*Industrial Relations Act 1979*

# ANNUAL REPORT 2022-2023

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 2023.

**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

**registry@wairc.wa.gov.au**

Published by The Western Australian Industrial Relations Commission, Perth, Western Australia

September 2023

This report is published on the Commission's website:

**www.wairc.wa.gov.au**

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# FROM THE CHIEF COMMISSIONER

The 2022-23 year has been a year of consolidation for the Industrial Relations Commission, following substantial legislative change introduced in the 2021-22 year. Two new Commissioner appointments were made which were very welcome.

A significant initiative arising from the legislative changes has been the dual appointment of qualified Commissioners as Industrial Magistrates. This is an historic change for the Industrial Relations Commission and enables the legal and industrial experience of Commissioners to be made available to assist in the important work of the Court.

Additionally, local government transitioned into the Commission's jurisdiction from the national industrial relations system, effective from 1 January 2023. This incorporates a significant sector into the State industrial relations system.

I thank my Commissioner colleagues and all staff of the Commission for their support 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

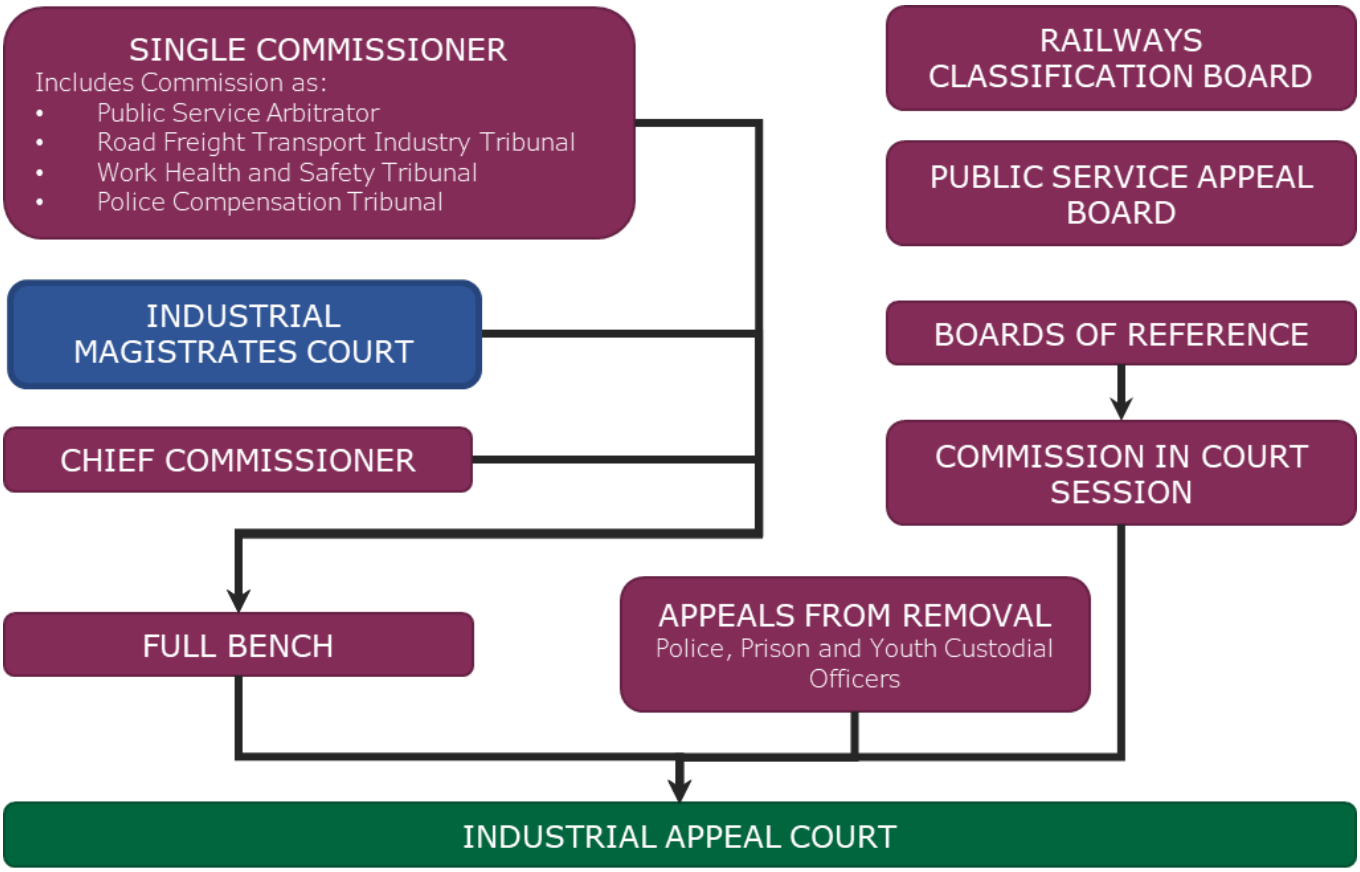


*Figure 1. Structure of the State Industrial Relations System*

# 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 |
| | T B Walkington |
| | C Tsang (Appointed 18 July 2022) |
| | T Kucera (Appointed 29 August 2022) |

## The Registry

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

| | |
|---|---|
| Registrar | Ms S Bastian |
| Deputy Registrar | Ms S Kemp |

## 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 Kenneth Martin |
| | The Honourable Justice Jennifer Smith |

## Industrial Magistrates

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

- Industrial Magistrate E O'Donnell
- Industrial Magistrate B Coleman
- Industrial Magistrate C Tsang *(Appointed 15 November 2022)*
- Industrial Magistrate T Kucera *(Appointed 15 November 2022)*
- (Chief Commissioner Kenner and Senior Commissioner Cosentino also hold dual appointments as Industrial Magistrates *(Appointed 15 November 2022))*

# NEW DEVELOPMENTS

## Legislation

In last year's Annual Report, I referred to the Industrial Relations Legislation Amendment Act 2021 which came into effect on 20 June 2022. Shortly after its commencement, the Commission embarked on its own motion, a review of the scope clauses of 23 private sector awards under s 37D of the IR Act. Those reviews are progressing, also in conjunction with a number of award reviews under s 40B of the IR Act to update and modernise State awards and make them fit for purpose.

In addition, under the legislation and regulations made to support the amendments to the *IR Act*, local government transitioned into the State industrial relations system effective from 1 January 2023. This has led to 139 local governments and about 28,000 employees now operating in the Commission's jurisdiction. Local government applications for this financial year have increased by 218%. This is primarily due to applications now being made under s 44 for compulsory conferences and under s 42E for conferences to assist in bargaining.

The dual appointment of four Commissioners as Industrial Magistrates effective from 15 November 2022, has expanded the resourcing of the Industrial Magistrates Court. This is assisting in the important work the Court does in the enforcement of industrial legislation and instruments, both State and Commonwealth, as the Court is also an eligible State court under the *Fair Work Act 2009.*

The introduction of the new stop bullying and sexual harassment jurisdiction now provides employees in the Commission's jurisdiction access to prompt remedies to stop such conduct in the workplace.

The *Owner-Drivers (Contracts and Disputes) Amendment Act 2022* was passed by the Parliament in October 2022 and commenced on 1 June 2023. The *Amending Act* has introduced significant changes to the jurisdiction and powers of the Road Freight Transport Industry Tribunal including:

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

## Welcome to Commissioner Tsang and Commissioner Kucera

On 3 October 2022, the Chief Commissioner presided over a Ceremonial Sitting of the Commission for speeches of welcome for Commissioner Charmaine Tsang and Commissioner Timothy Kucera.

The Minister for Industrial Relations the Honourable Bill Johnston MLA, Mr Owen Whittle representing UnionsWA, Mr Ryan Martin representing the CCIWA, and Ms Rebecca Lee representing the Law Society, all congratulated the appointees and acknowledged their distinguished careers in the law and industrial relations.

Commissioner Tsang comes to the Commission with an extensive background in the law, industrial relations and workplace health and safety, with over 20 years' experience. She has held senior positions both in companies and in private legal practice.

Commissioner Kucera has over three decades of experience in the law and workplace relations. Most recently he was the Secretary of the United Professional Firefighters Union of Western Australia. Prior to this he held senior positions as a lawyer in private practice in industrial relations and employment law, as well as in civil and criminal law.

Reference was made to both Commissioner Tsang's and Commissioner Kucera's extensive legal experience and workplace relations skills, as an ideal background to their appointments.

# THE WORK OF THE COMMISSION

## Statistics Snapshot

### Total Matters

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Initiated | 586 | 581 | (-1%) |
| Concluded | 533 | 552 | 19 (4%) |

### Matters Concluded by Jurisdiction/Area

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Mediation | 16 | 13 | -3 (-19%) |
| Commissioner sitting alone | 215 | 211 | -4 (-2%) |
| Public Service Arbitrator | 41 | 39 | -2 (-5%) |
| Public Service Appeal Board | 47 | 48 | 1 (2%) |
| Appeals from Removal – Police, Prison and Youth Custodial Officers | 5 | 5 | 0 (0%) |
| Police Compensation Tribunal | 0 | 2 | 2 |
| Road Freight Transport Industry Tribunal | 3 | 1 | -2 (-67%) |
| Work Health and Safety Tribunal | 9 | 13 | 4 (44%) |
| Railways Classification Board | 0 | 0 | 0 (0%) |
| Boards of Reference | 0 | 0 | 0 (0%) |
| Chief Commissioner | 11 | 8 | -3 (-27%) |
| Commission in Court Session | 5 | 7 | 2 (40%) |
| Full Bench | 12 | 14 | 2 (17%) |
| Industrial Appeal Court | 1 | 5 | 4 (400%) |
| Industrial Magistrate | 168 | 186 | 18 (11%) |

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

| | 2022-23 |
|---|---|
| Awards | 231 |
| Industrial Agreements | 378 |
| **Total** | **609** |

## Conciliation and case management

The resolution of disputes through conciliation is a core part of the Commission's work and is a principal object of the *IR Act*. Most disputes and industrial matters referred to the Commission, are resolved through conciliation rather than formal arbitration. There are two types of conciliation. The first is when an industrial matter is referred to the Commission by an individual for unfair dismissal or a denied contractual benefit, for example. The second is an application by a union or an employer, for a compulsory conference. Depending on the urgency of the matter, these latter types of applications for a conference, can be listed by the Commission at very short notice, including only hours after the application is filed.

