

2007

WESTERN AUSTRALIA



Forty Fourth Annual Report

of

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

for the period

1 July 2006 to 30 June 2007

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

2007

WESTERN AUSTRALIA



**Report of the Chief Commissioner of the
Western Australian Industrial Relations Commission
On the operation of the *Industrial Relations Act 1979***

1 July 2006 to 30 June 2007

**Minister Responsible for the Administration of the Act The
Hon. Michelle H Roberts BA DipEd MLA**

In her capacity as Minister for Employment Protection

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Membership and Principal Officers

Western Australian Industrial Relations Commission

During the year to 30 June 2007, the Western Australian Industrial Relations Commission (WAIRC) was constituted by the following members:

President	The Honourable M T Ritter (<i>Acting</i>)
Chief Commissioner	A R Beech
Senior Commissioners	J F Gregor (<i>Retired</i>) J H Smith
Commissioners	P E Scott S J Kenner S Wood J L Harrison S M Mayman

During the reporting period, the composition of the Commission changed in the following manner:

Senior Commissioner J F Gregor retired as from and including 10 November 2006. The Commission records its appreciation for his many years of loyal and dedicated service to the Commission and the community in general.

Commissioner J H Smith was appointed Senior Commissioner as from and including 24 November 2006.

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

Public Service Arbitrators

Commissioner P E Scott continued her appointment as the Public Service Arbitrator throughout the period. This appointment is due to expire on 21 June 2009.

Senior Commissioner J H Smith was appointed as an additional Public Service Arbitrator on 12 January 2007. This appointment is due to expire on 12 January 2008.

Commissioner S J Kenner continued his appointment as an additional Public Service Arbitrator. This appointment is due to expire on 25 June 2008.

Commissioner J L Harrison continued her appointment as an additional Public Service Arbitrator. This appointment is due to expire on 30 April 2008.

Coal Industry Tribunal of Western Australia

Commissioner S J Kenner continued his appointment as Chairperson of the Coal Industry Tribunal.

Railways Classification Board

Senior Commissioner J H Smith continued her appointment as Chairperson of the Railways Classification Board until its expiry on 3 April 2007.

Commissioner J L Harrison continued her appointment as Deputy Chairperson of the Railways Classification Board until its expiry on 3 April 2007.

These appointments will be renewed if and when an application is made to the Railways Classification Board.

Occupational Safety and Health Tribunal

Commissioner S M Mayman continued as Chairperson of the Occupational Safety and Health Tribunal. This appointment operates for the purposes of s.51H of the *Occupational Safety and Health Act 1984*.

Registry

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

Mr J Spurling	Registrar
Ms S Bastian	Registrar Designate
Mr J Rossi	Deputy Registrar
Ms S Tuna	Deputy Registrar
Mr A Wilson.	Deputy Registrar

The Western Australian Industrial Appeal Court

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

The Honourable Justice Steytler	Presiding Judge
The Honourable Justice Wheeler	Deputy Presiding Judge
The Honourable Justice Roberts-Smith <i>(Resigned February 2007)</i>	Ordinary Member
The Honourable Justice Pullin	Ordinary Member
The Honourable Justice Le Miere <i>(Appointed February 2007)</i>	Ordinary Member

Industrial Magistrates Court

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

Mr G Cicchini
 Mr W G Tarr *(Retired 27 April 2007)*
 Mr PM Heaney
 Mr GN Calder
 Ms PM Hogan

Matters before the Commission

1. Full Bench Matters

The Full Bench has been constituted on each occasion by the Acting President, the Honourable M T Ritter and by two (2) Commissioners.

The number of times the Acting President presided over the Full Bench is as follows:

The Honourable M T Ritter (Acting President)	40
--	----

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

Chief Commissioner A R Beech.....	12
Senior Commissioner J F Gregor.....	4
Senior Commissioner J H Smith	18
Commissioner P E Scott	14
Commissioner S J Kenner	7
Commissioner S Wood	6
Commissioner J L Harrison.....	11
Commissioner S M Mayman	8

The following summarises Full Bench matters:

Appeals

Heard and determined from decisions of the:

Commission - s.49.....	23
Industrial Magistrate - s.84.....	8
Coal Industry Tribunal	0
Public Service Arbitrator.....	2
Railways Classification Board	0
Occupational Safety and Health Tribunal	3

Organisations – Applications by or Pertaining to

Applications to register an organisation pursuant to s.54	0
Applications to amend the rules of a registered organisation pursuant to s.62	2
Applications relating to State branches of federal organisations pursuant to s.71	0
Applications to adopt rules of federal organisations pursuant to s.71A.....	0
Applications for registration of a new organisation pursuant to s.72	0
Applications seeking coverage of employee organisations pursuant to s.72A.....	0
Applications for cancellation/suspension of registration of organisations pursuant to s.73	1

Other

Proceedings for enforcement pursuant to s.84A brought by the Minister, or another person or organisation	1
Questions of law referred to the Full Bench.....	0
Matters remitted by the Industrial Appeal Court.....	1
Application to extend time for Appeal Books	4
Applications for extension of time to file Notice of Appeal	0
Number of Full Bench matters heard but not determined in 2006/2007	6

Orders

Orders issued by the Full Bench	64
---------------------------------------	----

2. Acting President

Matters before the Acting President sitting alone were as follows:

Applications for an order that the operation of a decision appealed against be stayed pursuant to s.49(11)	5
Applications for an order, declaration or direction pursuant to s.66	0

The following summarises s.66 applications:

Applications finalised in 2006/2007	1
Directions hearings	3
Applications part heard	0
Applications withdrawn by order	0
Applications discontinued by order	0

Orders

Orders issued by the Acting President from 1 July 2006 to 30 June 2007 inclusive:

Order pursuant to s.49 (11)	6
Order pursuant to s.66	6
Reference of rules by Full Bench under s.72A(6)	0
Application pursuant to s.92	0
Remitted from the Industrial Appeal Court	0
Rules brought to President pursuant to s.97Q	0

Consultations

Consultations with the Registrar pursuant to s.62 of the Act	6
--	---

3. Commission in Court Session

During the period under review, the Commission in Court Session has been constituted ten times each time by three Commissioners with the exception of the 2007 State Wage order which was constituted by five Commissioners. The extent to which each Commissioner has been a member of the Commission in Court Session is indicated by the following figures:

Chief Commissioner A R Beech	7
Senior Commissioner J F Gregor	2
Senior Commissioner J H Smith	7
Commissioner P E Scott	4
Commissioner S J Kenner	4
Commissioner S Wood	6
Commissioner J Harrison	3
Commissioner S M Mayman	5

These Commission in Court Session matters comprised of the following:

State Wage Case – s.51 and Review of Adult Minimum Weekly Rates of Pay (s.51 repealed on 4 July 2006).....	0
State Wage Order Case – s.50A Determine rates of pay for purposes of <i>Minimum Conditions of Employment Act 1993 (MCE Act) and Awards</i>	3
General Order – s.50	2
New Award.....	0
New Agreement.....	0
Variation of an Award – s.40B.....	2
Cancellation of an Award – s.47	3
Conference pursuant to s.44.....	0
Joinder to an Award	0

4. Federal Matters

Federal matters dealt with by State (WAIRC) Commissioners	6
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5. Rule Variations by Registrar

Variation of Organisation Rules by the Deputy Registrar	1
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6. Boards of Reference

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

7. Industrial Agents Registered by Registrar

Number of new agents registered during the period.....	2
Total number of agents registered as corporate body	31
Total number of agents registered as individuals	25
Total number of agents registered as at 30 June 2007	56

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

Year	Number at 30 June
2002	2359
2003	2499
2004	2506
2005	2759
2006	2737
2007	2804

Industrial Organisations Registered as at 30 June 2007

	Employee Organisations	Employer Organisations
No. of organisations	56	18
Aggregate membership	171,993	3637

Summary of Main Statistics

Western Australian Industrial Relations Commission

	MATTERS DEALT WITH ¹				
	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Full Bench:					
Appeals	52	41	51	34	36
Other Matters	6	13	11	12	4
Acting President sitting alone:					
S.66 Matters (finalised)	17	6	3	0	1
S.66 Orders issued	32	11	11	0	6
S.49(11) Matters	9	10	8	12	5
Other Matters	0	5	10	12	0
S.72A(6)	0	0	0	0	0
Consultations under s.62	2	6	0	2	6
Commission in Court Session:					
General Orders	1	3	2	2	4
Other Matters	1	8	7	9	9
Public Service Appeal Board:					
Appeals to Public Service Appeal Board	15	17	17	9	13
Commissioners sitting alone:					
Conferences ¹	370	387	332	259	138
New Agreements	203	275	444	264	76
New Awards	5	14	9	14	5
Variation of Agreements	0	2	3	1	2
Variation of Awards	231	175	261	157	132
Other Matters ²	71	76	109	93	46
Federal Matters	9	1	5	18	0
Board Of Reference - Other Awards (Chaired by a Commissioner)	0	2	1	0	1
Unfair Dismissal Matters Concluded:					
Unfair Dismissal claims	856	844	742	746	324
Contractual Benefits claims	233	192	261	259	191
Unfair Dismissal & Contractual Benefits claims together	539	507	436	207	16
Public Service Arbitrator (PSA):					
Award/Agreement Variations	32	21	40	39	25
New Agreements	56	15	26	19	24
Orders Pursuant to s.80E	30	0	0	0	1
Reclassification Appeals	85	105	88	143	84
TOTALS:	2855	2736	2877	2311	1147

