrates Court – total matters

	2020-21	2021-22	Variance
Matters lodged	271	169	-102 (-38%)
Matters concluded	271	169	-102 (-38%)

Industrial Magistrates Court – applications concluded

	2020-21	2021-22	Variance
Breach of the *Industrial Relations Act 1979* and/or related Industrial Instruments	10	18	8 (80%)
Breach of the *Fair Work Act 2009* and/or related Industrial Instruments	90	58	-32 (-36%)
Breach of the *Construction Industry Portable Paid Long Service Leave Act 1985* - s 83E	81	60	-21 (-26%)
Breach of the *Minimum Conditions of Employment Act 1993* and/or related Industrial Instruments	1	1	0 (0%)
Breach of the *Long Service leave Act 1958* and/or related Industrial Instruments	8	4	-4 (-50%)
Breach of multiple Acts and/or Industrial Instruments	32	16	-16 (-50%)
Small Claims – s 548 *Fair Work Act 2009*	47	12	-35 (-74%)
Enforcement of Order – s 83	2	0	-2 (-100%)
Total	**271**	**169**	**-102 (-38%)**

During this reporting year, 59 claims proceeded to at least one pre-trial conference. Forty nine claims were settled at a pre-trial conference or prior to a trial.

With the capacity to now make dual appointments of qualified Commissioners as Industrial Magistrates, those appointed will add to the resourcing of the court and assist in managing its workload.

REGISTRY AND COMMISSION SUPPORT SERVICES

Industrial agents

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).

As previously noted in Annual Reports, given the limited criteria for registration of industrial agents and concerns about the conduct and competency of some industrial agents, 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 prior Reviews of the IR Act have

recommended, are needed. Additionally, there has been an increase in the number of unregistered industrial agents and unregistered unions attempting to represent parties, particularly in relation to disputes about mandatory vaccination policies.

One change of significance resulting from the amendments to the IR Act which came into effect on 20 June 2022, is the prohibition of legal practitioners who are disqualified under the *Legal Profession Act 2008*, from being registered industrial agents.

During the reporting year, five new industrial agents were registered.

Industrial Agents - registrations

	2020-21	2021-22	Variance
Total number of agents registered as body corporate	22	26	4 (18%)
Total number of agents registered as individuals	15	15	0 (0%)
Total	**37**	**41**	**4 (11%)**

Industrial organisations

Industrial organisations – Registered as at 30 June 2022

	Employee organisations	Employer organisations
Number of organisations	33	11
Aggregate membership	177,562	3,579

Rule alterations by Registrar

The Registrar may, after consulting with the Chief Commissioner, issue a certificate under the IR Act authorising certain alterations to the rules of a registered organisation.

During the reporting year, 5 alterations to rules were lodged with the Registrar.

Right of entry

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

- To hold discussions with employees who wish to participate in discussions; and
- To request the inspection and take copies of relevant documents, and inspect a worksite or equipment, for the purpose of investigating any suspected breach of:
  - the IR Act; or
  - the *Long Service Leave Act 1958*; or
  - the *Minimum Conditions of Employment Act 1993*; or
  - the *Occupational Safety and Health Act 1984* (now the *Work Health and Safety Act 2020*); or
  - the *Mines Safety and Inspection Act 1994* (now the WHS Act); or
  - an award or order of the Commission; or
  - an industrial agreement; or
  - an employer-employee agreement.

Right of entry authorisations

	2020-21	2021-22	Variance
Authorisations issued	98	64	27 (37%)
Total number of authorisations	338	321	-17 (-5%)
Number of authorisation holders who have had their authorisation revoked or suspended by the Commission	0	0	0 (0%)
Number of authorisation holders who have had their authorisation revoked by the Registrar	79	105	26 (33%)

Award reviews

The review of awards in the private sector in accordance with s 40B of the IR Act commenced in 2020 and continued throughout the annual 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 *Minimum Conditions of Employment Act 1993*;

(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 and include the:

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

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 section 50 parties and relevant award parties commenced work on drafting amendments to the Metal Trades (General) Award in 2021. The Department of Mines, Industry Regulation and Safety has assisted the award review process through the provision of model clauses for the award provisions that required updating. The issues include annual leave, bereavement leave, carer's leave, parental leave, public holidays and sick leave. The parties' approach has been cooperative

and constructive, culminating in the award being updated by orders that were made by the Commission in February 2021.