How long matters and disputes take to resolve by conciliation varies considerably. In the case of larger and more complex collective disputes under s 44 of the *IR Act*, this might entail multiple compulsory conferences over an extended period. For example, bargaining disputes for a new industrial agreement may take many weeks, even months, to bring to finality. On the other hand, individual disputes, in relation to termination of employment for example, may be resolved more expeditiously in one or only a few conferences. It is pleasing to see an improvement in the timely conclusion of conciliation conferences with all matters showing an improvement in the 90-day conclusion period, compared to last year, ranging from a 10 to 24 percent improvement.

### Conciliation – on time matter processing

| | Concluded within 90 days | Concluded within 180 days |
|---|---|---|
| Unfair dismissal applications – s 32 | 71% | 85% |
| Denial of contractual benefits applications – s 32 | 67% | 83% |
| Compulsory conferences – s 44 | 72% | 83% |

## 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.

Mediation applications continue to be made in conjunction with appeals to the Public Service Appeal Board. The mediation jurisdiction under the *EDR Act* provides a useful avenue to attempt to resolve such matters at an early stage, as the Appeal Board is not able to conciliate appeals. Positive results from mediation continue to be achieved. There was a slight increase in mediation applications over the year.

### Mediation – total matters

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Matters lodged | 13 | 15 | 2 (15%) |
| Matters concluded | 16 | 13 | -3 (-19%) |

## 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.

As part of the amendments to the *IR Act* introduced in June 2022, the Commission now deals with claims that a worker has been the subject of bullying or sexual harassment in the workplace. The definition of "worker" extends beyond employees and includes contractors and subcontractors, employees of labour hire agencies, amongst others. Bullying is unreasonable behaviour that creates a risk to the safety and health of an employee. Sexual harassment involves unwelcome sexual advances or requests for sexual favours, or other unwelcome conduct of a sexual nature.

The Commission's jurisdiction extends to making orders to stop the behaviour, in circumstances where the Commission is satisfied that there is a risk the behaviour will continue. Orders for compensation cannot be made. Reasonable management action, for example performance management, carried out reasonably, is not bullying behaviour.

Applications for orders to stop bullying or sexual harassment are made to the Commission by the person the subject of the alleged behaviour. Respondents can include the applicant's employer or principal if the applicant is a contractor and may include other individuals in a workplace. The Commission is obliged to commence dealing with a stop bullying or sexual harassment application within 14 days of the application having been filed. On the filing of an application, the Registry conducts initial inquires with the parties through a triage process to explain the process of dealing with applications before being allocated to a Commissioner for conciliation as a first step. As these applications can often involve sensitive issues and vulnerable workers, the Commission takes considerable care to ensure all parties' interests are accommodated. At the conciliation stage, confidentiality is most important.

In this reporting year, 11 applications have been initiated, and five have been closed. Most matters concluded have been resolved through conciliation.

This is an important expansion of the Commission's jurisdiction that compliments the Fair Work Commission's jurisdiction to deal with the same type of claims in the national industrial relations system.

### Commissioners Sitting Alone – total matters

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Matters lodged | 244 | 253 | 9 (4%) |
| Matters concluded | 215 | 211 | -2 (-1%) |

### Commissioner Sitting Alone – matters concluded

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Unfair dismissal applications | 95 | 78 | -17(-18%) |
| Denial of contractual benefits claims | 35 | 30 | -5 (-14%) |
| Stop bullying and/or sexual harassment | - | 5 | - |
| Conference applications (s 44) | 39 | 34 | -5 (-13%) |

| | | | |
|---|---|---|---|
| Conferences referred for arbitration (s 44(9)) | 1 | 1 | 0 (0%) |
| Apprenticeship appeals | 0 | 0 | 0 (0%) |
| Public Service applications | 6 | 10 | 4 (67%) |
| Review of decisions of the Construction Industry Long Service Leave Payments Board | 3 | 1 | -2 (-67%) |
| Conferences to assist bargaining (s 42E) | 0 | 3 | 3 |
| Enterprise Orders (s 42I) | 0 | 1 | 1 (100%) |
| Orders arising from s 27 | 1 | 1 | 0 (0%) |
| Exemptions (awards) | 0 | 0 | 0 (0%) |
| Order to suspend or revoke authority of rep s 49J(5) | 1 | 0 | -1 (-100%) |
| Unspecified Grounds | 0 | 0 | 0 (0%) |

### Commissioner Sitting Alone - awards - matters concluded

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| New Awards | 0 | 0 | 0 (0%) |
| Variation of Awards | 10 | 11 | 1 (10%) |
| Joinders to Awards (s 38) | 0 | 0 | 0 (0%) |
| Interpretation of Awards | 1 | 0 | -1 (-100%) |
| Cancellation of Award | 0 | 3 | 3 |

### Commissioner Sitting Alone - agreements – matters concluded

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| New Agreements | 17 | 29 | 12 (71%) |
| Variation of Agreements | 0 | 2 | 2 |
| Retirement from Industrial Agreement | 5 | 1 | -4 (-80%) |
| Interpretation of Agreement | 0 | 1 | 1 |
| Orders as to terms of Agreement (s 42G) | 0 | 0 | 0 (0%) |
| 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

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Unfair dismissal | 107 | 67 | -40 (-37%) |
| Denial of contractual benefits | 35 | 33 | -2 (-6%) |
| **Total** | **142** | **100** | **-42 (-30%)** |

### Section 29 matters – matters concluded

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Unfair dismissal | 94 | 78 | -16 (-17%) |
| Denial of contractual benefits | 35 | 30 | -5 (-14%) |
| **Total** | **129** | **108** | **-21 (-16%)** |

## 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.

All Commissioners hold appointments as Public Service Arbitrators until 1 July 2025. The Senior Commissioner is the Public Service Arbitrator. Her appointment is also due to expire 1 July 2025.

In previous Annual Reports, comments have been made concerning the difficulties with the availability of nominees for membership of Appeal Boards. This leads 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. Chambers staff continue to be informed by employer and union nominating organisations of the difficulty in finding nominees who have sufficient understanding of industrial relations matters and who have enough time to attend hearings and give matters consideration. Additionally, complexity in provisions of the *IR Act* and the *PSM Act* applying to the Appeal Board, the Public Service Arbitrator and the Commission's general jurisdiction, and their procedures, continue to cause difficulty for parties, especially unrepresented parties.

As with the last reporting year, a substantial number of appeals to the Appeal Board were filed in this reporting year. Most appeals were from decisions to terminate employment. As also noted last year, several appeals challenged dismissals arising from vaccine mandates in workplaces. Most of those matters have now been concluded.

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

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Matters lodged | 109 | 78 | -31 (-28%) |
| Matters concluded | 88 | 87 | -1 (-1%) |

## Public Service Arbitrator – matters concluded

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Conference applications (s 44) | 19 | 17 | -2 (-11%) |
| Conferences referred for arbitration (s 44(9)) | 3 | 1 | -2 (-67%) |
| Appeals to the Public Service Appeal Board | 47 | 48 | 1 (2%) |
| Reclassification appeals | 4 | 4 | 0 (0%) |
| Conferences to assist bargaining | 3 | 0 | -3 (-100%) |
| Enterprise orders (s 42I) | 0 | 0 | 0 (0%) |
| Orders pursuant to s 80E | 0 | 1 | 1 |
| Unspecified grounds | 0 | 0 | 0 (0%) |

## Public Service Arbitrator - awards - matters concluded

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| New Awards | 0 | 0 | 0 (0%) |
| Variation of Awards | 0 | 8 | 8 |
| Joinders to Awards (s 38) | 0 | 0 | 0 (0%) |
| Interpretation of Awards | 0 | 0 | 0 (0%) |
| Cancellation of Awards | 0 | 0 | 0 (0%) |

## Public Service Arbitrator - agreements - matters concluded

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| New Agreements | 11 | 6 | -5 (-45%) |
| Variation of Agreements | 0 | 0 | 0 (0%) |
| Retirement from Industrial Agreement | 0 | 0 | 0 (0%) |
| Interpretation of Agreement | 1 | 2 | 1(100%) |
| Orders as to terms of Agreement (s 42G) | 0 | 0 | 0 (0%) |
| Cancellation of Agreements | 0 | 0 | 0 (0%) |

*Photos of the registration of the Public Sector PSA Agreement 2023*

# 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 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 2024.

The WHS Tribunal assists in the resolution of workplace safety and health issues under Western Australia's occupational safety and health laws. There has been a significant increase in the matters referred to the WHS Tribunal over the year, since the new Tribunal commenced, with all but one being concluded. Applications for external review comprised most of the matters referred to the Tribunal.