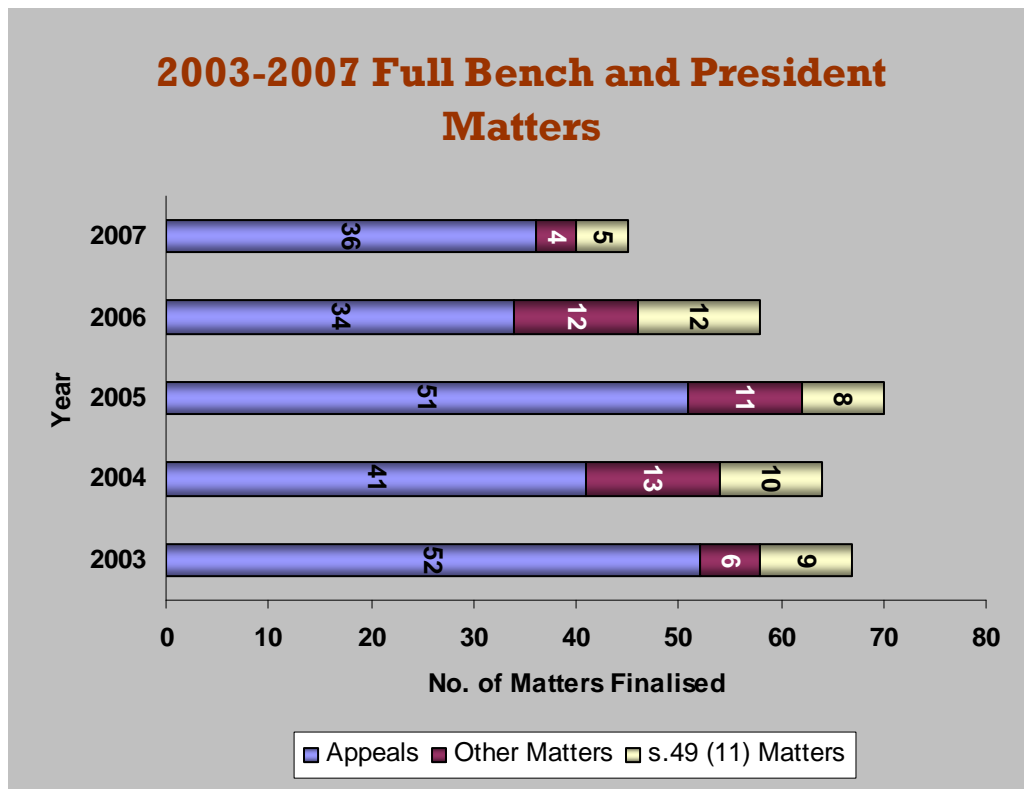
¹ The Railways Classification Board statistics have been removed from this table as there have been no more applications since the last application in 1998.

Notes

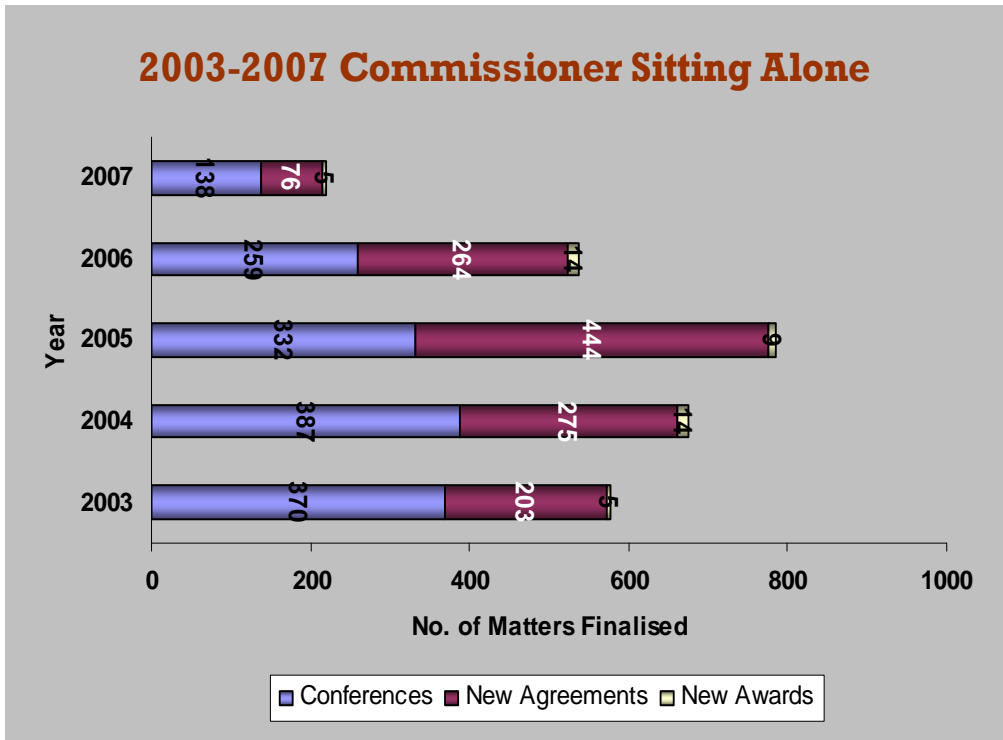
¹ CONFERENCES include the following:	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Conferences (s.44)	263	249	228	177	75
Conferences referred for arbitration (s.44(9))	39	55	54	23	22
Conferences divided	0	0	0	4	0
Conferences referred and divided	0	2	0	2	0
PSA conferences	57	63	40	44	35
PSA conferences referred	11	18	10	9	6
PSA conference divided	0	0	0	0	0
TOTALS	370	387	332	259	138

² OTHER MATTERS include the following:	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Applications	48	52	64	32	12
Apprenticeship Appeals	2	0	0	0	0
Occupational Safety & Health Tribunal #	-	-	3	13	7
Public Service Applications	12	24	42	42	27
Workplace Agreements	9	-	-	-	0
TOTALS	71	76	109	93	46

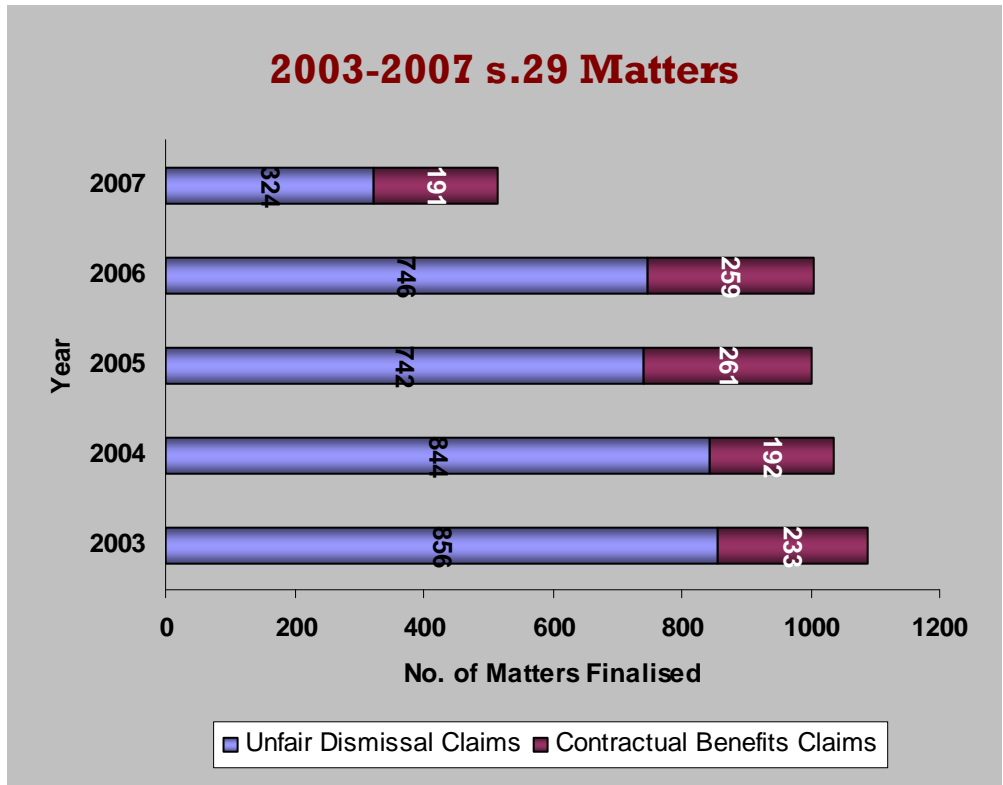
#The Tribunal operates under the Occupational Safety and Health Act 1984 and thus its operation is outside the scope of this Report. This figure records the number of applications to the Tribunal which have been finalised.