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 to navigate their way through the Commission's jurisdiction.

The Commission's pro bono scheme

Several law firms and industrial agents continue to provide assistance and advice to particularly vulnerable employees and employers, to deal with matters before the Commission. The types of assistance provided range from advice on the merits of the claim and preparation of a written submission, to representation at a conciliation conference. Those law firms and industrial agents providing pro bono assistance are referred to in Appendix 2.

Two applicants were referred to the pro bono scheme during the year, one of which was an appellant for a Full Bench appeal. The pro bono scheme continues to be an important initiative in enabling access to justice. Thanks are given to those law firms and industrial agents who continue to participate in the scheme.

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

Circle Green Community Legal and JCLC

During the reporting year, 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 can provide direct assistance to employees coming before the Commission, the JCLC has offered to help 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.

Eight sessions were held over the reporting year, with a total of 16 attendees.

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.

COMMUNITY ENGAGEMENT

Professional development

Pandemic restrictions still impacted on the capacity of Commissioners to take part in professional development activities in the reporting year. However, some professional development was undertaken including the 2021 Council of Australian Tribunals New South Wales Online Conference held in November and the 2022 Council of Australian Tribunals National Conference (online) held in June. Commissioners also attended a programme conducted by the Western Australian Equal Opportunity Commission and a presentation from Ms Alexander Shehadie of MAPN Consulting, in relation to sexual harassment and bullying.

Commissioners also took part in programmes conducted by the Resolution Institute in relation to mediation, adjudication and determination writing.

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 year.

Members of the Commission also presented at seminars and conferences:

- The Chief Commissioner presented at the Law Society of Western Australia CPD seminar on 'Persuasive Advocacy in Industrial Tribunals' in October 2021.
- Senior Commissioner Cosentino presented at the Piddington Society Mediation programme in July 2021 and February 2022, and at the UnionsWA Industrial Officers and Lawyers Network Conference in December 2021.
- Commissioner Emmanuel presented at the UWA Policy Institute in November 2021, the UnionsWA Industrial Officers and Lawyers Network Annual Conference in December 2021 and the WA Bar Association spring CPD series in October 2022.

Work experience at the Commission

The Commission continues to provide 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 Magistrates Court.

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

DISPUTES AND DECISIONS OF INTEREST

Disputes of interest

The prisons and fire and emergency services portfolios have been particularly busy in this reporting year, especially in relation to disputes brought under s 44 of the IR Act.

Prisons

In the reporting year, 15 disputes were referred to the Commission under s 44 of the IR Act by the Western Australian Prison Officers' Union of Workers. These disputes related to rostering, staffing levels, overtime, allowances and entitlements, leave approvals, disciplinary investigation processes and COVID-19 policy implementation. The Western Australian Prison Officers' Union of Workers has also filed two applications for interpretation of their industrial agreement, which are to be heard.

Although there has been a large volume of applications, many have been able to be resolved by agreement. Often, the Commission has convened multiple conferences which has allowed the union and employer to engage in ongoing discussions about the variety of matters in dispute.

Fire and Emergency Services

The impact of the COVID-19 pandemic on the State's fire and emergency services was evident throughout the discussions held across the seven s 44 disputes filed by the United Professional Firefighters Union of Western Australia. Disputes related to the location of appliances, overtime, rostering, mandatory vaccination and health and wellness. Most of the disputes filed required multiple conferences. Discussions are ongoing in relation to several disputes however, none have been referred for hearing and determination at this stage.

Bargaining

In the reporting year, Commissioner Emmanuel has dealt with bargaining disputes in the portfolios of police, public transport and health.

Police

Two conferences were held in relation to bargaining for the 2021 Police industrial agreement. The negotiations broadly related to the implementation of the two rest days that the Public Service Arbitrator had ordered be included in the existing industrial agreement and discussions about police officers' right to disconnect. The parties were ultimately able to reach an agreement, and the *Western Australia Police Force Industrial Agreement 2021* was registered on 2 December 2021.

Public Transport

The bargaining dispute in relation to public transport related to rostering provisions that were to be included in the new industrial agreement. The dispute was resolved at conciliation and the *Public Transport Authority Railway Employees (Trades) Industrial Agreement 2021* was registered on 16 June 2022.

Health

The bargaining process in relation to negotiations for a replacement agreement for the *WA Health System – Medical Practitioners – AMA Industrial Agreement 2016* was extensive and underscores the importance of conciliation as a bedrock of the Commission's jurisdiction.