## Occupational Safety and Health Tribunal – total matters

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Matters lodged | 9 | 0 | -9(-100%) |
| Matters concluded | 7 | 5 | -2 (-29%) |

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

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| *Occupational Safety and Health Act 1984* | 7 | 5 | -2 (-29%) |
| *Mines Safety and Inspection Act 1994* | 0 | 0 | 0 (0%) |
| *Petroleum (Submerged Lands) Act 1982* | 0 | 0 | 0 (0%) |

## Work Health and Safety Tribunal – total matters

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Matters lodged | 3 | 9 | 6 (200%) |
| Matters concluded | 2 | 8 | 6 (300%) |

## Work Health and Safety Tribunal – matters concluded

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Disqualification of health and safety representatives – s 65(1) | 0 | 0 | 0 (0%) |
| Extension of deadline for making decision resolving issue – s 82A | 2 | 1 | -1 (-50%) |
| Issue about continuity of engagement of worker – s 89A | 0 | 2 | 2 |
| Civil proceedings in relation to discriminatory or coercive conduct – s 112 | 0 | 1 | 1 |
| Application for external review – s 229 | 0 | 4 | 4 |

# 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.

Two applications of this nature were made to the Tribunal during the reporting year. One dispute regarding degree of permanent impairment, one dispute regarding amount of compensation. Both matters were discontinued after conciliation during the reporting period.

## 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 Commissioner Kucera have constituted the Tribunal over the reporting year.

As reported last year on a large matter involving 28 separate applications with claims totalling some $4 million. The Tribunal has been continuing to facilitate negotiations between the parties through conferences and correspondence. Changes in the representation of some parties and other matters have delayed the progress of the claims, however, the Tribunal continues to assist them to reach a negotiated resolution.

### Road Freight Transport Industry Tribunal – total matters

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Matters lodged | 1 | 1 | 0 (0%) |
| Matters concluded | 3 | 1 | -2 (-66%) |

## 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

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Matters lodged | 5 | 6 | 1 (20%) |
| Matters concluded | 5 | 5 | 0 (0%) |

### 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 for compensation may be made.

Five 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*.

One appeal was 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.

There was a significant increase in applications under s 66 of the *IR Act* in the reporting year. These applications are only within the Chief Commissioner's jurisdiction. They involve applications by a member or a former member of a union, or the Registrar, about the observance or non-observance of the rules of a union or the manner of their observance. An enquiry may be sought in relation to an election for office bearers in a union. The Chief Commissioner has wide powers to disallow rules or require a union to alter a rule.

Several s 66 applications have involved unions seeking orders to establish an interim management committee to manage the affairs of the union, pending changes to the rules to bring them into

alignment with a counterpart federal organisation. These applications are often necessary because the union has a s 71 certificate which exempts them from conducting separate State elections for offices in the union. However, where the rules of both the State and federal unions have not remained in alignment, there may be a need for a separate election in the State union for it to function or an interim management committee to bring the rules back into alignment.

These s 66 applications have arisen in many cases by a proactive compliance process being engaged in by the Registrar, in ensuring unions met their statutory obligations under the *IR Act.* A significant component of this is educative, to highlight gaps in compliance and to assist unions in meeting their obligations.

## Chief Commissioner – total matters

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Matters lodged | 7 | 21 | 14 (200%) |
| Matters concluded | 11 | 8 | -3 (27%) |

## Chief Commissioner - matters concluded

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Organisation rules – s 66 | 5 | 6 | 1 (20%) |
| Employee organisations, orders as to whom they represent – s 72A(6) | 0 | 0 | 0 (0%) |
| Registrar consultations – s 62 | 6 | 2 | -4 (-67%) |

*Photo of the public waiting area outside the Commission's hearing and conference rooms*

# 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

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Matters lodged | 6 | 5 | -1 (-17%) |
| Matters concluded | 5 | 5 | 0 (0%) |

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 2023 State Wage Case on 16 June 2023. The Commission increased the State Minimum Wage by 5.3%, bringing it to $863.40 per week from 1 July 2023. The Commission also increased award rates by 5.3% from that time. In making its decision, the Commission was required to balance a range of economic and labour market considerations, and social and equity considerations. As with the 2022 State Wage Case, cost of living pressures and the impact of this on the low paid, were significant considerations.

## Special Public Holiday General Order

This matter involved an application by UnionsWA for a general order to apply to all awards, industrial agreements, enterprise orders and employer-employee agreements made under the *IR Act*. The General Order sought was in relation to a special public holiday by proclamation under the *Public and Bank Holidays Act 1972* (WA). The application arose from the proclamation by the Governor under the *PBH Act,* that 22 September 2022 would be a National Day of Mourning, following the passing of Her Majesty Queen Elizabeth the Second. It sought to cover a gap in industrial instruments that provide for payment of penalty rates of pay for working on a public holiday but make no provision for payment when working on a special public holiday, applying Statewide.

After considering the history of entitlements to payment when working on a public holiday from 1946, the Commission in Court Session was satisfied that a lacuna existed in awards and that it would be consistent with equity, good conscience and the substantial merits of the case to grant the application and make a General Order.

## Location Allowances General Order

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 ([2023] WAIRC 0032). They increased by 5.62% to reflect the increase in the Consumer Price Index for Perth (excluding housing) for the year to March 2023. The increase was effective from 1 July 2023.

The Location Allowances General Order affects 82 awards.

## Organisations matters

The Commission in Court Session has dealt with several registered organisations matters over the reporting year. Two of them have involved the Australian Rail, Tram and Bus Industry Employees Union, West Australian Branch, as it was formerly known. The union first applied to the Commission in Court Session to amend its rules in relation to its name, eligibility for membership and office bearers, to align with changes made to the structure of its counterpart federal body, registered under the *Fair Work (Registered Organisations) Act 2009 (Cth)*. Whilst there were other extensive changes to the ARTBIU rules, those matters had to be dealt with by the Registrar under the *IR Act*.

The second matter coming before the Commission in Court Session involving the ARTBIU, following orders made in the above matter, was an application for a new s 71 certificate, enabling the State union offices to be held by those elected to office in the federal branch of the ARTBIU. A new s 71 certificate was granted, with the Commission being satisfied that the statutory requirements were met.

# 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.

There has been a 50% reduction in the number of appeals to the Full Bench from Commissioners' decision. In many respects this is a good thing, as it tends to reflect general satisfaction by parties to proceedings with the outcome of a matter at first instance. It is also pleasing to note the finalisation rate of all appeals, of 100% within 12 months, this reporting year. Forty per cent were finalised within six months, and a further 60% within six to 12 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. A 50% increase in the number of appeals concluded by the Full Bench, occurred over the year.

## Full Bench – total matters

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Matters lodged | 14 | 7 | -7 (-50%) |
| Matters concluded | 8 | 12 | 4 (50%) |

## Full Bench – appeals concluded from decisions of the:

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Commission – s 49 | 4 | 6 | 2 (50%) |
| Industrial Magistrate – s 84 | 3 | 4 | 1 (33%) |
| 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 | 0 | -1 (-100%) |
| Work Health and Safety Tribunal – s 29 *Work Health and Safety Act 2020* | 0 | 0 | 0 (0%) |
| Police Compensation Tribunal – s 33ZZD *Police Act 1892* | 0 | 0 | 0 (0%) |

## Full Bench - on-time matter processing of appeals

| | 2020-21 | 2022-23 |
|---|---|---|
| Appeals finalised within 6 months | 66% | 40% |
| Appeals finalised between 6 and 12 months | 33% | 60% |
| Appeals finalised >12 months | 0% | 0% |

## Full Bench – matters concluded

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Order for enforcements of the Industrial Relations Act 1979 – s 84A | 0 | 2 | 2 |

## 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*

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Matters lodged | 4 | 2 | -2 (-50%) |
| Matters concluded | 4 | 2 | -2 (-50%) |

## Western Australian 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

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Appeals lodged | 3 | 2 | -1 (-33%) |
| Appeals concluded | 1 | 5 | 4 (400%) |

## 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 153 claims that fell within the Court's general jurisdiction during the reporting year.

The work of the court has been assisted by the dual appointment of qualified Commissioners as Industrial Magistrates, from February 2023, when the dual appointees commenced hearing matters in the Court. This will over time, reduce the listing times and improve the Court's efficiency in dealing with matters that come before it. This has been a very positive initiative enabled by the changes to the *IR Act* that came into effect in June 2022.

### Industrial Magistrates Court – total matters

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Matters lodged | 169 | 157 | -12 (-7%) |
| Matters concluded | 168 | 186 | 18 (11%) |

### Industrial Magistrates Court – applications concluded

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Breach of the *Industrial Relations Act 1979* and/or related Industrial Instruments | 18 | 21 | 3 (17%) |
| Breach of the *Fair Work Act 2009* and/or related Industrial Instruments | 58 | 64 | 6 (10%) |
| Breach of the *Construction Industry Portable Paid Long Service Leave Act 1985* - s 83E | 60 | 62 | 2 (3%) |
| Breach of the *Minimum Conditions of Employment Act 1993* and/or related Industrial Instruments | 1 | 0 | -1 (-100%) |
| Breach of the *Long Service leave Act 1958* and/or related Industrial Instruments | 4 | 7 | 3 (75%) |
| Breach of multiple Acts and/or Industrial Instruments | 16 | 17 | 1 (6%) |
| Small Claims – s 548 *Fair Work Act 2009* | 12 | 10 | -2 (-17%) |
| Enforcement of Order – s 83 | 0 | 1 | 1 |
| Criminal Prosecutions – s 83E(9) | 0 | 4 | 1 |
| **Total** | **168** | **186** | **18 (11%)** |

### Industrial Magistrates Court – monies ordered to be paid

| | 2022-23 |
|---|---|
| Wages | $135,311.54 |
| Penalties | $116,186.00 |
| Costs | $1,785.00 |
| **Total** | **$253,282.54** |

During this reporting year, 89 claims proceeded to at least one pre-trial conference. Sixty-five claims were settled at a pre-trial conference or prior to a trial. This reflects the significant value of pre-trial conferences, in not only enabling programming orders and directions to be made, but also in providing an invaluable opportunity for the resolution of claims at an early stage.