2003-2007 Commissioner Sitting Alone



2003-2007 s.29 Matters



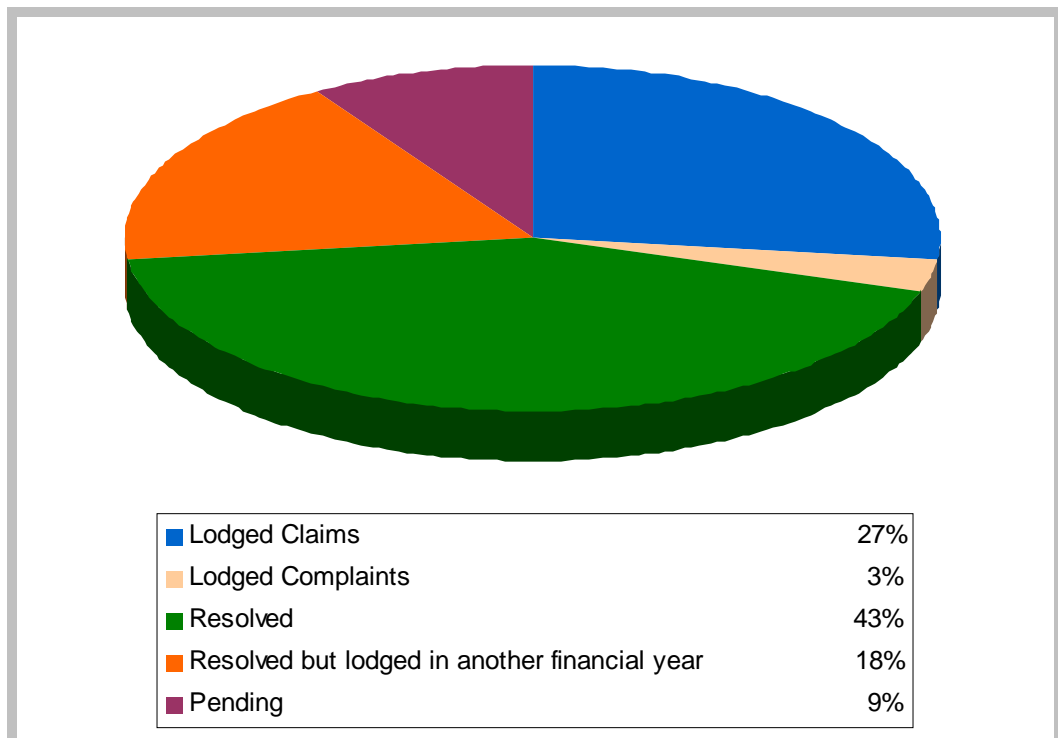
The Western Australian Industrial Appeal Court

Decisions issued by the Industrial Appeal Court during this period 4

Industrial Magistrates Court

The following summarises the Court for the period under review:

Lodged Claims	89
Complaints Lodged	10
Resolved (total)	141
Resolved (lodged in the period under review)	82
Resolved but lodged in another financial period	59
Pending	29
Total number of resolved applications with penalties imposed.....	34
Total value of penalties imposed.....	\$238,550.00
Total number of claims/complaints resulting in disbursements	19
Total value of disbursements awarded	\$8,940.00
Claims/Complaints resulting in awarding wages.....	29
Total value of wages of Magistrate matters resolved during the period	\$236,167.00



The matters dealt with by the Industrial Magistrates Court related to alleged breaches of federal awards and agreements, State awards and agreements and the *Minimum Conditions of Employment Act 1993*, together with claims pursuant to the *Long Service Leave Act 1958* and enforcement of orders of the WAIRC.

Commentary

1. Legislation

INDUSTRIAL RELATIONS ACT 1979

Short Title	Number & Year	Assent	Commencement
Reprint 10: The Industrial Relations Act 1979 as at 8 July 2005			
<i>Petroleum Legislation Amendment and Repeal Act 2005</i>	13 of 2005	1 Sep 2005	ss.49(1), 2(b), 3 and 4(b): 28 Mar 2007 (see s.2 and Gazette 27 Mar 2007 p.1405)
<i>Labour Relations Legislation Amendment Act 2006</i>	36 of 2006	4 Jul 2006	4 Jul 2006 (see s.2(1))
Reprint 11: The Industrial Relations Act 1979 as at 3 November 2006 (includes amendments listed above except those in the <i>Petroleum Legislation Amendment and Repeal Act 2005</i>)			
<i>Criminal Investigation (Consequential Provisions) Act 2006 s.73</i>	59 of 2006	16 Nov 2006	1 Jul 2007 (see s.2 and Gazette 22 Jun 2007 p.2838)
<i>Financial Legislation Amendment and Repeal Act 2006 s.4</i>	77 of 2006	21 Dec 2006	1 Feb 2007 (see s.2 and Gazette 19 Jan 2007 p.137)

On 4 July 2006, the Act was amended by the *Labour Relations Legislation Amendment Act 2006*. The change amended Part 3 Right of Entry, Part 4, ss.9-20 regarding the State Wage order, Part 5 Good Faith Bargaining and Part 8 Civil Penalties. In Part 3, subsection (6)(a) was added to s.49J regarding circumstances under which the Registrar cannot revoke a right of entry authority under subsection (6). There were several amendments to Part 4 that included repealing subsections 30(2), 50(9) and (10), 51N(1) and Part II Division 3A Subdivision 2. Section 51 was repealed and replaced with ss.50A and 50B which allows for the making of a State Wage order before 1 July each year that determines rates of pay for purposes of the *Minimum Conditions of Employment Act 1993* and awards. Subsections 26(1), 40B(1)(a), 51B(1) were amended and ss.51BA – BE were inserted as a result of ss.50A and 50B. The definition of award was deleted from s.51C(1), and s.51N(3) was amended to allow for s.51N(1) being repealed. Section 7(5) was amended to include reference to collective agreements as defined in the Commonwealth Act and Part II Division 3B was inserted regarding collective agreements and good faith bargaining.

On 1 February 2007, the Act was amended by the *Financial Legislation Amendment and Repeal Act 2006*. The change amended the terminology to “consolidated account” in subsection (8) of s.69 regarding the conduct of an election by Registrar or Electoral Commissioner.

On 28 March 2007, the Act was amended by the *Petroleum Legislation Amendment and Repeal Act 2005* which added references to clauses in the *Petroleum Act 1967*, *Petroleum Pipelines Act 1969* and *Petroleum (Submerged Lands) Act 1982* by adding subsection (3)(c) to s.7 dealing with the interpretation of the Act.

On 1 July 2007, the Act was amended by the *Criminal Investigation (Consequential Provisions) Act 2006* which amended clause 2(3) of Schedule 3 Police Officers to include reference to special constables.

INDUSTRIAL RELATIONS COMMISSION REGULATIONS 2005

Citation	Gazettal	Commencement
<i>Industrial Relations Commission Amendment Regulations 2007</i>	27 Mar 2007 pp.1405-6	28 Mar 2007 (see r.2 and Gazette 27 Mar 2007 p.1405)

2. State Wage Order Case

On 13 June 2007 the Commission in Court Session delivered its decision in the 2007 State Wage order case pursuant to s.50A of the Act. Section 50A was inserted into the *Industrial Relations Act 1979* ("the Act") and assented to on 4 July 2006. Section 50A requires the Commission before 1 July in each year, to make a General Order setting the minimum weekly rate of pay applicable under the *Minimum Conditions of Employment Act 1993* ("MCE Act") to adults, apprentices and trainees and to adjust rates of wages paid under awards.

One welcome effect of this change to the legislation is that in the absence of a National Wage Case, the Commission now has the power to adjust both minimum wages under the MCE Act, and adjust rates of wages paid under awards on its own motion and in one hearing.

The application for the 2007 State Wage order was created on the Commission's own motion. It placed public advertisements of the proceedings and received submissions from the Minister for Employment Protection ("Minister"), Trades and Labor Council of WA ("TLCWA"), Australian Mines and Metals Association, Inc ("AMMA"), Chamber of Commerce and Industry of WA ("CCIWA"), the Employment Law Centre, Australian Young Christian Workers and Western Australian Council of Social Services. The Minister, TLCWA, AMMA and CCIWA appeared in the proceedings and also made oral submissions.

The evidence and material before the Commission showed that the trend for very strong economic activity in Western Australia was continuing, and that a real wage increase would be sustainable. After hearing submissions and considering the evidence the Commission issued a General Order that adjusted the minimum wage and rates of wages paid under awards by a \$24.00 per week increase, effective on and from the commencement of the first pay period on or after 1 July 2007.

Of particular note in this year's State Wage order was the Statement of Principles. Prior to the insertion of s.50A into the Act, s.51 of the Act provided that the Commission was required to adopt or modify the national wage fixing principles. The provision was repealed in July 2006 and replaced by s.50A of the Act which requires the Commission to set principles in respect of wage, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment.

The obligation of the Commission to make principles is not met now by adopting, as has occurred in the past, principles derived from principles made by the Australian Industrial Relations Commission; nor is it met by merely adopting without change the Statement of Principles adopted in the 2006 General Order which were made under a different statutory regime. After hearing from the parties the Commission modernised and made modifications to the 2006 principles. Apart from some minor modifications, more important changes included a scope clause set out in the Principle 1 which made it plain that the principles only deal with the matters set out in s.50A(1)(d) of the Act and not with conditions of employment generally. The Commission deleted former Principle 2(e) and Principle 7 which dealt with the 38 hour week, and removed reference to the structural efficiency principle. The Commission had particular regard to the issue of gender equity but considered that as such a claim can be brought under Principle 10, it was not necessary to create a separate principle for this purpose.