Commissioner Emmanuel convened 13 conferences in this application. Key issues for the parties included whether senior doctors should continue to be employed on 5 year maximum term contracts and how the leave entitlements of doctors in training were dealt with as those doctors progressed in the public health system. Following extensive conciliation, the parties reached an agreement, and that final industrial agreement has been filed for registration.

It is very pleasing to see a successful outcome in this dispute.

Decisions of interest

Industrial Appeal Court appeals

Statutory interpretation of the word 'site' considered, as Industrial Appeal Court dismisses appeal

The Industrial Appeal Court has clarified the meaning of the phrase 'on a site' and the word 'site' in the definition of 'construction industry' in s 3(1) of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) (the Act). The IAC dismissed the appeal, upholding the decision of the Commission at first instance and Full Bench on appeal, which related 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 Act.

At first instance, the appellant, who provides maintenance services under contract at established operational locations such as mines and processing plants, argued that it should not be obligated to register as an employer with the Board because they do not engage employees in the 'construction industry'. The principal issue raised in the proceedings at first instance was whether the appellant's employees, who perform work on its clients' premises, do so 'on a site' for the purposes of the definition of 'construction industry' in s 3(1) of the Act.

Chief Commissioner Scott concluded that the work performed by the appellant's employees was performed 'on a site' within the definition of 'construction industry'. Scott CC rejected the appellant's principal contention that 'on a site' and 'on site' where used in the Act, means a 'building site' or a 'construction site'. She held that on its proper construction, the words 'on a site' meant at a place at which any of the activities of sub pars (a)(i) through to (xvii) of the definition of 'construction industry' were being performed. The application was dismissed.

The matter was taken on appeal to the Full Bench of the Commission. Senior Commissioner Kenner delivered the primary reasons, with Commissioners Matthews and Walkington agreeing.

The Full Bench determined that no error in law had occurred in the decision reached by Scott CC. The Full Bench concluded that Scott CC had regard to the context and purpose of the Act, and correctly concluded that the statutory text must prevail in the case of any inconsistency. The appeal was dismissed.

The matter was taken on appeal to the Industrial Appeal Court. Buss and Murphy JJ considered that the appellant's proposed meaning of the word site was not justified by the text, context, or purpose of the Act, and that it left no scope for the word 'site' to include an area on which building or infrastructure works are already situated. Their Honours held that it was further inconsistent with the effect of subpar (xvii) of par (a) of the definition of 'construction industry' in s 3(1). Their Honours further held that the phrase 'construction industry' has no fixed ordinary meaning, and that the appellant's reliance on its industry, did not clarify the proper construction of the word 'site' in par (a) of s 3(1).

Kenneth Martin J considered that the meaning of the word 'site' that was contemplated by Scott CC and the Full Bench on appeal was open in the circumstances, and that the alternative meaning put forward by the appellant was not supported. His Honour considered the five reasons that the appellant provided for their preferred interpretation, finding that the appellant's suggested meaning was put forward to suit the appellant's economic circumstances and that it was 'ill-fitting, measured against the text of the statutory definition used by the Act'.

Kenneth Martin J held that Scott CC, in the decision at first instance, and Kenner SC, in the decision of the Full Bench, were correct in their interpretation of the word 'site' and the phrase 'on a site'. His Honour held that the word was used as a reference to the activities in the preface of subpar (a), as they are carried on at the places as identified under (i) to (xviii) in the second limb of subpar (a) of the definition of 'construction industry'. It was not limited to merely a reference to a construction site or building site. The appeal was dismissed.

Programmed Industrial Maintenance Pty Ltd -v- The Construction Industry Long Service Leave Payments Board [2021] WASCA 208

Full Bench appeals

Jurisdiction of Full Bench to review federal decisions of Industrial Magistrate and cost order made

In 2019, the appellant commenced proceedings (the first proceedings) before the Industrial Magistrates Court (IMC), alleging the respondent failed to comply with federal and State industrial instruments and failed to pay overtime. The proceedings were dismissed by her Honour Scaddan IM in December 2019. The appellant appealed this decision to the Full Bench of the Commission (the first appeal). In August 2020, the Full Bench dismissed the appeal in that matter, on the basis that the appellant's claim before the IMC in the first proceedings, the subject of the appeal, involved the exercise by the court of its jurisdiction under the *Fair Work Act 2009* (Cth) (FW Act), and the Full Bench did not have jurisdiction to hear the matter.