Additionally, 83 claims were discontinued before being listed for court hearings. This includes matters where a pretrial conference was listed but subsequently vacated. Whilst no judicial functions were performed in relation to these matters, many of them involved significant involvement of Registry staff in liaising with parties.

# 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).

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

### Industrial Agents – registrations

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Total number of agents registered as body corporate | 26 | 25 | -1 (-4%) |
| Total number of agents registered as individuals | 15 | 12 | -3 (-20%) |
| **Total** | **41** | **37** | **-4 (-10%)** |

## Industrial organisations

### Industrial organisations – Registered as at 30 June 2023

| | Employee organisations | Employer organisations |
|---|---|---|
| Number of organisations | 33 | 11 |
| Aggregate membership | 177,415 | 3,586 |

### 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 Industrial Relations Act 1979; or

- the Owner-Drivers (Contracts and Disputes) Act 2007; or
- the Long Service Leave Act 1958; or
- the Minimum Conditions of Employment Act 1993; or
- the Work Health and Safety Act 2020; or
- an award or order of the Commission; or
- an industrial agreement; or
- an employer-employee agreement.

### Right of entry authorisations

| | 2021-22 | 2022-23 | Variance |
|---|---|---|---|
| Authorisations issued | 64 | 75 | 11 (17%) |
| Total number of authorisations | 321 | 317 | -4 (-1%) |
| 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 | 105 | 73 | -32 (-30%) |

## Rule alterations by the 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 under s 62(3) of the *IR Act*. These involve general variations to rules that are not required to be dealt with by the Commission Court Session. Two applications were made under s 71(9)(b) of the *IR Act*, which relates to a rule change lodged with the Registrar, following the issuance of a certificate under s 71 authorised by the Commission in Court Session.

# Award reviews

The review of awards in the private sector in accordance with s 40B of the *IR Act* commenced in 2020 and is ongoing. Section 40B authorises the Commission to review awards to ensure that the award:

1. does not contain wages that are less than the minimum award wage as ordered by the Commission under section 50A;
2. does not contain conditions of employment that are less favourable than those provided by the *Minimum Conditions of Employment Act 1993*;
3. 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*;
4. does not contain provisions that are obsolete or need updating; and/or
5. 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.

I reported last year on the review of the Metal Trades (General) Award in 2021 to modernise and update its terms, which is complete. Significant work has been undertaken this reporting year by the Commission in conjunction with the Department of Mines, Industry Regulation and Safety and the award parties, to update and modernise the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977. Following several conciliation conferences, the Commission has assisted the parties in making substantial progress on a revised award, which hopefully will be concluded soon.

## Award scope variations

The *Industrial Relations Legislation Amendment Act 2021* introduced a new power in s 37D for the Commission to vary the scope of private sector awards by its own motion.

Following the commencement of this new provision, the Commission invited UnionsWA, the Chamber of Commerce and Industry (CCI), the Australian Resources and Energy Employer Association, formerly known as the Australian Mines and Metals Association (AREEA), the Western Australian Local Government Association (WALGA), the Minister for Industrial Relations and other interested parties to consult with it, to identify awards suitable for scope review.

Twenty awards were identified arising out of the consultation process. Accordingly, the Commission, of its own motion, commenced 20 proceedings for variations of the awards' scope clauses.

Of the 20 awards impacted, proposed variations have been published in relation to three of them:

- Restaurant, Tearoom and Catering Workers' Award.
- Cleaners and Caretakers Award.
- Contract Cleaners Award.

It is anticipated that scope variations will be made to these three awards later in 2023. The variations will clarify and improve the area and scope provisions, by:

1. specifying that the scope extends to employees who are "connected to the state of Western Australia" and their employees while performing work covered by the awards.
2. expressly refer to the fact the awards apply to labour hire organisations that supply employees to host employers to perform work that is otherwise covered by the awards.
3. expressly state that the awards do not apply to employers and employees who are subject to other specified state awards, where the work performed might be similar in nature.
4. expressly state that the awards do not apply to employers and employees that are national system employers and national system employees under the *FW Act*.

During a conference between interested parties in the proceedings, it became apparent that, in many cases, the scope of the award should be reviewed in conjunction with a broader review of the relevant award to contemporise the award and ensure that it did not contain terms and conditions below statutory minimum conditions. It was also considered desirable to use the scope review process to consolidate several awards.

Where the award scope is being reviewed in conjunction with a broader review of the award, or with a view to consolidation, the process involves greater complexity, detailed analysis of the effects of proposed variations, and comparisons of terms and conditions across awards. This work is progressing.

To date, the *Farm Employees Award* has been the subject of significant variations to update the award, so that the variation of its scope can now proceed. It is anticipated that a hearing in relation to the scope will be held later in 2023. During this matter, the Commission will consider whether dairy farm employees and aquiculture employees ought to be included in the *Farm Employee's Award* scope, which would mean those groups of employees would be award covered for the first time.

DMIRS have provided a great deal of assistance to the Commission in the award scope variation process. The Commission is grateful for this assistance.

# 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.

Six applicants were referred to the scheme, with three of the six ultimately choosing not to proceed with seeking assistance from the scheme. Of these three applicants, two decided not to proceed with their application, with one of these applicants making this determination after seeking independent, paid legal advice.

In one instance, the Pro Bono Scheme Coordinator was unable to secure assistance for the applicant as none of the Scheme members contacted had capacity to provide assistance or were conflicted from providing assistance. The Pro Bono Scheme Coordinator subsequently arranged a referral for the applicant to receive legal assistance from Circle Green Community Legal.

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.

## 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.

Nine information sessions were held over the reporting year, with a total of 25 attendees.

Attendance at these information sessions was initially impacted by the lasting impacts of Covid-19 interruptions, and several sessions were cancelled due to lack of attendees. Since late 2022, the Commission's Registry has held collaborative discussions with Circle Green to co-develop a more accessible and modern format for this information, such as short informational videos available on the Western Australian Industrial Relations Commission and Industrial Magistrates Court websites that can be viewed at any time.

# COMMUNITY ENGAGEMENT

## Professional development

Commissioners also took part in various professional development programmes in the reporting year. These included:

- The Senior Commissioner attended the Australian Law Reform Commission 'Without Fear or Favour – Responses to the ALRC Report on Judicial Impartiality' – September 2022 and the National Judicial College of Australia 'Writing Better Judgments' programme – October 2022.
- Commissioner Tsang and Commissioner Kucera attended the National Judicial College of Australia 'Writing Better Judgments' programme – March 2023.
- Commissioner Tsang attended (online) the Council of Australian Tribunals NSW conference – September 2022; attended the Resolution Institute 'Mediation Training' – November 2022; and Resolution Institute online CPD sessions over the period July to November 2022.

## Events supported by the Commission

Commission members attended various functions and other forums, at the invitation of employee and employer organisations, and other organisations, throughout the reporting year including:

- Commissioner Emmanuel attended the 'Women in IR Breakfast' – October 2022; the MDC Legal End of Year Event – October 2022; and the Annual Firefighters Retirement Dinner – November 2022.

Members of the Commission also presented at seminars and conferences:

- The Chief Commissioner attended and presented (meeting by video-link) at the annual Heads of Tribunal meeting convened by the President of the Fair Work Commission – October 2022; presented two sessions at Curtin University on 'An Introduction to the Western Australian Industrial Relations Commission' – March 2023.

- Senior Commissioner Cosentino presented at the Piddington Society Mediation programme - August 2022 and March 2023; the Anna Stewart Memorial Project – September 2022; the Law Society Practical Advocacy Weekend – October 2022; and the DMIRS 'Welcome to the WAIRC' – May 2023.

- Commissioner Emmanuel presented at a panel session at the UnionsWA Industrial Officers and Lawyers Network Annual Conference on advocacy before industrial tribunals – February 2023; co-presented at the Piddington Society Boorloo (Perth) Conference CPD session on the Commission's stop bullying and sexual harassment jurisdiction – March 2023.

- Commissioner Tsang provided opening remarks for the College of Law program: 'Connor's Story – Disability in the Workplace' – October 2022; was a panellist at the Jollie Club panel event: 'The inclusive sport of equality, equity, and fairness'; provided the Keynote speech at the Asian Australian Lawyers Association Lunar New Year Dinner – February 2023; was a Panellist Asian Australian Lawyers Association 'Movers and Shakers: Asian-Australian Decision Makers Shaping the Law'.

- Commissioner Kucera presented at a panel session at the UnionsWA Industrial Officers and Lawyers Network Annual Conference on Ethics – February 2023.

## Work experience at the Commission

As reported last year, 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, mainly in relation to disputes brought under s 44 of the *IR Act.*

### Prisons

In the last year, several disputes have been referred to the Commission and largely many of these applications were related to entitlements under and provisions of the *Department of Justice Prison Officers' Industrial Agreement 2020,* including shift swaps, regional allowances and leave entitlements.

Numerous applications have required several conferences, and a number are ongoing.

### Fire and Emergency Services

There has been a large volume of applications made in relation to the Fire and Emergency Services portfolio with 12 applications referred in the last financial year. These matters broadly relate to the interpretation of the *Western Australian Fire Service Enterprise Bargaining Agreement 2020,* allowances, consultation, the location and suitability of appliances, and leave entitlements. Many applications filed required numerous conferences to resolve matters or are ongoing. One matter proceeded to a hearing on jurisdiction.