The Commission also advised that in the latter half of 2007 an application will be created on its own motion to consider the 2008 State Wage order and it will then convene for the purpose reviewing the State Wage Principles 2007 to ensure that they are appropriate to be applied and followed in this State in relation to the exercise of jurisdiction under the Act to set the wages, salaries,

allowances or other remuneration of employees or the prices to be paid in respect of their employment. The outcome of that review will then be able to be considered formally during the 2008 State Wage order proceedings.

The computerised system for updating and maintaining awards used in 2006 was further developed and refined. The automatic process covered 77% of awards in their entirety, however it is significant to note that of the 327 awards receiving the State Wage order update, 76 awards required some sort of manual intervention. The various types of manual intervention required on these awards can be explained as follows (some overlap occurs):

- Calculation of junior rates of pay in 26 awards, 7 of which do not prescribe a formula for calculation (9% of total manual)
- Manual insertion of the Minimum Adult Award Wage clause due to non-standard numbering format in 11 awards (14% of total manual)
- Calculation of trainee rates in 11 awards (14% of total manual)
- Unconventional calculation of adult rates of pay could not be automated in 34 awards, 8 of which were due to the requirement to have wage changes itemised e.g. separate column/entry to be added

Draft schedules of the awards as amended by the State Wage order were provided on compact disc to the Minister, TLCWA, AMMA and CCIWA on the day the decision was handed down.

All awards were updated on the Commission's website (<http://www.wairc.wa.gov.au>) on the morning of 29 June 2007, two days prior to when the Commission's State Wage order had effect.

3. Statutory Minimum Wage

During the period of this Report, there were two increases to the minimum weekly rate of pay prescribed for the purpose of the MCE Act. On 22 August 2006, the Commission in Court Session, on its own motion, issued a State Wage order pursuant to s.50A of the Act increasing the minimum weekly rate of pay to \$504.40 on and from the commencement of the first pay period on or after 1 September 2006. This increase corresponded to the increase ordered by a Commission in Court Session in the 2006 State Wage Case in June 2006 to rates of wages paid under awards; however, the Commission did not then have the power to also adjust the minimum weekly rate of pay prescribed for the purpose of the MCE Act in the absence of a national wage decision. Section 50A, which operated from 4 July 2006, gave that power and this led directly to the order of 22 August 2006.

On 20 June 2007, the Commission in Court Session, on its own motion, issued a State Wage order pursuant to s.50A of the Act increasing the minimum weekly rate of pay prescribed for the purpose of the MCE Act to \$528.40 on and from the commencement of the first pay period on or after 1 July 2007.

4. Minimum Rate for Award Apprentices 21 Years of Age and Over

During the period of this Report, there were two increases to the minimum rate for apprentices 21 years of age and over whose rates of pay are prescribed by awards. On 4 July 2006, the Commission in Court Session, on its own motion, issued a State Wage order pursuant to s.50A and s.51(4), increasing the minimum rate for adult apprentices under awards to \$421.70 with effect on and from 7 July 2006. On 20 June 2007, the Commission in Court Session, on its own motion, issued a State Wage order pursuant to s.50A(1) of the Act increasing the minimum rate for adult apprentices under awards. The increase was two-tiered being \$448.65 per week on and from the commencement of the first pay period on or after 1 July 2007 and to \$466.65 on and from the commencement of the first pay period on or after 1 September 2007.

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

The minimum weekly wage rates for apprentices and trainees under the MCE Act were increased on two occasions during the reporting period.

For apprentices aged 21 years of age and over, a General Order issued on 20 October 2006 setting their rates as follows: (a) \$300.00 per week on and from the commencement of the first pay period on or after 1 November 2006; (b) \$350.00 per week on and from the commencement of the first pay period on or after 1 February 2007; (c) \$400.00 per week on and from the commencement of the first pay period on or after 1 May 2007; and (d) \$448.65 per week on and from the commencement of the first pay period on or after 1 July 2007. Then on 20 June 2007 a State Wage order issued increasing their rates to: (a) \$448.65 per week on and from the commencement of the first pay period on or after 1 July 2007 and (b) \$466.65 per week on and from the commencement of the first pay period on or after 1 September 2007. It also ordered that the minimum weekly rates of pay for trainees aged 21 and over be determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship under the award or under the relevant award where an employer-employee agreement is in force. For trainees aged 21 and over who do not fall within any of these categories, the minimum rate of pay was based on the trainee rate of pay based on the Metal Trades (General) Award 1966. These rates applied on and from the commencement of the first pay period on or after 1 September 2006. Trainee rates of pay were further increased by the State Wage order issued on 20 June 2007 with effect from the commencement of the first pay period on or after 1 July 2007. The increase was on the same basis as the 2006 State Wage order.

For apprentices and trainees under 21 years of age, the State Wage orders on 22 August 2006 and on 20 June 2007, each time ordered that the minimum weekly rates of pay would be the relevant apprentice or trainee rates of pay in the award, relevant award where an employer-employee agreement is in force, or the rate of pay determined by reference to apprentice or trainee rates of pay in the *Metal Trades (General) Award 1966*.

6. Public Service Arbitrator and Public Service Appeal Board

Public Sector - General

Issues raised in previous Annual Reports regarding the complexity and interrelationship of the various pieces of legislation dealing with public sector employees continue to be problematic. These issues were dealt with at length in the last Annual Report and do not need repeating.

Nevertheless, the artificial delineation between the jurisdictions of the various components of the Commission in its general jurisdiction, the Public Service Arbitrator ("the Arbitrator") and the Public Service Appeal Board ("the PSAB"), continues to be confusing, particularly for employees, and is time consuming and repetitive in its process. Cases still arise where employees lodge their applications/appeals in the wrong jurisdiction, e.g. the Commission's general jurisdiction, when the claim ought to have been made to the Arbitrator or the Public Service Appeal Board (e.g. *Arthur Lewis Ninnette v. Director General, Department of Education and Training* filed in the Commission's general jurisdiction, then later, and properly, in the PSAB). When the error is discovered, the employee must then file in the correct jurisdiction. In the intervening period, the time for filing in the correct jurisdiction has elapsed and the employee must file an application to have his/her original application received out of time. This usually involves an additional hearing and determination process. If the scheme of legislation allowed the employee's application to simply be referred from the incorrect jurisdiction within the Commission to the correct one, or alternatively, for the jurisdictions to be combined, this issue would be resolved and provide for a streamlined process.

Issues also continue regarding the question of whether the claim of the employee or union relates to a breach of a Public Sector Standard and is thus excluded from the Arbitrator's jurisdiction (*The Civil Service Association of Western Australia Incorporated v. Director General, Department for Community Development* ((2007) 87 WAIG 2523).

It is also noted that a number of matters have come before the Arbitrator in respect of significant delays in disciplinary and investigation processes being undertaken by public sector agencies. In *Civil Service Association of Western Australia Incorporated v Commission for Corrective Services* (PSA CR 21 of 2006) the union sought that the Arbitrator order the cessation of a disciplinary process on the basis of the length of time which that process had taken. A similar matter has recently come before the Arbitrator in conciliation where the investigation of grievances by employees has taken an inordinate time. These issues reflect the concerns expressed in the Annual Report over a number of years regarding the lengthy time frames involved in the multi-layered disciplinary processes set out in the *Public Sector Management Act 1994*.

In other cases, employees have suffered considerable stress and unfairness simply because the investigation process undertaken by their employer has been lengthy and repetitive or has contained serious flaws (*PSA CR 21 of 2006* as above). The Arbitrator determined that it was appropriate that the employer be allowed to continue and to finalise that process but that did not alleviate the unnecessary stress and anxiety placed on the employee due to the length of time taken.

Classification Issues

In the last year a significant issue has arisen with respect to the appropriate test to be applied by the Arbitrator in dealing with classification issues (*Health Services Union of Western Australia (Union of Workers) v Director General of Health in right of Minister for Health as the Metropolitan Health Service at Path West Laboratory Medicine WA* (PSA CR 15 of 2006) and *Health Services Union of Western Australia (Union of Workers) v Director General of Health in right of the Minister for Health as the Metropolitan Health Service at Path West Laboratory Medicine WA* (PSA C20 of 2007)).

The Work Value Principle contained within the Statement of Principles issued by the Commission in Court Session has traditionally been used as the test to be applied to claims for the reclassification of public sector positions. The Work Value Principle is based on the issue of work value change and the claimant is required to prove that there has been a significant net addition to the nature of the position through change in the level of skill, responsibility or the circumstances under which the work is performed i.e. a significant change in the requirements of the position.

In an appeal against the decision in PSA CR 15 of 2006, above, the Full Bench of the Commission decided that the Statement of Principles does not fetter the Arbitrator's jurisdiction to deal with issues of classification of government officers whose conditions are set by an industrial agreement (FBA 37 of 2006).

Given that the Arbitrator is not constrained by the Statement of Principles, it is yet to be determined what criteria will apply to the Arbitrator's consideration of claims that the classification attached to a position is wrong, or that a position has been wrongly downgraded, in the absence of change to the requirements of the position.

The issue has the potential to expand the test for and the involvement of the Arbitrator in dealing with matters of classification for public sector employees. On that basis, the hearing of these matters will be of interest to organisations and agencies beyond the parties to the dispute.