In September 2020, the appellant commenced further proceedings (the second proceedings) before the IMC under the FW Act. The respondent made an application to the court that the appellant's claim at first instance be struck out. The Industrial Magistrate concluded that the applicant's claims had either been, or ought to have been, litigated before the court in the first proceedings, and dismissed the claim. On an application for costs by the respondent, the Industrial Magistrate did not award costs, finding that the proceedings before the court were not instituted 'vexatiously or without reasonable cause'. However, her Honour, Hawkins IM, did observe that the appellant came 'perilously close'.

The appellant appealed the decision of the second proceedings to the Full Bench under s 84 of Act (the second appeal). The Full Bench listed the appeal for hearing to show cause why it should not be dismissed for want of jurisdiction.

The appellant claimed that, as the court in the second proceedings dismissed his claim in the exercise of its powers to strike out the application under the *Magistrates Court (Civil Proceedings) Act 2004* (WA) and the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA), being State laws, that the Full Bench had jurisdiction to hear the appeal. The respondent contended that the appeal should be dismissed for want of jurisdiction, contending that the first appeal made it clear that the only avenue of appeal from a decision of the court exercising jurisdiction under the FW Act, is to the Federal Court. The respondent again made an application for costs.

The Full Bench considered that, under s 565 of the FW Act, an appeal from the court when 'exercising jurisdiction' under the FW Act, can only be brought in the Federal Court. The Full Bench considered that a while the IMC may exercise its various procedural and other powers under State legislation, this does not alter the law that the jurisdiction exercised by the court is federal only.

The respondent sought an order for costs. The Full Bench considered that given the procedural history, the appellant, while self-represented, was no stranger to the exercise of State and federal jurisdiction by the IMC and Full Bench. The appellant had acknowledged in his notice of appeal in the second appeal, that the Full Bench had no jurisdiction in relation to an appeal from the court exercising federal jurisdiction under the FW Act.

The Full Bench considered that this was one of the 'very rare occasions' when a costs order in favour of the respondent should be made. The Full Bench dismissed the matter for want of jurisdiction and ordered that the appellant pay costs to the respondent in the sum of $5,150.00.

Adrian Manescu v Baker Hughes Pty Limited [2021] WAIRC 00558

Full Bench clarifies penalty provisions

The Full Bench has unanimously found that the $2,000 maximum penalty in s 83(4) of the IR Act for the contravention of industrial instruments should apply to each individual contravention rather than the maximum applying regardless of the number of contraventions. The appellant, an industrial inspector, appealed against the decision of the Industrial Magistrate on the following grounds:

1. The learned Industrial Magistrate made an error of law in holding that on the proper construction of s 83(4)(a) of the IR Act, the maximum penalty that can be imposed by the Court for multiple proven contraventions of an instrument to which s 83 applies is $2,000, regardless of the number of proven contraventions;

2. The penalty of $1,700 for the 282 proven contraventions imposed by the learned Industrial Magistrate was manifestly inadequate; and

3. The learned Industrial Magistrate made an error of law in holding that the costs incurred by the appellant for a process server and Landgate search fees were costs 'for the services of any … agent' of the appellant within the meaning of s 83C(2) of the IR Act.

The learned Industrial Magistrate considered that in the context of s 83(1), which her Honour viewed as contemplating multiple contraventions or failures, because of the expression

'contravenes' and 'fails' in that subsection, s 83(4) should be construed as referable to multiple contraventions attracting a maximum penalty of $2,000. Her Honour, therefore, imposed a single penalty for the 282 admitted contraventions.

The Full Bench considered this approach to the construction of s 83(4) was wrong, having regard to the natural and ordinary meaning of the words in the section. The Full Bench considered the alternative and correct construction, that the maximum applied to each contravention, was consistent with the objects of the enforcement regime of the IR Act and the context generally including the legislative history. The Full Bench reconsidered the penalty to be imposed, including the application of course of conduct principles. The Full Bench assessed the individual penalties for each of the 282 contraventions and considered whether any adjustment should be made to ensure that, to the extent of any overlap between separate contraventions that can be considered part of a single course of conduct, there is no double penalty imposed. The Full Bench was satisfied that the contraventions were part of a single course of conduct, and as such, it was appropriate to make an adjustment, but as a separate stage after individual penalties are assessed.