### Bargaining

In the last year, Commissioner Emmanuel has dealt with bargaining disputes in the portfolios of Police, Prison Officers, Youth Custodial Officers and Firefighters. A common issue for all parties across these portfolios was the State Government wages policy.

### Police Officers

Nine conferences were held in the financial year in relation to bargaining for a replacement for the *Western Australia Police Force Industrial Agreement 2021.* Key issues for the parties included the right to disconnect and increases to allowances such as shift allowances, skills allowances and meal allowances. Two offers were put. The parties have reached agreement, and the Commission looks forward to registering the replacement agreement as soon as possible.

### Prison Officers

Eight conferences were convened in the financial year in relation to bargaining for a replacement of the *Department of Justice Prison Officers' Industrial Agreement 2020*, including to deal with industrial action. Several offers have been put. Key issues include the adaptive regime, staffing levels and purchased leave. This matter is ongoing.

### Youth Custodial Officers

Three conferences were convened in the financial year in relation to a replacement agreement for the *Department of Justice (Youth Custodial Officers') CSA Agreement 2021,* including to deal with industrial action. The parties reached agreement and the Commission looks forward to registering the replacement agreement in due course.

### Firefighters

Seven conferences were convened in the financial year in relation to a replacement for the *Western Australia Fire Service Enterprise Bargaining Agreement 2020,* including to deal with industrial action. Key issues for the parties included superannuation, overtime, and adjustments to allowances. A third offer was recently put, and members will be balloted in coming weeks.

## Decisions of interest

### Industrial Appeal Court appeals

*Prison officer's appeal dismissed for want of jurisdiction*
*Alexander Byers v The Director General, Department of Justice* [2023] WASCA 43; (2023) 103 WAIG 267

A decision of Commission by a majority, dismissed the prison officer's appeal against his employer's removal action on the ground that was harsh, oppressive or unfair. This decision did not enliven the Industrial Appeal Court's jurisdiction to hear an appeal of a decision from the Commission, under s 110E of the *Prisons Act 1981* (WA), that removal action was harsh, oppressive or unfair.

Background

The appellant was a prison officer, employed by the respondent under s 13(2) of the *Prisons Act*, from April 2000 until July 2021. The appellant was dismissed after testing positive for cannabis, during a random drug test at Hakea Prison on 11 August 2020. The appellant appealed to the Commission pursuant to s 106(1) of the *Prisons Act*, on the ground that the removal decision was harsh, oppressive or unfair. On 6 May 2022, the Commission, by majority, comprising Chief Commissioner Kenner and Commissioner Emmanuel, dismissed the appeal. Senior Commissioner Cosentino delivered separate reasons, in which she found that the removal decision was unfair.

Contention

The appellant appealed to the Industrial Appeal Court on the ground that the majority of the Commission erred in law:

1. in deciding that the true meaning of reg 38(2) of the *Prisons (Prison Officers Drug and Alcohol Testing) Regulations 2016* (WA) had the effect of requiring the respondent to take removal action; and

2. by concluding that s 107(1)(a) of the *Prisons Act* does not require the Commission to consider all the reasons for the removal decision.

The appellant contended that, in the circumstances of this case, where one of the Commission members who heard the appeal has decided that the decision to take removal action relating to the appellant was harsh, oppressive or unfair, s 110E is enlivened, which in turn enlivens the jurisdiction of the Court to hear an appeal under s 90 of the *Industrial Relations Act*. The respondent filed a notice of motion seeking an order that the appeal be dismissed for want of jurisdiction. This was contended on the basis that the Court does not have jurisdiction to hear an appeal from a decision of the Commission under s 110B of the *Prisons Act* read with s 90 of the *Industrial Relations Act* on the ground that the majority of the Commission erred in deciding that the removal decision was not harsh, oppressive or unfair.

Findings

The Court dismissed the appeal for want of jurisdiction. The Court only has jurisdiction to hear an appeal if the Commission has made a 'decision', under s 110E of the *Prisons Act*, that the removal decision was harsh, oppressive or unfair. However, no appeal can lie against 'reasons for decision' of the Commission or a member of the Commission given in any proceeding. Section 35(1) of the *Industrial Relations Act* distinguishes a decision from reasons for decision. The reasons for decision of the Senior Commissioner do not constitute a decision within the meaning of s 35 or s 90(1), as modified, of the *IR Act*. Absent a decision that reflects the Senior Commissioner's reasons, the appellant's right of an appeal to this Court is not enlivened.

## Full Bench matters

### *Union found to have contravened Commission Orders*

*The Registrar, Western Australian Industrial Relations Commission; v Janet Reah; Australian Nursing Federation, Industrial Union of Workers Perth* [2023] WAIRC 00299; (2023) 103 WAIG 531

The Full Bench found that the Australian Nursing Federation had contravened the Commission's orders made on 18 and 23 November 2022 by holding a member ballot, taking industrial action, encouraging its members to take industrial action and making public statements regarding such action. The Australia Nursing Federation received a penalty of $350,000 for organising a State-wide strike of 1,808 members on 25 November 2022, providing transportation to strike events and paying 939 members a strike pay subsidy, which was in contravention of the Commission's orders and had a major impact on the State health system.

Background

In mid-July 2022, negotiations began between the Australian Nursing Federation (ANF) and the West Australian Department of Health (Department) for a new industrial agreement covering ANF members in public hospitals in the state. In mid-October 2022, ANF members authorised potential industrial action, including a strike between 24 and 30 November 2022. In early November 2022, the Department requested a compulsory conference to assist negotiations under s 44 of the *Industrial Relations Act 1979* (WA).

On 15 November 2022, the Department made a conditional offer with a three percent wage increase, contingent on the ANF stopping planned rolling stoppages. After agreeing 'in principle' to the offer, ANF members were to vote on it. On 17 November 2022, ANF Secretary, Ms Reah, expressed dissatisfaction with the offer, suggesting a State-wide strike if members voted 'no.' An online poll opened on 18 November 2022, and remained open until 22 November 2022, for ANF members to vote on the offer. On 18 November 2022, the Senior Commissioner convened another compulsory conference between the ANF and Department representatives. Following the conference, the Senior Commissioner issued orders to postpone the ballot for ANF members to vote on the employer's offer and prohibited the ANF from making any public statements or commentary regarding voting for or against the offer or requesting a better offer.

The Senior Commissioner made orders deferring the conduct of the ballot and precluding the ANF from making public statements about claims better than the offer.

Between 18 and 23 November 2022, the ANF breached the orders by keeping the ballot open beyond the specified date and making public statements against the orders, including plans for a State-wide strike on 25 November 2022. On 22 November 2022, Ms Reah announced the rejection of the offer in the ballot and declared a State-wide strike on 25 November 2022. Preparations for

the strike continued. On 23 November 2022, the resumed compulsory conference before the Senior Commissioner occurred. The Department sought interim orders to halt the planned strike, citing the ANF's short notice, its demand for a five percent wage increase, and the potentially severe impact on the state's health system. The Senior Commissioner made orders that the ANF by its officers, employees and members must not, and must cease all industrial action, and must not encourage any industrial action.

After the conference, Ms Reah told the media, in effect, that the strike would still occur on 25 November 2022. Ms Reah also sent a letter to the Senior Commissioner stating, in effect, that the ANF does not intend to comply with the 23 November 2022 orders. On the evening of 23 November 2022, Ms Reah emailed ANF members, sharing a document titled 'ANF Strike Guide 2022,' providing strike details and mentioning a $150 strike pay subsidy. On 24 November 2022, the Senior Commissioner's Associate summoned Ms Reah to attend a compulsory conference on 25 November 2022. On the morning of 25 November 2022, Ms Reah publicly refused to respond to the summons and emphasised her prioritisation of ANF members. She did not attend the compulsory conference.

On 25 November 2022, approximately 1,758 ANF members working in the public health system engaged in industrial action, violating the No Strike Order. The actions involved walking off the job or not reporting for duty. These activities included rallies held at multiple locations across the State, such as Parliament House and Dumas House in Perth, as well as in Albany, Broome, Bunbury, Geraldton, and Karratha. The ANF arranged and financed bus services through Horizons West to transport members to the Parliament House rally, with around 1,470 members registering for this service. Additionally, the ANF provided various materials to participants in preparation for the rallies, and speeches were delivered by Ms Reah and others representing the ANF at these gatherings.

On 28 November 2022, the Senior Commissioner directed the Registrar to initiate proceedings before the Full Bench to enforce her orders of 18 and 23 November 2022, and for Ms Reah's failure to comply with the summons. Additionally, the Senior Commissioner consulted with the ANF regarding the possibility of directing the Registrar to issue a summons to the ANF to appear before the Commission in Court Session, to show cause why its registration should not be cancelled or suspended due to non-compliance with her orders of 18 and 23 November 2022.

Contentions

The Registrar commenced these proceedings under s 84A of the Act in response to the failure of Ms Reah to respond to the summons to attend the compulsory conference on 25 November 2022, and the ANF's failure to comply with the Senior Commissioner's orders. Ms Reah and the ANF largely admitted the alleged conduct. At the outset of the proceedings on 12 April 2023, the Registrar's counsel informed the Full Bench that the conferral of the parties had led to an agreed position regarding a proposed penalty for consideration. The agreed penalty against the ANF amounted to $350,000. Senior counsel for Ms Reah and the ANF confirmed that the agreed total penalty of $350,000 for the ANF and a maximum penalty of $10,000 for Ms Reah. They suggested that the total sum should be apportioned among the 39 categories of contraventions, resulting in a penalty of approximately $8,974.35 per category, close to the maximum $10,000 penalty per contravention as prescribed by the Act.