WA Police Enterprise Bargaining Dispute

During the course of 2006, the Commissioner of Police and the WA Police Union of Workers were in dispute in respect of their negotiations for a replacement enterprise bargaining agreement (PSA CR 23 of 2006). The Arbitrator convened approximately 30 conferences for the purpose of conciliation and for the preparation for a hearing of the dispute. At the height of the dispute a number of police stations were closed on an evening and police officers took a variety of other types of industrial action. Orders were issued by the Arbitrator for the lifting of that industrial action.

The dispute was listed for hearing and determination in December 2006, however on the eve of the hearing, the parties were able to resolve the dispute as part of the conciliation process. A new enterprise bargaining agreement was subsequently registered.

Department of Planning and Infrastructure

The members of the Civil Service Association of Western Australia Incorporated employed at the Department of Planning and Infrastructure licensing centres were involved in industrial action on the basis of concerns regarding a lack of action by the employing authority in reviewing the classification levels of the positions concerned. The Arbitrator convened many conciliation conferences which resulted in a process being put in place, and ultimately, a resolution was reached through that process.

Specified Callings

The Arbitrator continues to oversee the review of specified callings within the public health system in Western Australia. This will result in the reclassification of professional and semi-professional occupations and appeals being dealt with by the Arbitrator.

The Civil Service Association of Western Australia Incorporated and government employers are now also involved in a conciliation process regarding a claim by that union for a review of specified callings in the public sector generally (P 6 and 7 of 2006).

Public Service Appeal Board Time Frames

The Public Service Arbitrator, who chairs the Public Service Appeal Board, has become concerned over the time being taken by some government agencies to nominate a member for the Public Service Appeal Board. Each claim to the Public Service Appeal Board requires a formation of a new Board. This is a time consuming process and the Arbitrator's staff have spent considerable time in following up with a number of employing agencies to have their nominations received within a reasonable time so that the particular appeal can be dealt with expeditiously. In two cases this year the employing agencies took 24 and 25 working days respectively to advise of their nominee. A process has now been put in place to alert the particular agency in advance of the need for a nomination to be received expeditiously. However this still requires additional follow up by Arbitrator's staff to achieve a nomination within a reasonable period.

7. Award Review Process

The Award Review section is responsible for providing information and award services to the Commission and for maintaining electronic records of all State awards and industrial agreements.

This information is available to the public via publication on the Department's website and in the Western Australian Industrial Gazette ("WAIG").

Throughout 2006/2007 the program of reviewing all State awards continued through the efforts of Awards Review staff and the Minister, TLCWA and CCIWA.

The section also deals with award enquiries and award back-rate enquiries in relation to State awards and, when required, federal award enquiries.

Approximately 800 back-rate enquiries were dealt with during the period. Enquiries were received from the general public, employers, practitioners, students and government departments. The reasons for enquiries ranged from checking for current and historical rates of pay, workers' compensation claims and claims for underpaid wages to child support calculations.

During the period, 65 new agreements were processed together with 1 award cancellation, 2 new awards and 113 award variations, with relevant notices being prepared for the Commission's website and the WAIG.

Award Review staff actively supported the Registry's service to the Australian Industrial Relations Commission, Records section and the Department's telephone call centre. Additionally, the section manages the function of archived award and agreement information for enquirers.

The section managed and mentored two Public Service Trainees and provided work experience to two undergraduates during 2006/2007. During the year, educational talks and tours for various groups, including undergraduates, were conducted by Award Review staff.

Major Achievement 2006/2007

All Western Australian awards on the Commission's website were updated on Friday 29 June 2007 as a result of the 2007 State Wage order, in advance of their application on and from 1 July 2007.

This achievement is significant in placing WAIRC at the forefront of the exercise of applying wage increases to awards and publishing the new rates. It is of course also invaluable to employers and employees alike.

This level of efficiency is due to the detailed award knowledge, application and planning of staff of the Award Review section complemented by the expertise of our Information Technology Branch. Registry staff and the Chief Commissioner's Associate also provided valuable assistance.

8. Right of Entry Permits

Industrial Relations Act 1979 - Part II, Division 2G, s.49J				
Organisation	Permits Issued			
	2003/04	2004/05	2005/06	2006/07
Association of Professional Engineers, Australia (Western Australian Branch), Organisation of Employees	2	-	-	-
Australian Collieries' Staff Association, Western Australian Branch, The	-	-	-	-
Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch	-	10	4	3
Australian Rail, Tram & Bus Industry Union of Employees, Western Australian Branch, The	1	-	-	1
Australian Workers' Union, West Australian Branch, Industrial Union of Workers, The	5	5	2	1
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch, The	2	2	3	2
Breweries & Bottleyards Employees' Industrial Union of Workers of Western Australia, The	-	1	-	-
Civil Service Association of Western Australia Incorporated, The	23	18	7	13
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division	1	7	1	-
Construction, Forestry, Mining and Energy Union of Workers, The	5	5	9	7
Federated Brick, Tile and Pottery Industrial Union of Australia (Union of Workers) Western Australian Branch, The	-	-	-	-
Food Preservers' Union of Western Australia, Union of Workers, The	1	2	3	1
Forest Products, Furnishing & Allied Industries Industrial Union of Workers, WA, The	5	3	-	1
Health Services Union of Western Australia (Union of Workers)	9	2	-	-
Independent Education Union of Western Australia, Union of Employees, The	-	2	8	5
Liquor, Hospitality & Miscellaneous Union	30	20	26	33
Media, Entertainment & Arts Alliance of Western Australia (Union of Employees)	1	-	-	-
Plumbers & Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, The	-	-	-	-
Sales Representatives' & Commercial Travellers' Guild of WA, Industrial Union of Workers	-	1	2	1
Shop, Distributive and Allied Employees' Association of Western Australia, The	3	9	8	2
State School Teachers' Union of WA (Incorporated), The	-	4	2	-
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	1	1	2	-
United Firefighters Union of Australia, West Australian Branch	-	-	1	-
West Australian Branch, Australasian Meat Industry Employees' Union, Industrial Union of Workers, Perth	-	1	-	-
Western Australian Branch of the Australian Medical Association, The	-	4	2	-
Western Australian Clothing and Allied Trades' Industrial Union of Workers, Perth, The	-	5	4	-
Western Australian Grain Handling Salaried Officers Association (Union of Workers)	1	-	-	-
Western Australian Police Union of Workers	-	-	-	-
Western Australian Prison Officers' Union of Workers	7	-	1	-
Western Australian Railway Officers' Union	-	-	-	2
TOTAL	101	106	87	72

Number of permits that have been issued (gross total).....	709
Number of people who have been issued a permit (gross total but not counting twice any individual who has had a permit, given it back and got another permit).....	578
Number of people who have had more than one permit	88
Number of people who presently hold a permit.....	257
Number of permits that are current	347
Number and names of permit holders who have had their permit removed or suspended by the Commission	0

9. Claims by Individuals – Section 29

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

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

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

Section 29 Applications Lodged

Applications alleging unfair dismissal continue to represent the most significant proportion of the types of applications that are lodged under s.29, the numbers of these applications has now fallen significantly.

	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Unfair Dismissal	827	762	703	700	154
Denial of Contractual Benefits	198	238	245	285	124
TOTAL	1562	1468	1293	1039	278

Section 29 Applications Finalised

	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Unfair Dismissal	856	844	742	748	324
Denial of Contractual Benefits	233	192	261	259	191
Both in same application	539	507	436	207	16
TOTAL	1628	1543	1439	1214	531

Section 29 Applications Lodged Compared with All Matters¹ Lodged

Section 29 applications now represent 33.5% of all the matters lodged in the Commission.

	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
All Matters Lodged	3276	2953	2633	2061	829
Section 29 Applications Lodged	1562	1468	1293	1039	278
Section 29 as Percentage (%) of All Matters Lodged	48%	50%	49%	50%	33.50%

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

Section 29 Applications Finalised Compared with All Matters Finalised

A similar pattern emerges in that the s.29 applications now represent less than half of all the matters dealt with.

	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
All Matters finalised	3127	2822	3012	2475	1239
Section 29 Applications finalised	1628	1543	1439	1214	531
Section 29 as Percentage (%) of All Matters Finalised	52%	55%	48%	49%	43%

Section 29 Matters – Method of Settlement

The following table shows that approximately 78% of s.29 matters were settled without recourse to formal arbitration.

	Unfair Dismissal	Contractual Benefits	Both	Total	%
Arbitrated claims in which order issued	72	36	6	114	21.8
Settled after proceedings before the Commission	164	95	7	266	50.8
Matters referred for investigation resulting in settlement	6	13	0	19	3.6
Matters discontinued/dismissed before proceedings commenced in the Commission	71	36	0	107	20.4
Matters withdrawn/discontinued in Registry	10	8	0	18	3.4
Total Finalised in 2006-2007 Reporting Year	323	188	13	524	100

Demographic Data for Section 29 Applications

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

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

Representation

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

	Male	Female	No Data	Total	% Male	% Female	% No Data	% Total
Industrial Agent	7	6	0	13	53.9	46.1	0	4.7
Legal Representation	19	5	0	24	79.2	20.8	0	8.6
Personal	116	73	0	189	61.4	38.6	0	68
Other	9	4	0	13	69.2	30.8	0	4.7
No Data Provided	2	3	34	39	5.1	7.7	87.2	14
TOTAL	153	91	34	278	55	32.7	12.2	100

Age Groups

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

Age Group	Male	Female	No Data	Total	% Male	% Female	% No Data	% Total
Under 16	5	1	0	6	83.3	16.7	0	2.2
17 to 20	2	4	0	6	33.3	66.7	0	2.2
21 to 25	16	14	0	30	53.3	46.7	0	10.8
26 to 40	53	23	0	76	69.7	30.3	0	27.3
41 to 50	38	33	0	71	53.5	46.5	0	25.5
51 to 60	24	13	0	37	64.9	35.1	0	13.3
Over 60	8	2	0	10	80	20	0	3.6
No Data Provided	7	1	34	42	16.7	2.3	81	15.1
TOTAL	153	91	34	278	55	32.7	12.2	100

Employment Period

It is significant to note that 19.4% of all applicants were employed for less than 3 months compared to 22.3% in the 2005/2006 reporting period.