The Full Bench upheld the appeal and set aside the decision of the Industrial Magistrates Court, substituting an increased penalty. The Full Bench also confirmed that the disbursements claimed by the industrial inspector were recoverable costs and not excluded from recovery as costs of an 'agent'.

Janine Marie Callan v Garth Douglas Smith [2021] WAIRC 00216

Single Commissioner matters

Jurisdiction -whether salary exceeded the prescribed amount

Mr Stewart was a helideck operator for UGL. He made a claim to the Commission for benefits he says were denied under his contract of employment. UGL objected to the Commission hearing the matter because it said that the applicant's salary exceeds the prescribed amount in s 29AA(4) of the IR Act, in circumstances where the applicant was paid a Site Uplift Allowance.

The Commission heard and determined UGL's jurisdictional objection on the papers. The Commission agreed with the reasoning of Beech CC in ***Budimlich v J-Corp Pty Ltd*** [2014] WAIRC 00303 that the word 'salary', in the context of s 29AA(4) of the IR Act, means 'a fixed payment made periodically to a person as compensation for regular work.' In those circumstances, the Commissioner found that Site Uplift Allowance did not form part of Mr Stewart's salary and that his salary did not exceed the prescribed amount.

UGL's jurisdictional objection was dismissed.

Stewart v UGL Operations & Maintenance Pty Ltd [2021] WAIRC 00474

Employee or independent contractor

Mr Bhatia is a truck driver. He argued that the respondent, who trades as Allwest Haulage, owed him $4,941.49 arising out of a contract of employment between them.

Allwest Haulage did not engage with the Commission in relation to this matter and did not appear at the conciliation conference or hearings listed in this matter. From its limited contact with the Commission, it seemed that Allwest Haulage disputed the claim because it said Mr Bhatia was a sub-contractor, not an employee.

The Commission considered the two recent High Court decisions dealing with the question of whether a person is an employee or independent contractor but found that the facts of this matter were very different to those in the High Court decisions. The Commissioner found that the written contract between the parties was far from comprehensive and that from the evidence, it was clear Mr Bhatia was an employee, not a contractor.

The Commission went on to find that the benefits Mr Bhatia claimed, including payment for hours worked, a food allowance and payment for an air ticket from Perth to Port Hedland, all arose under his contract of employment and that they had been denied. The Commission ordered Allwest Haulage to pay Mr Bhatia $4,941.49.

Bhatia v Dack WA Pty Ltd [2022] WAIRC 00252

Termination of employment by effluxion of time

Ms Haimona's former employer objected to the Commission dealing with her unfair dismissal application on two jurisdictional grounds. The first ground was that there was no 'dismissal' by it of the employment. The second objection was that the application was filed outside the 28 day period for filing unfair dismissal claims. The employer's position was that Ms Haimona was appointed under a fixed term contract for a specified period, which ended with the effluxion of time.

Under the relevant Industrial Agreement, Ms Haimona's employment had to be categorised as either casual or fixed term, but it could not be in both categories. As she was engaged and paid on a casual basis, her employment was casual, thus excluding the possibility that it was fixed term. The Commission found that the effect of s 114 of the IR Act is that the contractual fixing or limiting of the time for the end of Ms Haimona's contract was of no effect, being inconsistent with the Industrial Agreement.

Accordingly, the employment did not end by the effluxion of time, and there was a dismissal. The first jurisdictional objection therefore failed. The Commission considered it to be in the interests of justice to extend the time for Ms Haimona to bring her unfair dismissal application.

Haimona v WACHS Fitzroy Crossing Health [2021] WAIRC 00442

No jurisdiction to deal with a claim based on unjust enrichment

Mr Rohan worked for S&DH Enterprises as an Electrician, at the Kemerton Lithium Plant located north-east of Bunbury. To get to and from site, Mr Rohan was required by both the owner of the Kemerton Lithium Plan and his employer to commute via a bus operated by his employer, from a transport depot which was a 20 minute drive from the Kemerton Lithium Plan.

S&DH Enterprises Pty Ltd paid Mr Rohan a 'Composite Hourly Rate' for the ordinary hours he worked at the Kemerton Lithium Plant, and an overtime rate for hours he worked outside of ordinary hours at the Kemerton Lithium Plant. However, it did not pay him in respect of his time spent travelling to and from the transport depot and the Kemerton Lithium Plant.