The following day, 13 April 2023, Ms Reah and the ANF filed documents entitled 'Undertaking As To Future Conduct', which acknowledged the gravity of the conduct, assured compliance with future orders and reassured the Full Bench that its' future conduct in relation to matters within the

jurisdiction of the Western Australian Industrial Relations Commission ('WAIRC') will be unqualifiedly according to the provisions of the IR Act

Findings

The Full Bench ordered and declared that: Ms Reah failed to comply with a summons issued under s 44(3) of the Act on 24 November 2022, and she personally pay a penalty of $10,000 to the State, within 21 days; and the ANF contravened, or failed to comply with, the orders of the Senior Commissioner of 18 November 2022 and 23 November 2022, and that it pay a penalty of $350,000 to the State, within 21 days

Kenner CC

On balance, the Chief Commissioner was satisfied that the State-wide strike by the ANF had a major impact on the State health system. Further, the total number of employees taking industrial action on 25 November 2022, by walking off the job or failing to report for duty, was 1,808. Those 1,808 employees were members of the ANF. It was an agreed fact that 1,470 ANF members registered for the buses on the ANF iFolio system. Offering free bus transport to members to enable them to walk off the job or to be absent from duty, so they can attend a rally as a key part of an act of industrial action, and the taking up of that offer by a process of registration of intent, was an act of encouragement by the ANF to take part in the strike on 25 November 2022.

The Registrar submitted, and the ANF did not contest, that a comparison of the lists of staff recorded as having taken unpaid strike leave on 25 November 2022 and those members of the ANF registering for bus transport to the rally, at Parliament House, contained 808 names common to both lists. On balance, the Chief Commissioner was satisfied that 808 members of the ANF contravened or failed to comply with the No Encouragement Order in this respect. Finally, as submitted by the Registrar, and seemingly accepted by the ANF, the Chief Commissioner found that 939 ANF members were paid a strike pay subsidy.

The Chief Commissioner accepted the Registrar's approach to agreed penalties. This approach enabled the Full Bench to determine the outer limits of the maximum penalties that may be applicable, before weighing in the balance both the course of conduct and totality principles, to establish an appropriate, final penalty amount. It was appropriate that Ms Reah pay the maximum penalty of $10,000 because she was the leader of the ANF and its principal spokesperson during the dispute leading to the State-wide strike and was, at all material times, the public face of the ANF campaign. Further, Ms Reah's deliberate non-compliance with the summons to the s 44 conference before the Senior Commissioner on 25 November 2022 required a significantly high specific and general deterrent to make clear that such acts of non-compliance will not be tolerated by the Commission. Ms Reah's undertaking as to future conduct was also taken into account.

The Chief Commissioner found that the agreed penalty of $350,000 was a just and appropriate outcome because it reflected the serious nature of the ANF's conduct, which occurred over a considerable period. The ANF's conduct was contumacious and was at the most extreme end of the seriousness criterion. The ANF's most serious conduct was its public defiance of the Commission's orders and its outspoken criticism of those orders, which was exacerbated by its deliberate and highly publicised actions conveyed through the media. The tone of the ANF's communications was belligerent non-compliance.

Kucera C

Commissioner Kucera agreed with the Chief Commissioner's reasons, including the assessment of the number of breaches and how those breaches are characterised. Further agreeing with the Chief Commissioner, Commissioner Kucera stated that the ANF repeatedly breached the No Encouragement Order when it determined a member's eligibility for and made strike payments. This non-compliance persisted over an extended period, indicating a pattern of intentional violations for each payment made. Despite being a part of a continuing course of conduct, the conduct is not a single contravention. This attracts a higher overall penalty.

Commissioner Kucera found that the ANF made no effort to comply with the Defer Ballot and No Further Claims orders. But instead, it actively and deliberately, resolved to and did defy such orders publicly. Commissioner Kucera considered that the ANF knowingly accepted the risk of potential consequences for violating the Commission's orders, essentially viewing any potential penalties as a cost of doing business. He concluded the State-wide strike's impact on the public health system, including the cancellation of elective surgeries and outpatient appointments, was significant. In absence of the ANF's undertaking, the penalty imposed would have been more than $350,000 because the ANF had not expressed remorse for the conduct.

Emmanuel C

Whilst being in general agreement with the Chief Commissioners reasons, Commissioner Emmanuel considered a penalty of $350,000 insufficient to meet the requirements of specific and general deterrence in this matter. The outcome proposed by the parties reflects one 'that the contravening party may simply see as an acceptable cost of doing business'. Such a quantum would not be a just and appropriate outcome. Considering the seriousness and overall contumacy of the ANF's conduct and the ANF's repeated public statements that it would defy the orders, Commissioner Emmanual would order that the ANF pay a penalty of $480,000.

### *Full Bench refuses application for interrogatories*

*The Registrar, Western Australian Industrial Relations Commission v Australian Nursing Federation, Industrial Union of Workers Perth* 2023 WAIRC 00083; (2023) 103 WAIG 198

On 17 March 2023, in proceedings for enforcement of orders of the Senior Commissioner, following an application by the applicant, the Full Bench made orders requiring the respondent to give discovery on affidavit of various categories of documents and for substituted service of a summons. However, an order for the administration of interrogatories was refused.

Background

On 15 February 2023, the Full Bench ordered the respondent to give discovery on affidavit of various categories of documents by 27 February 2023. The subsequent discovery that the respondent filed on 27 February 2023 was manifestly inadequate and failed to comply with the 15 February 2023 order. In direct contravention, and a contemptuous failure to comply with the order of the Full Bench, the respondent simply refused to provide the documents required.

Contentions

The applicant's interlocutory application posed 40 questions that it sought the respondent to answer. The applicant submitted that the proposed interrogatories sought to be answered were for the purpose of identifying potential contraventions of the orders made by the Senior Commissioner the subject of these proceedings and disclosing factual material relevant to those alleged contraventions. The proposed interrogatories included questions regarding communications to

members, public statements and decisions made by the respondent. The applicant further submitted that answers to the questions posed would aid in the Full Bench having before it in the substantive proceedings all the relevant material, to enable it to determine the respondent's conduct and the seriousness of any contraventions. The respondent opposed the application for interrogatories, on grounds that granting the application would be oppressive and likely to lead to a significant delay in the respondent's preparation for the substantive proceedings. The respondent also submitted that many of the questions were vague and objectionable.

Findings

The Full Bench dismissed the application because, given the tight timetable agreed to by the parties and the nature of the questions posed in the proposed interrogatories, an order to require the respondent to answer the questions in the available time would be unreasonable and oppressive. Further supporting the application's dismissal was the existing direction requiring the parties to put on written evidence-in-chief approximately one week from the date of this decision's delivery.

### *Full Bench dismisses appeal against Industrial Magistrates Court redundancy severance pay decision*

*B. K Elsegood & D.S Elsegood & D.K Elsegood & Elsegood Holdings Pty Ltd & S.M Elsegood & Falconcrest Holdings Pty Ltd v Alan Mahon* [2023] WAIRC 00024; (2023) 103 WAIG 73

The Full Bench has dismissed an appeal against an Industrial Magistrates Court decision which had found the respondent was made redundant and had ordered that the appellants pay severance pay.

Background

The appellants were a steel manufacturing partnership, of which the respondent was Chief Executive Officer. In 2020, the appellants informed the respondent they could not afford his $250,000 remuneration, and that his employment would be terminated unless he accepted a reduction. The respondent did not agree and was sent a termination letter. The respondent commenced an Industrial Magistrates Court claim alleging contravention of the Commission's termination, change and redundancy General Order in [2005] WAIRC 01715; (2005) 85 WAIG 1681. The Industrial Magistrate held that the respondent was made redundant. The appellants appealed to the Full Bench under s 84 of the *IR Act*. The appellants sought to challenge the redundancy conclusion, to quash the decision, and set aside its orders.

The respondent contended that there were no errors of law in the decision at first instance and contended that the job of the CEO was no longer required, as restructuring meant work previously performed by the respondent was performed by the Managing Partner and an external consultant.

Findings

The Full Bench considered the history and context of the redundancy General Order; and the broader principles surrounding redundancy. The Full Bench found the evidence did not support a conclusion that the appellants wished to keep the respondent in his job. The Full Bench found the dismissal was in prospect if the respondent did not accept lower remuneration offered. The Full Bench found the respondent was dismissed on financial grounds, that a definite decision had been made and that this was communicated unequivocally. The Full Bench noted the appellants' advanced no authority or principle to support the impossibility of a CEO being made redundant, and that was never contended at first instance. The Full Bench noted that except in limited circumstances, a point not raised in proceedings cannot be raised for the first time on appeal. The Full Bench found it was not in the interests of justice to permit raising the point on appeal for the

first time and noted that it was not persuaded it had merit. The Full Bench considered that the appellants were entitled to terminate and abolish the CEO position, noting that there is no requirement for a partnership to have a CEO as decision maker.

The Full Bench found cl 4.1 of the General Order must be construed faithfully to its text, with the definition of redundancy being broad and informed by its industrial history and context, and breadth of meaning. The Full Bench noted that the termination resulted from the decision to cease having a CEO due to financial constraints, and at this time, the position no longer existed. The Full Bench found that as the position no longer existed, and the respondent had no duties to perform, that he was redundant under cl 4.1 of the General Order. The Full Bench found on the evidence the Industrial Magistrate's findings were open and the only ones reasonably open. The Full Bench found no error in the decision of the Industrial Magistrate and dismissed the appeal.