Period of Employment	Male	Female	No Data	Total	% Male	% Female	% No Data	% Total
Under 3 months	31	23	0	54	57.4	42.6	0	19.4
4 to 6 months	18	7	0	25	72	28	0	9
7 to 12 months	28	12	0	40	70	30	0	14.4
1 to 2 years	22	17	0	39	56.4	43.6	0	14
2 to 4 years	18	12	0	30	60	40	0	10.8
4 to 6 years	10	6	0	16	62.5	37.5	0	5.8
Over 6 years	16	11	0	27	59.2	40.8	0	9.7
No Data Provided	10	3	34	47	21.3	8.8	72.3	16.9
TOTAL	153	91	34	278	55	32.7	12.2	100

Salary Range

	Male	Female	No Data	Total	% Male	% Female	% No Data	% Total
Under \$200 P/W	23	21	0	44	52.3	47.7	0	15.8
\$201 to \$600 P/W	16	22	0	38	42.1	57.9	0	13.7
\$601 to \$1000 P/W	42	32	0	74	56.8	43.2	0	26.6
\$1001 to \$1500 P/W	45	9	0	54	83.3	16.7	0	19.4
\$1501 to \$2000 P/W	15	2	0	17	88.2	11.8	0	6.2
Over \$2001 P/W	11	4	0	15	73.3	26.7	0	5.4
No Data Provided	0	0	36	36	0	0	100	12.9
TOTAL	152	90	36	278	54.7	32.4	12.9	100

Category of Employment

64% of all applicants stated that they were Full Time, Permanent, or Permanent Full Time employees at the time of their termination

Period of Employment	Male	Female	No Data	Total	% Male	% Female	% No Data	% Total
Casual	11	3	0	14	78.6	21.4	0	5
Casual Full Time	3	1	0	4	75	25	0	1.4
Casual Part Time	1	5	0	6	16.7	83.3	0	2.2
Fixed Term	7	4	0	11	63.6	36.4	0	4
Full Time	29	29	0	58	50	50	0	20.9
Permanent	17	4	0	21	80.9	19.1	0	7.5
Permanent Full Time	76	23	0	99	76.8	23.2	0	35.6
Permanent Part Time	3	10	0	13	23.1	76.9	0	4.7
Probation	3	1	0	4	75	25	0	1.4
Part Time	2	8	0	10	20	80	0	3.6
No Data Provided	1	3	34	38	2.6	7.9	89.5	13.7
TOTAL	153	91	34	278	55	32.7	12.2	100

Reinstatement Sought

36.3% of applicants did not seek reinstatement when they lodged their application compared with 48% in the 2005/2006 period.

Reinstatement Sought	Male	Female	No Data	Total	% Male	% Female	% No Data	% Total
Yes	39	16	0	55	70.9	20.1	0	19.8
No	52	49	0	101	51.5	48.5	0	36.3
No Data Provided	62	26	34	122	50.8	21.3	27.9	43.9
TOTAL	153	91	34	278	55	32.7	12.2	100

Reinstatement Sought by Age Group

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

Age Groups	Yes	No	No Data	Total	% Yes	% No	% No Data	% Total
Under 16	0	4	2	6	0	67	33	2
17 to 20	2	3	1	6	33	50	17	2
21 to 25	5	13	12	30	17	83	40	11
26 to 40	19	31	26	76	25	41	34	27
41 to 50	17	32	22	71	24	45	31	26
51 to 60	9	14	14	37	24	38	38	13
Over 60	2	1	7	10	20	10	70	4
No Data Provided	1	3	38	42	2	8	90	15
TOTAL	55	101	122	278	20	36	44	100

10. Employer-Employee Agreements (EEAs)

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

INDUSTRIAL RELATIONS ACT 1979 PART VID

Applications to Lodge EEAs for Registration

Number of EEAs Lodged	2005-2006	2006-2007
Meeting Lodgement Requirements	75	43
Not Meeting Lodgement Requirements	6	3
Total	81	46

EEAs Lodged for Registration and Finalised

Outcome	2005-2006	%	2006-2007	%
Refused	16	22%	4	8
Registered	47	64%	35	69
Withdrawn	10	14%	12	23
Total	73	100%	51[#]	100%

Note – # The Total Number of EEAs finalised in 2006-2007 includes some EEAs that were lodged in 2005-2006 but not finalised during the 2005-2006 period.

Guidelines and Principles for No Disadvantage Test

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

Demographic Data for Registered EEAs

Registered EEAs by Gender	2005-2006	%	2006-2007	%
Female	24	51%	17	49%
Male	23	49%	18	51%
Total	47	100%	35	100%

Registered EEAs by Age	2005-2006	%	2006-2007	%
Employees 18 years of age or over	45	96%	35	100%
Employees under 18 years of age	2	4%	0	0%
Total	47	100%	35	100%

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

	2005-2006	% of Total Registered EEAs	2006-2007	% of Total Registered EEAs
Number of Registered EEAs where the employee had a disability	8	17%	2	6%

EEAs Registered by Term of Agreement

Term of EEA	2005-2006	%	2006-2007	%
<1 year	1	2%	0	0%
1 to 2 years 25 12%	3	6%	24	69%
2 to 3 years	43	91%	11	31%
Total	47	100	35	100%

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

During the reporting period, no appeals pursuant to s.33P of the *Police Act 1892* were lodged.

Three appeals were finalised during this reporting period. One of these was lodged during the 2004-2005 period and remained adjourned during the last reporting period. This appeal was dismissed as a result of a For Mention hearing at which there was no appearance by the appellant.

The other two appeals were lodged in the last reporting period. One was discontinued and the other upheld.

12. Information Technology

Internet (<http://www.wairc.wa.gov.au>)

The Commission's website has been redeveloped following extensive consultation with internal and external stakeholders. Improvements have been made for easier access by the visually impaired.

New "indexing" has improved accessibility to the site. Streaming of matters of public interest has continued with audio-only streams now also available in addition to the video streams.

Development

A good deal of technology time has been invested in "automating" rapid application of State Wage decisions to all awards saving considerable staff time on each occasion of changes to awards.

Statistical reporting, allowing better managerial understanding of work flows, has been improved, with emphasis on a centralised reporting structure available, with appropriate permissions, to all Commission staff and members.

Legacy databases are being gradually migrated to newer and improved technologies.

Infrastructure

The Commission has refreshed its network infrastructure to provide desktop users with a faster and more reliable work environment, and to anticipate and deal with the Commission's emerging needs.

To facilitate increased service delivery via the internet the Commission has increased its internet band width to 6Mbps which allows, with convergence of remote e-mail devices, ADSL provision, and remote access technologies, more effective remote use for the Commission, particularly when travelling.

13. Other Matters

Transport – Passenger Railcar

A very low level of disputation occurred between The Australian Rail Tram and Bus Industry Union of Employees, Western Australian Branch ("ARTBIU") and the Public Transport Authority ("PTA") during 2006/2007. Three disputes occurred which related to dismissal of employees or employee entitlements. Each matter resulted in the Commission convening compulsory conferences. During the year the Commission also convened a compulsory conference in respect of a dispute relating to rostering of country train drivers.

During the course of the year the ARTBIU and the PTA sought the assistance of the Commission to act as a private mediator and/or arbitrator in respect of six disputes involving disciplinary matters and employee entitlements.

In addition, during the year the ARTBIU and a private contractor sought the assistance of the Commission to act as a private mediator in respect of a dispute which related in part to the circumstances in which an award provision was made by the Commission in 2005.

Transport – Other Government

A dispute arose in late 2006 between the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch ("TWU") and the Director General of the Department of Premier and Cabinet about the rostering of casual drivers which resulted in the Commission convening several compulsory conferences in 2006 and 2007 before the matter was resolved by the parties.

Also in late 2006 a dispute arose between The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and the Commissioner of Main Roads about the work value of the work of bridge inspectors. This dispute was resolved after the Commission held two compulsory conferences.

Transport - General

There has been a very low level of disputation in this industry for many years. This trend continued in 2006/2007. The TWU made applications for two compulsory conferences in respect of two matters in 2006/2007. One involved a dispute about an employee's entitlement to long service leave. The other related to the making of an agreement to generally cover terms and conditions of employment of employees engaged by a transport company. One dispute was arbitrated in late 2006. The arbitration resulted in the Commission making an order to reflect the terms of a compromise reached at a compulsory conference in early 2006.

Media and Arts

The Commission registered an industrial agreement which was entered into by the parties prior to the operation of s.16 of the federal *Workplace Relations Act* 1996. The agreement was entered into in 2004 and covered the terms and conditions of employment of a company in the newspaper industry.