Mr Rohan claimed that he was entitled under the terms of his employment contract to be paid overtime for this time spent commuting to and from the transport depot, on the basis that such time was time that he was at work and working for the purpose of the contract. His claim was brought under section 29(1)(b)(ii) of the IR Act, which enables an employee to refer a matter

concerning denied contractual benefits to the WAIRC. He claimed in the alternative for reasonable remuneration for such time, on the basis of unjust enrichment.

The Commission found that on a correct construction of the contract terms, work commenced when Mr Rohan was at the Kemerton Lithium Plan and finished when he left that site. As a result, his time on the bus was not time 'worked' for the purpose of the contract and did not attract overtime payments. This conclusion was informed by the context of the relevant contract clauses, including the contract's structure, language and interaction of other clauses.

The Commission also found that it did not have jurisdiction to determine the alternative claim based on unjust enrichment, because such claim was not a claim of denied contractual benefits. The Commission distinguished the case from situations where parties claim a remedy for a denied contractual benefit calculated on the basis of quantum meruit. As a remedy for denied contractual benefits, that is within the Commission's powers. Rather, this claim was based on the principles of unjust enrichment, which is an entirely separate type of claim to a claim for a denied contractual benefits, being a claim that is outside the four corners of the contract.

The Commission's findings in respect of the unjust enrichment claim are the subject of an appeal to the Full Bench.

Rohan v S&DH Enterprises Pty Ltd [2022] WAIRC 00196

Public Service Arbitrator

Claim based on promissory estoppel succeeds

The Australian Medical Association (WA) Incorporated (AMA) filed a s 44 dispute in relation to two of its members who are Senior Medical Practitioners at the Sexual Assault Resource Centre (SARC). The parties were in dispute about the rate of pay for the two medical practitioners. After five conciliation conferences over several years, the AMA referred the matter for hearing and determination.

Both medical practitioners were classified as Senior Medical Practitioners under the *WA Health System – Medical Practitioners – AMA Industrial Agreement 2016* (Industrial Agreement). In this agreement, the pay scale for Senior Medical Practitioners has a maximum of Level 18.

In February 2007, senior medical practitioners who worked at SARC began to be paid according to a new pay scale (Pay Scale), which provided for senior medical practitioners to progress beyond Level 18 according to caseload and academic milestones. In accordance with the Pay Scale, the AMA's members completed further high level postgraduate study and were paid at the top level of the Pay Scale, Level 21.

In April 2016, after both medical practitioners had obtained Masters degrees and become Founding Fellows within the Faculty of Clinical Forensic Medicine, a Health Service senior executive approved contract variations which allowed the employees to be paid at Level 23. In April 2017, the Health Service informed the medical practitioners that the Level 23 contract variation would be rescinded and all new contracts would align with the pay scale set out in the Industrial Agreement.

The AMA sought a declaration that the Health Service is bound by the Pay Scale (which provided payment up to Level 21) and argued that the Health Service is estopped from unilaterally terminating the Pay Scale.

In her written reasons for decision, the Arbitrator considered the principles of promissory estoppel as set out by Quinlan CJ and Vaughan JA in *Wilson v Arwon Finance Pty Ltd* [2020] WASCA 137. The Arbitrator found that the Pay Scale amounted to a representation by the Health Service that the SARC doctors would progress up the pay levels of the Pay Scale as they achieved academic and/or case load milestones.

The Arbitrator considered that the senior executive who approved the above industrial payment had actual authority to do so. The Arbitrator noted, however, that this actual authority may not be necessary for an estoppel to arise.

By approving and applying the Pay Scale, the Arbitrator concluded that the Health Service induced and maintained the assumption that SARC medical practitioners would be paid under the Pay Scale, if they reached particular academic and case load milestones. The Arbitrator found that on the evidence, the two medical practitioners studied their Masters degrees because of the existence of the Pay Scale.

The Arbitrator found that obtaining a Masters plainly goes well beyond ordinary professional development. The Health Service did not act to avoid the medical practitioners suffering detriment when it withdrew the Pay Scale. It did not fulfil the assumption it created by approving and implementing the Pay Scale for over 11 years.

The Arbitrator observed that the Health Service dealt poorly and unfairly with the issue of whether the medical practitioners ought to be paid in accordance with the Pay Scale. The Arbitrator declared that the Health Service is estopped from offering the medical practitioners a further contract at a lower pay level than Level 21, as set out in the Pay Scale.