### *Decision that does not finally determine parties' rights cannot be subject to appeal*

*Y.D HUI & A.E IMAM v Brian Edward Ravenscroft* [2022] WAIRC 0072; (2022) 102 WAIG 1352

The Full Bench has dismissed an appeal that was lodged by a single member of a partnership as the decision appealed against did not finally determine the rights of the parties.

Background

The appeal involved a husband-and-wife café business partnership which sought to appeal a default judgement order made by the Industrial Magistrates Court. The respondent was an industrial inspector that had alleged both members of the partnership had failed to produce records for examination, and that one member had obstructed an industrial inspector in the performance of their statutory duties. The Industrial Magistrates Court order was made against both partnership members individually, and the appeal was purportedly brought by both members of the partnership as the appellants.

Findings

The Full Bench noted that one partner had not been represented by the other as that partner was a respondent in her own right, she did not appear and filed the notice of appeal in her own name. The Full Bench noted there was no reference to her husband as an appellant in her appeal notice or grounds. The Full Bench found that for a person to have standing they must be 'a party' to the proceedings under s 84(3) of the *IR Act*. The Full Bench found that only one partner was an appellant and that no appeal was filed by her husband.

The Full Bench found the relevant 'decision' that was the subject of the appeal was the order of the learned Industrial Magistrate that granted the respondent's application at first instance for default judgment. The Full Bench noted issues with the amended and purported grounds of appeal referencing 'appellants' and referring to the incorrect decision. The Full Bench found that under s 27(1) of the *IR Act* it was not open to the Full Bench to amend an appeal that had the effect of substituting the decision under appeal for another decision. The Full Bench found it could only consider the ground which contended that the Industrial Magistrate erred in not granting an adjournment on the hearing of the default judgment application, and the assertion of a denial of procedural fairness.

The Full Bench found that the decision of the learned Industrial Magistrate could not be the subject of an appeal under s 84 of the *IR Act*, as it did not finally determine the rights of the parties to the proceedings. The Full Bench noted that the Industrial Magistrates Court had a discretionary power

to set aside a default judgement but that no application was made by either partner to set aside the order. The Full Bench found that the appeal was incompetent and dismissed the appeal.

## Commission in Court Session

*Commission in Court Session cannot exercise the general rule alteration powers reserved to the Registrar under the IR Act*

*The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v (Not Applicable)* [2023] WAIRC 00226; (2023) 103 WAIG 414

The Commission ordered that the applicant's Rules be altered to change its name and its rules regarding office bearers and the eligibility for membership, as such changes fell within the Commission in Court Session's jurisdiction, were proposed in accordance with the applicant's Rules and no objection was made by the applicant's members.

Contentions

The application, made under s 62(2) of the *IR Act*, sought to alter the applicant's Rules to maintain consistency with the operation of the ARTBIU. The proposed alterations to the Rules were extensive, including changes to the applicant's name, eligibility for membership and rules regarding office bearers and who may hold office. In compliance with its Rules, the applicant gave evidence that a letter was sent to all members of the applicant's Executive by email, containing written notice of the proposed alterations to the Rules. The letter specified that the meeting of the Executive to consider the proposed alterations to the Rules would be convened on 21 September 2022. On this date, the Executive unanimously endorsed the proposed alterations to the Rules. All the applicant's current members were notified of the proposed alterations and the reasons for the proposed alterations and were provided with the opportunity to object. Finally, the applicant deposed that no objections were raised by members. Despite many additional proposed alterations not falling within s 62(2), the applicant contended that the Commission in Court Session had a general residual jurisdiction to deal with any matter the Registrar could deal with concerning alteration to the rules of an organisation.

Findings

The Commission in Court Session was not persuaded that it can exercise the powers of the Registrar generally, in relation to the alteration of organisations' registered rules, in the exercise of a general residual jurisdiction and power. The Commission's jurisdiction is limited to specific matters outlined in s 62(2) and any proposed alterations beyond those matters need to be the subject of a separate application to the Registrar. In other respects, the Commission in Court Session ordered alterations within its jurisdiction be made to the applicant's Rules.

*Loss of Confidence required to appeal under s 33P of Police Act 1892*

*Kovacs v Western Australia Police Force* [2023] WAIRC 00140; (2023) 103 WAIG 326

The appellant served as First Class Constable in the Western Australian Police Force. He was dismissed in September 2022. The reason for the dismissal was disobeying the Commissioner of Police's direction requiring him to have at least one COVID-19 vaccination by 1 December 2021 unless having a medical exemption. The appellant challenged the decision to dismiss him by appealing the dismissal to the Police Appeal Board.

The appellant then sought to further appeal the dismissal decision by way of an appeal to the Western Australian Industrial Relations Commission under s 33P of the *Police Act 1892* (WA).

The Commission needed to decide whether the appellant had a further right of appeal to the Commission or not. Was the dismissal decision 'removal action' from which an appeal under s 33P lies? The appellant was advised that following an investigation, the Commissioner of Police may, amongst other things, issue a Notice of Loss of Confidence under s33L of the *Police Act*. However, no Notice of Loss of Confidence was issued. The Commission was provided with the document trail that ultimately led to the dismissal decision. The documents showed that the appellant was instead charged with a disciplinary offence, by the issue of a Disciplinary Charge Sheet. The appellant was 'convicted' of that charge by Presiding Officer Deputy Commissioner Adams at Police Headquarters on 14 September 2022. Deputy Commissioner Adams' 'Penalty of dismissal was confirmed by a notice signed by the Commissioner of Police on 23 September 2022. The notice is expressed to be 'in accordance with Section 23(5)' of the *Police Act*.

The appellant had a right of appeal to the Police Appeal Board under s from a 'disciplinary offences', which he exercised. Under s 33H of the *Police Act*, 'the decision of the Board is final'. This clearly means that there is no further appeal from a decision of the Police Appeal Board. The *Police Act* gives the Commission jurisdiction to determine appeals by police officers against removals for loss of confidence. Removal for loss of confidence and dismissal are distinct concepts, even if the ultimate consequence is the same for the police officer concerned: *McGrath v Commissioner of Police* [2005] WAIRC 01989; (2005) 85 WAIG 2006 at [21] and The Honourable Minister of Police Commissioner of Police v Western Australian Police Union of Workers [2000] WAIRC 01174; (2001) 81 WAIG 356 at [111]. As the appellant was not removed for loss of confidence, there was no decision to appeal to the Commission. Accordingly, the Commission dismissed the appeal for want of jurisdiction.

## Single Commissioner matters

*Demotion and transfer not found to be harsh or disproportionate*
*Wendyl Kevin Tennent v Minister for Corrective Services* [2023] WAIRC 00348; (2023) 103 WAIG 816

The applicant was employed by the Minister for Corrective Services as a Senior Officer. In 2021, the Minister investigated and upheld an allegation that the applicant breached the Department of Justice Code of Conduct by failing to remain alert while on duty. The applicant was demoted to the rank of Prison Officer and transferred to a different prison.

The Commission considered the definitions of 'alert' and 'vigilant', finding that the applicant was neither. On his own evidence, the applicant was in the tearoom from at least 1am, and from at least 3am to 5am with the television on and lights off, and from 3am to 3:30am he had his shoes off, a pillow under his back for a period, his feet up and his eyes occasionally closed. The Commission found that the applicant was not alert or vigilant in the performance of his duties as the Senior Prison Officer and Officer in Charge of Wandoo on the night shift in question. In doing so, he breached the Department's code of conduct. The Commission found that a Senior Officer must model behaviour and lead by example. Plainly, a senior staff member appearing to be asleep during a shift is a serious matter and is as damaging to staff standards and expectations as if the Senior Officer were asleep. The Commission expressed concern that the applicant did not show contrition or have any insight into why his conduct was problematic.

Ultimately the Commission was not persuaded that the demotion and transfer was harsh or disproportionate and the application was dismissed.

*Traffic Controller found to be engaged 'in the Construction Industry' for the purposes of the Act*
*Contra-Flow Pty Ltd v The Construction Industry Long Service Leave Payments Board* [2022] WAIRC 00648; (2021) 102 WAIG 1212

MyLeave had determined that Contra-Flow Pty Ltd, a traffic management services business, was liable to pay contributions under the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) (the Act) in respect of a Traffic Controller it employed. Contra-Flow sought review of that decision, arguing that it was not an 'employer' as defined by the Act, because it does not engage persons as employees in the construction industry for the purpose of the definition of employer in the Act.

The first issue for the Commission to decide was what type of work the Traffic Control employee must perform on roadworks sites to be classified as being engaged 'in the construction industry' for the purposes of the definition of 'employer' in the Act. The second issue was whether in fact, the employee performed such work and is therefore engaged 'in the construction industry'.

The Commission concluded that an employee must themself perform the maintenance and repair activities referred to in the definition of 'construction industry' to be engaged 'in the construction industry'. Further, the Commission considered the employee's traffic control work on the sites where roadworks were carried out qualified him as being engaged 'in the construction industry'.

The Commission concluded that:

(a) the correct meaning of 'in the construction industry' does not require that an employee must themselves be doing the activities listed in the 'construction industry' definition; and

(b) the ordinary and natural meaning of 'in the construction industry' means that the employee's work that the employee is engaged to perform for the employer is part of the steps, processes or tasks that, are or in combination with other steps, processes or tasks, amount to, the 'construction industry' as defined.