Local Government

Disputation in this industry during 2006/2007 largely related to unfair dismissal matters. The Commission convened one compulsory conference between the Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth ("WAMRBPREDU") and a metropolitan local government authority. The local government authority filed a notice of objection stating it objected to the application as the respondent was a constitutional corporation and not subject to the jurisdiction of the Commission by operation of ss.6 and 16 of the *Workplace Relations Act*. The jurisdictional issue was not determined by the Commission as the WAMRBPREDU decided not to pursue the application. The WAMRBPREDU also made an application for a compulsory conference claiming a remote local government authority had unfairly dismissed an employee. At the conference the employer raised s.16. The issue of jurisdiction was set down for hearing but did not proceed as the WAMRBPREDU decided to discontinue the application.

During 2006/2007 the Commission had before it nine (9) unfair dismissal and contractual benefit applications made under s.29(1)(b)(i) and (ii) of the Act against local government authorities. In each case the local government authority challenged the jurisdiction of the Commission to hear and determine the claim on the basis that its jurisdiction to do so is excluded by operation of the *Workplace Relations Act*. Of these matters, one was referred for hearing and determination. The issue was whether the Shire of Cue was a trading corporation and thus a constitutional corporation. All of the other applications were discontinued either prior to or following a conciliation conference. In some of these matters the parties reached an agreement to compromise the Applicant's claims.

Fire Brigade

When discussions between the parties to finalise an Enterprise Bargaining Agreement broke down in June 2006 the Commission on its own motion convened informal discussions between the parties to assist them to reach agreement on the issues in dispute. The Commission then convened conferences to assist the parties to reach an in-principle agreement on a wage outcome and the parties also agreed on a mechanism to progress outstanding issues. After arbitrating the remaining issues in dispute, an Enterprise Bargaining Agreement between the parties was registered on 27 June 2007 (*Fire Emergency Services Authority of Western Australia v. United Firefighters Union of Australia West Australian Branch* ((2007) 87 WAIG 1349; [2007] WAIRC 00561)).

Education

Western Australian Government Employees

After bans were implemented by the Liquor, Hospitality and Miscellaneous Union in October 2006 in support of a new Industrial Agreement for cleaners, education assistants and gardeners the Commission assisted the parties to finalise new agreements for these employees. These agreements were registered in May 2007.

State School Teachers

On 4 August 2006 the Commission registered the School Education Act Employees' (Teachers and Administrators) General Agreement 2006. Since September 2006 the Commission has been assisting the parties to reach agreement on a range of issues in dispute which have been ongoing for some years including an agreement on a reporting template, bans in place with respect to literacy and numeracy testing and teacher workloads.

Independent School Teachers

The Commission has conciliated and/or arbitrated a number of disputes between schools operating in the Western Australian Catholic education system and the Independent Education Union covering issues such as disciplinary action against teachers and disputes over where unions meetings are to be held.

Metal and Mining

In the context of the metal industry a significant matter has been the s.40B review of the Metal Trades (General) Award 1966 by the Commission in Court Session. The review was initially commenced by the Commission in Court Session on 10 March 2004 with the publication by the Commission in Court Session of a Statement intended to be used for the purposes of guidance to parties in the process of a s.40B award review ((2004) 84 WAIG 465). Arising from those proceedings, the Metal Trades award was then the subject of specific consideration by the Commission in Court Session, following substantial input from the parties to the award over an extensive period of time.

As a consequence of the proceedings before the Commission in Court Session, reasons for decision and a proposed order were published on 4 April 2007 ((2007) 87 WAIG 903). After giving the parties a further opportunity to make submissions in relation to the proposed order, the Commission in Court Session handed down its final order varying the Metal Trades award on 24 May 2007 ((2007) 87 WAIG 910).

The award has been substantially varied to delete obsolete provisions and to modernise its content consistent with the requirements of s.40B of the Act. It is hoped that the modernised provisions will provide model clauses for the ongoing review under s.40B of all awards

14. Effect of *Workplace Relations Amendment (Work Choices) Act 2005* ("Work Choices") on Certain Matters

Awards

Although s.16 of Work Choices became operative on 26 March 2006 which had the effect of rendering inoperative the Commission's jurisdiction to make awards which are to apply to constitutional corporations, Regulation 4.55 of Division 12 of Part 4 of Chapter 7 of the Workplace Relations Regulations 2006 preserved for a period of six months appeals against any decision to make or vary a State award that is to apply to a constitutional corporation. During this period Regulation 4.55 also preserved the power to vary an award as a result of an appeal. In reliance on this power, appeals were heard by the Full Bench and one appeal by the Industrial Appeal Court. These matters all related to the making of awards that applied to employers in the mining industry who are trading corporations.

During the year the Commission varied a large number of common rule awards to apply the 2006 General Order Wage Case safety net adjustments. Prior to 26 March 2006 many of these awards applied to employers who were constitutional corporations. The amendments proceeded without an issue being raised whether the Commission had power to vary the awards in the circumstance where some of the respondents or parties to the awards are constitutional corporations. However following a request by two employers who contend that they are trading corporations and are sole employer respondents to three awards, the Commission on its own motion has listed proceedings to decide whether to cancel these three awards under s.47 of the Act. The proceedings have been referred to a Commission in Court Session for hearing and determination and have yet to be determined.

Unfair Dismissals

During the past 12 months the Commission has been regularly called upon to determine whether employers named as respondents to unfair dismissal claims are constitutional corporations. In most matters the issue whether a corporation is a trading or financial corporation has been clear as the entity in question has been a private business. Consequently most claims have been dismissed or discontinued. In matters where the respondent is a government body or an organisation with charitable objects the issue has not been clear.

In *Aboriginal Legal Services of Western Australia Incorporated v. Lawrence* ((2007) 87 WAIG 856) the Full Bench upheld a finding made at first instance that the Aboriginal Legal Services of Western Australia Incorporated ("ALS") was not a constitutional corporation and therefore the Commission had jurisdiction to hear and determine an unfair dismissal claim brought by a former employee of the ALS. As identified by the Commission at first instance and by the Full Bench, there was little by way of factual issues in dispute between the parties. The ALS provides legal services, amongst other things, to members of the Aboriginal community in Western Australia. Its sole source of funding for the services is by way of a contract entered into between the ALS and the Commonwealth government. It was the existence of, and the terms of, this contract that founded the appellant's argument that the ALS was a constitutional corporation, both at first instance and on appeal.

The Full Bench considered in some detail relevant High Court and Federal Court authorities in relation to what is a trading corporation including *R v. The Trade Practices Tribunal; ex parte St George County Council* ((1974) 130 CLR 533); *R v. The Judges of the Federal Court of Australia and Another; ex parte the Western Australian National Football League (Inc) and Another* ((1979) 143 CLR 190); *State Superannuation Board v. The Trade Practices Commission* ((1982) 150 CLR 282); *Fencott v. Muller* ((1983) 152 CLR 570); *Commonwealth v. Tasmania* ((1983) 158 CLR 1) and *Actors and Announcers Equity Association of Australia v. Fontana Films Pty Ltd* ((1982) 150 CLR 169). In particular, the Full Bench adverted to and applied the judgment of Toohey J in *Hughes v. Western Australian Cricket Association (Inc) and Others* ((1986) 19 FCR 10).

The Full Bench considered that the arrangement between the Commonwealth department which provided funds to the ALS and between the ALS providing a service to its clients was a tripartite arrangement which could not be ignored in considering the ALS' activities as a whole. The Full Bench concluded that the best general description of trading is "an exchange for value or the provision of goods or services for value". The Full Bench concluded that the ALS entering into and performing the contract with the Commonwealth department did constitute trading with that department because of the combined effects of the contractual documents between them.

In relation to the ultimate question of whether the ALS is a trading corporation the Full Bench considered it was not a trading corporation because the use made of the funds as specified by the Commonwealth department is the provision of legal services without charge to clients. The funds from the Commonwealth department are provided on a regular basis over three years in accordance with a single contract, are large in size and by far the majority of the total income received by the ALS. There is no specific nexus between the provision of legal services for the clients of the ALS and the receipt of funds from the government in accordance with the contract, and the provision of the legal service, is more than just the predominant activity of the ALS; it affects in a qualitative sense the trading with a Commonwealth department as against the activities of the ALS as a whole. The Full Bench concluded that the Commission at first instance did not err in concluding that the ALS is not a trading corporation and the appeal was dismissed.

The decision of the Full Bench has been appealed and is listed for hearing by the Industrial Appeal Court on 3 October 2007.

In *Dawn Sewell v. Glenn Brown – CTI Logistics* ((2006) 86 WAIG 3278) the Commission considered the impact of the Work Choices amendments to the *Workplace Relations Act 1996* ("WRA") on the Commission's unfair dismissal jurisdiction, insofar as constitutional corporations is concerned. It was common ground that the respondent in these proceedings was a constitutional corporation for the purposes of ss.4 and 6 of the WRA as provided for by s.51(xx) of the Commonwealth Constitution. In considering the relevant legislative provisions, and the terms of s.109 of the Commonwealth Constitution, it was concluded that given the terms of s.16(1)(a) of the

WRA, when read with the relevant provisions of the WRA in relation to claims of unfair and unlawful termination of employment in Division 4 of Part 12 of the WRA, those provisions intended to cover the field in relation to claims of unfair dismissal of employees formerly employed by a constitutional corporation (citing *Wenn v. Attorney-General for Victoria* ((1948) 77 CLR 84)). The Commission also applied relevant principles as to the operation of s.109 of the Commonwealth Constitution as set out in *Ashley Todd Mitchell v. United Credit Union Limited* ((1998) 78 WAIG 2939).