Australian Medical Association (WA) Incorporated v North Metropolitan Health Service [2021] WAIRC 00526

Public Service Appeal Board

Employer direction to attend appointment with Consultant Neurologist found to be unreasonable

Mr Walley appealed against the dismissal from his employment with the Department, after about 45 years of service, most recently as an Aboriginal Education Officer. The reason given for his dismissal was his alleged refusal to obey a direction to attend or participate in a medical appointment with a Consultant Neurologist.

The Board considered that the employer's decision to refer Mr Walley for review by a Consultant Neurologist was unjustified on a proper assessment of the medical evidence available to it at the time. The direction to attend the appointment with the Consultant Neurologist was unnecessarily invasive of Mr Walley's privacy and was therefore unreasonable. Accordingly, his refusal to attend an appointment was not misconduct. Further, when Mr Walley attended a later appointment, but refused or failed to sign a consent form, this was not misconduct because the employer failed to establish what form of consent was required of Mr Walley, or that Mr Walley had refused to give it.

While finding the dismissal was unfair, the Board declined to order reinstatement because the evidence before it did not permit it to reach a sound conclusion as to whether Mr Walley had been fit to perform the inherent requirements of his role since the date of dismissal or at the time of

the hearing. The Board adjusted the dismissal decision by adjusting the period of notice from 5 weeks to 13 weeks.

The manner in which the Board adjusted the decision is the subject of an application for judicial review in the Supreme Court.

Walley v Director-General, Department of Biodiversity, Conservation and Attractions [2021] WAIRC 00569

PSAB considers limits of powers and how to exercise its discretion in managing its processes. Concludes witness summons procedures unavailable in PSAB matters.

In 3 separate decisions in this matter, the Board has been called upon to consider what powers it has available to it to control and manage its procedures, and how such powers should be exercised in the interests of justice.

In the first application, the Board was asked to direct the Registrar to issue summonses to certain witnesses to compel their attendance at the hearing of the appeal. The Board concluded that it had no power to make such order, and that the provisions of the IR Act concerning summonses to witnesses did not apply to proceedings before the Board. The Board observed that the ability to compel witnesses to attend to give evidence and produce documents is highly desirable and perhaps sometimes necessary for the administration of justice. However, it found that the statutory text, particularly that the witness summons provision is not one of the provisions which section 80L says applies to the Board's proceedings, indicated a plain intention to exclude that power.

The Board was next asked to disallow evidence that a party had foreshadowed it would adduce at the hearing, by way of its filed outlines of witness evidence. The Board agreed to make directions as to what evidence could and could not be adduced at the hearing. It noted that although it could be said that the objections are premature, given that the witness outlines will not themselves form the evidence in the proceedings and cannot be tendered into evidence, there is utility in the Board making directions to facilitate the efficient hearing and determination of the matter.

The Board also noted that while the Board is not bound by the rules of evidence, that does not mean that it should disregard the rules of evidence or allow any evidence to be tendered without limitations. Sections 26(1)(a) and 26(1)(b) of the IR Act are designed to provide a flexible approach to the receipt of evidence and other material in proceedings. The Board always retains a discretion as to whether to accept material upon which it may rely in reaching a decision. These are provisions that provide flexibility in matters of procedure only, not to circumvent the substantive law.

The Board granted an application for a witness who was planning to travel overseas on the hearing dates to give evidence provisionally by way of a witness examination prior to the hearing. In that application, the Board noted that whether more could have been done to secure the attendance of the witness was not to the point. Even if more could have been done, the Board's exercise of its discretion is not for the purpose of punishing parties for mistakes or their conduct of the proceedings, much less, punishing witnesses. Rather, the sole question is whether the interests of justice will be served by granting the order sought

Spasojevic v Speaker of the Legislative Assembly [2021] WAIRC 00641

Complexity of IR Act's provisions about constituent authorities leads to misguided application

Ms Way was employed as a Clinical Nurse in Anaesthetic Research on fixed-term contracts. As the end date of the most recent contract approached, Ms Way was expecting her role to be reviewed for permanency. Despite some indications to her that her contract would be renewed, neither a further contract nor permanent conversion eventuated.

Ms Way's appeal was made under s80I(1)(a) of the IR Act. The employer objected to the appeal, on the basis that there was no decision which could be the subject of an appeal to the Board.