In the Commission's assessment, the work of Traffic Controllers must be part of the steps, processes and tasks that, in combination with other steps, processes and tasks, amount to the construction, reconstruction, maintenance of or repairs to roads. Contra Flow therefore engaged the Traffic Controller employee in the construction industry for the purpose of the definition of 'employer' and Contra Flow is an 'employer' for the purpose of the Act. MyLeave's decision was affirmed.

## Public Service Appeal Board

*Appeal against termination dismissed: Electorate Officer received improper benefit from conduct*
*Spasojevic v Speaker of the Legislative Assembly* [2023] WAIRC 00001; (2021) 103 WAIG 138

The Public Service Appeal Board dismissed an Electorate Officer's appeal against a decision terminating her employment for misconduct. The Electorate Officer was a long-standing employee of the Speaker of the Legislative Assembly, employed as an Electorate Officer in the Kwinana Electorate Officer of MLA Roger Cook. Over about four years, she travelled overseas with her family to Europe, Bali and Vietnam, whilst being paid wages. She was also away from the workplace for eight workdays while she was in hospital.

The Board found that the Electorate Officer was not entitled to be paid when not at work, unless she was exercising a right to take annual leave or personal leave, in accordance with the applicable

industrial award or industrial agreement. The Electorate Officer had not applied for annual leave for her overseas travel. Instead, she either did not apply for leave at all, or applied for personal leave. When the Electorate Officer applied for personal leave for her time in hospital, she only applied for two days' leave, not eight. The Board found that the Electorate Officer's overseas trips were holidays, and the circumstances in which they were taken did not entitle her to personal leave. She ought to have applied for annual leave but did not do so. As a result, she was paid wages while she was not at work, without any deduction from her annual leave accrual. That conduct amounted to the dishonest receipt of benefits which the Electorate Officer was not entitled to receive. It was therefore misconduct, justifying dismissal.

The Board found that the employee knew that by not submitting the correct leave application forms, she would receive payment of salary as if she was working, and that she knew she improperly benefited from her conduct. Accordingly, the Board concluded the Electorate Officer had engaged in deliberate misconduct justifying her dismissal. It referred to previous cases establishing that misuse of sick leave constitutes misconduct sufficient to justify termination of employment. It dismissed the Electorate Officer's appeal.

*Prospect of success relevant consideration when requesting extension of time*
*Mackay v North Metropolitan Health Services (WA Health)* [2022] WAIRC 00291; (2022) 102 WAIG 500

The appellant was employed by the North Metropolitan Health Service (NMHS) as a Level 2 Clerical Officer until 26 April 2022, when her employment was terminated because she failed to provide her employer with evidence that she had been vaccinated against COVID-19. That date, 26 April 2022, was the last day of a five-week notice period given to her by NMHS of the termination of her employment. The decision to terminate the employment was communicated to Ms Mackay on 22 March 2022.

On 26 April 2022, an association or company which trades under the name 'Independent Workers' Union of Australia' (IWUA) purported to file an appeal to the Public Service Appeal Board (Board) against the termination decision on the appellant's behalf. The appeal was out of time. The Public Service Appeal Board considered whether to grant the appellant an extension of time. The appellant argued that it should, because the reason for the delay was incorrect advice she had received from IWUA about time limits. The Board accepted that this was an adequate explanation for the delay, even though the Board considered it was unreasonable for the appellant to have relied on IWUA's advice, the IWUA being neither a law firm, nor a registered organisation.

Ultimately though, the appellant failed to persuade the Board to grant the extension because she did not attempt to address the prospects of success in the appeal and so it was not shown that the interests of justice required that an extension of time to appeal be granted.

*Termination upheld where appellant failed to exercise appropriate scrutiny of overtime payments*
*Michael John Millward v Chief Executive, North Metropolitan Health Service* [2022] WAIRC 00776; 102 WAIG 1470

Background

The appellant was a Consultant Medical Oncologist at Sir Charles Gairdner Hospital from 2003 until 21 December 2021. He was dismissed by the respondent because of two breaches of discipline relating to the overtime claimed by and the engagement as a contractor of another health service employee. In 2019, Corruption and Crime Commission (CCC) proceedings concluded that the appellant's colleague, who was the Clinical Trials Manager, engaged in serious misconduct when

she claimed and was paid overtime to which she was not entitled. That employee resigned but was later re-engaged at the initiative of the appellant as a contractor (Worker).

The respondent investigated the appellant's role in both the payment of overtime and the contracting arrangement. The respondent substantiated two allegations against the appellant, which were broadly:

Allegation 1: That the appellant was negligent or careless in the performance of his functions because he failed to exercise an appropriate level of oversight and scrutiny in relation to the payment of the overtime payments to the Worker, constituting a breach of discipline contrary to s 161(d) of the *Health Services Act 2016* (WA); and

Allegation 3: That the appellant breached his duty of fidelity and good faith to his employer when he approved the engagement of the Worker on a contract which was detrimental to the respondent, constituting a breach of discipline contrary to s 161(c) of the *Health Services Act 2016* (WA).

The appellant appealed his dismissal to the Public Service Appeal Board (Board).

Findings

The Board found that Allegation 1 was substantiated, and that the appellant was negligent and careless in the performance of his functions. The Board was satisfied that the appellant had oversight and management of the Worker at the relevant time and that he approved overtime payments to her in circumstances where he had not properly reviewed her overtime claims, the reasons she gave for the overtime or whether she had worked the overtime at all. The Board found that Allegation 3 was substantiated, and that the appellant committed an act of misconduct that amounted to a breach of discipline. He dishonestly used his position to obtain a benefit for the Worker and to cause a detriment to the health service. He negotiated the terms of a contract for the Worker through a labour hire agency, which allowed the Worker to be paid more than what she would have been paid had she been an employee.

The Board noted that the appellant failed to take responsibility for his actions and considered that termination of employment was a fair penalty in the circumstances. The Board dismissed the appeal.

## Work Health and Safety Tribunal

*Refusal to vaccinate not refusal to work*
*Julian Cosentino v Director General, Department of Education* [2022] WAIRC 00846; 103 WAIG 61

Background

The applicant was employed as a Participation Coordinator at a primary school. He applied to the Work Health and Safety Tribunal (Tribunal) for pay and benefits arising out of a period when he said that he refused to work under s 26(1) of the *Occupational Safety and Health Act 1984* (WA) (OSH Act) because he refused to be vaccinated. In December 2021, the Chief Health Officer of Western Australia and Director General, Department of Education made directions and issued instructions about mandatory vaccination for education workers who were working in an education facility. The applicant refused to be vaccinated and did not seek an exemption, and did not work from 23 December 2021 until 10 June 2022, when vaccination requirements were lifted.

The applicant submitted that the direction to receive a vaccination constitutes 'work' and contended that a refusal to be vaccinated constitutes a refusal to work under s 26(1) of the OSH Act. He said

that his refusal was reasonable because he believed the vaccination would expose him to a risk of imminent and serious injury or harm to his health. He argued that the direction to be vaccinated was not a reasonable and lawful order and complained that the respondent did not do a risk assessment of the COVID-19 vaccinations.

Findings

The Tribunal noted that several of the remedies sought by the applicant were outside of the Tribunal's powers and that it was not within the jurisdiction of the Tribunal to consider whether the respondent could have been more accommodating (for example by allowing the applicant to work from home while he was unvaccinated). The Tribunal found that receiving a vaccination was not 'work' for the purposes of s 26 of the OSH Act and that the applicant's refusal to be vaccinated was not a refusal to work.

The Tribunal considered that even if the applicant's absence from work was because the applicant believed that it would expose him to a risk of imminent and serious injury or harm to his health, this belief was not based on reasonable grounds. The Tribunal noted the expert evidence accepted in *Falconer v Chief Health Officer (No 3)* [2022] WASC 270. In particular, the Tribunal highlighted the Chief Health Officer's statements to the effect that COVID-19 vaccinations were safe and effective, were an important measure in reducing the spread of COVID-19 and were necessary to protect workers and the community. The Tribunal concluded that in the relevant period, the applicant did not refuse to work. He was unable to lawfully perform his work because of the instructions about mandatory vaccination that were in place. The Tribunal found that the applicant was not entitled to pay and other benefits during the claim period and dismissed the application.

# APPENDICES

## Appendix 1 – Members of the Public Service Appeal Board

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|---|---|
| Mr Matthew Abrahamson | Mr P Heslewood |
| Ms B Anderson | Mr D Hill |
| Ms J Auerbach | Ms K Johnson |
| Mr D Barratt | Mr M Jozwicki |
| Mr s Barrett | Mr G Lee |
| Ms R Barrow | Ms J Love |
| Ms B Bogdan | Ms M Maher |
| Ms T Borwick | Ms C McSwain |
| Ms L Brick | Ms H Moir |
| Mr G Brown | Ms J Neagle |
| Mr P Budd | Mr R Parkes |
| Ms M Butler | Ms N Pyne |
| Ms K Carter | Ms H Redmond |
| Mr N Cinquina | Mr G Richards |
| Ms J Coates | Ms M Ristic |
| Ms B Conway | Ms R Sinton |
| Mr s Dane | Ms B Skalko |
| Mr R Davenport | Ms s Smith |
| Ms M Di Lello | Mr K Sneddon |
| Ms T Fowler | Ms D Southcott |
| Ms J Furey | Mr G Sutherland |
| Ms s Gibson | Mr M Taylor |
| Mr A Gifford | Mr G Thompson |
| Ms A Greenland | Ms V Tomlin |
| Mr M Golesworthy | Ms J van den Herik |
| Mr B Hawkins | Mr C Webster |
| Ms E Hamilton | Ms M Wood |

## Appendix 2 – Pro Bono Providers

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| 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 |