The Board dismissed the appeal, finding that:

a) Ms Way, as a Registered Nurse, was not a public service officer as defined and therefore had no standing to appeal under the IR Act; and

b) The decision not to offer permanency or a further fixed term contract was not a decision for the purpose of s80I(1)(a). Ms Way relied on the Commissioners Instruction 23, but the Board is without jurisdiction to enforce Commissioner's Instructions.

The Board disavowed any criticism of Ms Way for bringing her appeal to the Board, noting that it has been observed many times, by many people, including the previous Chief Commissioner, that the scheme of the IR Act concerning its constituent authorities, particularly the Board and the Public Service Arbitrator, are unduly and unnecessarily complex and confusing. In Ms Way's case, the confusion was compounded by the information she received from the Office of the Parliamentary Commissioner for Administrative Investigations, known as the Ombudsman, which told her that she had a right of reference to the WAIRC and that it would therefore not investigate her complaints.

Way v Chief Executive, East Metropolitan Health Service [2021] WAIRC 00543

Work Health and Safety Tribunal

On Friday 6 May 2022, the National Tertiary Education Union (Union) asked the WorkSafe Commissioner (Regulator) to appoint an inspector under s 82(1) of the *Work Health and Safety Act 2020* (WA) (WHS Act) to resolve an issue at The Animal Hospital Murdoch University. The Union's letter to the Regulator raised at least 12 areas of concern including understaffing, overwork, excessive stress, self-harm, fatigue and physical danger.

Under s 82(3) of the WHS Act, an inspector must make a decision resolving the issue no later than 2 days after the date that the request for the inspector is made. The following Monday (9 May 2022), the Regulator applied to the Tribunal under s 82A of the WHS Act for the Tribunal to set a new deadline for the inspector to make his decision.

When the Regulator makes an application for a new deadline under s 82A of the WHS Act, the Tribunal is required to give all parties to the issue, including affected workers, the opportunity to be heard. This was difficult to arrange in circumstances where the Regulator and the Union were the only parties named on the application form. The Tribunal contacted The Animal Hospital Murdoch University and invited it to be heard about the application. The Tribunal requested that the Union and The Animal Hospital Murdoch University notify the affected workers and their representatives of the application and the opportunity to be heard.

A hearing was held on 10 May 2022 and the Tribunal set a new deadline of 27 May 2022.

On 27 May 2022, the Regulator filed another application for a further extension of the deadline for the inspector to make a decision. The Regulator provided the inspector's investigation plan and confirmed that it had two inspectors working to resolve the matter. Again, all parties to the issue were given an opportunity to be heard at a hearing on Friday 3 June 2022. After hearing from the parties, the Tribunal considered the work that remained to be done in accordance with the investigation plan, the additional support that would be provided to the inspector if required, the Regulator's proposed new deadline of Friday 24 June 2022 and the responses to the investigation plan and the application. The Tribunal also considered that no party to the issue opposed the Regulator's application for a new deadline and set a new deadline of Friday 24 June 2022. These two applications were the first to be made under s 82A of the WHS Act.

WorkSafe Commissioner v National Tertiary Education Union [2022] WAIRC 00200*; WorkSafe Commissioner v National Tertiary Education Union* [2022] WAIRC 00240

APPENDICES

Appendix 1 – Members of the Public Service Appeal Board

Mr Matthew Abrahamson	Mr Peter Heslewood
Mr Michael Aulfrey	Mr Dan Hill
Ms Michelle Bastian	Ms Amanda Kaczmarek
Ms Sherina Bhar	Mrs Lois Kennewell
Ms Teresa Borwick	Mr Bruce Kirwan
Mr Charlie Brown	Mr Greg Lee
Mr George Brown	Ms Julie Love
Mrs Leanne Brown	Ms Morgan Marsh
Ms Kendall Carter	Mr Gavin Richards
Mrs Michele Clement	Ms Maria Ruane
Ms Bethany Conway	Ms Rebecca Sinton
Mr Sam Dane	Ms Kathleen Smith
Mr Ross Davenport	Mr Damien Stewart
Mr Hayden Falconer	Mr Grant Sutherland
Mr Darian Ferguson	Mr Robert Thornton
Ms Trish Fowler	Ms Liz Ward
Mr Mark Golesworthy	Ms Sara Young
Mr Bruce Hawkins	

Appendix 2 – Pro Bono Providers

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

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