The issue whether local government bodies are constitutional corporations has also been an issue considered by the Commission this year.

Contractual Benefit Claims

There has not yet been a conclusive determination of the extent to which the Commission's power to hear and determine a claim by an employee of a denied contractual benefit has been overridden by Work Choices where the employer is a constitutional corporation. Prior to the High Court decision in *NSW v. The Commonwealth* ((2006) 231 ALR 1) the issue arose in *Donna Laura Leo v. Community Choice Financial Services Pty Ltd and Ors* ((2006) 86 WAIG 1541). The applicant had been formerly employed by a financial services provider in relation to which there had been a change of corporate ownership. Furthermore, it was alleged by the applicant that an entity which had formerly employed her was deliberately put into administration to avoid any contractual obligations that may have been due to her on the termination of her employment.

The first issue which arose in the case was the extent to which, if at all, the Commission should "pierce the corporate veil" on the basis of the applicant's assertions that any benefits and obligations to her arising from her employment by the first entity should have become obligations incurred by the second entity. Additionally, there was a claim to attach liability personally to directors of one of the corporate entities.

The Commission considered the relevant legal principles in relation to the separate-legal-entity doctrine applicable to company law, and circumstances in which the veil of incorporation will be pierced. It was noted that whilst the authorities are not definitive in relation to this issue, there needs to be some particular circumstances such as the presence of wrong doing, protection of fraud or concealing a sham transaction, to attract the operation of the doctrine. On the evidence before the Commission in this case, the Commission was not satisfied that the circumstances warranted the piercing of the veil of incorporation. Nor was the Commission satisfied on the basis of relevant principle, that any liability should be attached to former directors of the applicant's former employer.

The issue whether the effect of s.16(1)(a) of the WRA can exclude the State Commission's jurisdiction in relation to denied contractual benefits when that subject matter is not dealt with in the WRA to any extent was then considered. Whilst the Commission dismissed the applicant's claims on other grounds, and thus it was not necessary for the Commission to express any concluded views in relation to the Work Choices points, some obiter observations were made. These included consideration of the scope of the WRA as not reflecting an exhaustive statement of the law in relation to employer/employee relationships in an area such as claiming money debts in the form of wages or salary as contractual benefits; it is entirely unregulated. Further, a note was made of the express exclusions contained in s.16 of the WRA, suggestive of that legislation not covering the entire field between employer and employee.

The transitional arrangements set out in Regulation 1.2 of Division 2 of Part 1 of Chapter 2 of the Workplace Relations Regulations 2006 which preserve the jurisdiction of the Commission to hear and determine some contractual benefit claims have also been considered. Regulation 1.2 provides that s.16(1) of the WRA does not apply (to exclude the jurisdiction of this Commission where the employer is a constitutional corporation) to the extent to which a law of Western Australia relates to compliance with an obligation under that law in respect of an act or commission which occurred prior to 26 March 2006.

In *Phillips v. TR7 Pty Ltd* ((2006) 86 WAIG 2646) the Commission held that a claim made under s.29(1)(b)(i) of the Act is a claim that arises in common law and is not a claim that relates to an obligation under the Act. However, in *Smith v. Albany Esplanade Pty Ltd t/as The Esplanade Hotel* ((2007) 87 WAIG 509) the Commission observed that Regulation 1.2 did apply to preserve the

jurisdiction of the Commission to hear and determine contractual benefits claims where an act or omission relied upon arose prior to 26 March 2006. In *Forster v. Australia Imperial Financial Services Pty Ltd* ((2007) 87 WAIG 2485) the act was the entering into of a contract of employment prior to 26 March 2006 which gave rise to claims for unpaid commissions that arose after 26 March 2006.

15. Decisions of Interest

A selection of the decisions issued by the Commission follows. I draw to your attention that the Acting President has caused the catchwords of Full Bench decisions from 16 June 2006 to be published on the Commission's website. This is a useful tool for research and I thank him for doing so.

***Worksafe Western Australia Commissioner v. Anthony and Sons Pty Ltd t/a Oceanic Cruises* ((2006) 86 WAIG 2950)**

This case determined that the Occupational Safety and Health Tribunal does not have the jurisdiction to extend the time within which a review is to be lodged. Section 51 of the *Occupational Safety and Health Act* 1984 (WA) ("OSH Act") provides for the review of improvement or prohibition notices issued pursuant to that Act by the WorkSafe Commissioner. Section 51A of that Act provides for a further review of such notices by the Tribunal. To access this further review a reference may be made to the Tribunal within 7 days of receiving the decision of the WorkSafe Commissioner.

On 5 January 2006 an inspector appointed under the OSH Act issued an improvement notice to Oceanic Cruises. The company requested that the notice be rescinded. This request was rejected, which led the company to seek a further review of the notice on 30 March 2006. This request for further review was sent to the Tribunal some 9 days after the decision of the WorkSafe Commissioner. The WorkSafe Commissioner challenged the jurisdiction of the Tribunal to deal with the review because it had been received more than 7 days after the WorkSafe Commissioner's decision. This matter was heard on 21 April 2006 and the Tribunal published a decision on 23 June 2006 declaring that the Tribunal had power to extend the time limit for lodgement beyond the 7 day period prescribed in s.51A.

On appeal, the Full Bench of the Commission determined that given the scheme of the OSH Act the Tribunal does not have power to extend the 7 day period. The Full Bench found that s.26 and s.27 of the *Industrial Relations Act* 1979 could not be used to extend the jurisdiction of the Tribunal.

***Thomas Quinn v. Kalgoorlie Consolidated Gold Mines Pty Ltd* ((2006) 86 WAIG 2725)**

The Full Bench determined in this matter that the General Order on Termination, Change and Redundancy, which took effect on 1 August 2005, is an industrial instrument as defined by s.29AA(5)(b) of the *Industrial Relations Act* 1979. The General Order, as an industrial instrument, applied to the employment of Mr Quinn because it affected the terms and conditions of his employment.

By s.29AA certain claims for unfair dismissal or denied contractual benefit are excluded from the jurisdiction of the Commission where the salary of the applicant is over a prescribed amount. At the time of hearing this matter at first instance the prescribed amount was \$104,800. Mr Quinn's salary was \$127,280. An exception to the exclusion is provided where the contract of employment is an industrial instrument which is defined in s.29AA(5) of the Act to include an award, order of the Commission, industrial agreement or employer-employee agreement. As the General Order was determined to be an order of the Commission, and applied to Mr Quinn's employment, Mr Quinn's application was within jurisdiction.

***Construction, Forestry, Mining and Energy Union of Workers v. Skilled Rail Services Pty Ltd* ((2006) 86 WAIG 1278)**

In this matter the Commission made a new award to apply to locomotive drivers working in the iron ore production and processing industry who are employed by labour hire companies. The

proceedings have some history in that the Commission initially determined on 17 March 2006 that a new award should be made with rates of pay and conditions of employment derived generally from those applicable at BHP Billiton for rail operations. That decision *Construction, Forestry, Mining and Energy Union of Workers v. Skilled Rail Services Pty Ltd* ((2006) 86 WAIG 1278) was the subject of an appeal to the Full Bench of the Commission. In its decision handed down 3 August 2006 *Skilled Rail Services Pty Ltd v. Construction, Forestry, Mining and Energy Union of Workers* ((2006) 86 WAIG 2509) the Full Bench upheld the appeal in part only, in relation to the operation of the Commission's Wage Fixing Principles and the matter was remitted to the Commission at first instance for further consideration.

Arising from those proceedings, a new award was made in September 2006 ((2006) 86 WAIG 2980). The case concerned the application and interpretation of the Structural Efficiency Principle of the Commission's Wage Fixing Principles in particular, whether in the making of a new award, the Commission is required to establish minimum rates of pay having regard to awards which have already undergone a minimum rates adjustment process. General consideration was also given by the Commission in relation to structural efficiency in the making of awards and the requirements imposed by the Act in that regard.

General Matters

***Bowen Summerton v. Director General Department of Education and Training of Western Australia* ((2006) 86 WAIG 2850)**

In this matter the Commission considered and applied relevant principles in relation to summary termination of employment arising from the commission of a criminal offence outside of the workplace. The case involved a claim by a former school psychologist who was summarily dismissed for misconduct on the grounds that he had been charged and convicted of fraud. Having considered the relevant authorities concerning a conviction for a criminal offence outside of the workplace, and the required connection between the offence committed and the nature of the employment, the Commission concluded that the employer's summary dismissal of the employee should not be overturned. It was held that the applicant, as a school psychologist being responsible for care of young persons, held a particular position of trust in the community. The Commission concluded that parents and the community generally, expected no less than the highest standard of care and attention accompanying such responsibilities and that the applicant had, through a dishonesty offence, seriously called into question the relationship of trust between employer and employee.

***Director General Department for Community Development v. Civil Service Association of Western Australia Incorporated* ((2007) 87 WAIG 2663)**

This matter involved a dispute between the Civil Service Association of Western Australia Incorporated ("the CSA") and the Department for Community Development in relation to workloads and resourcing for case workers involved in community development work in particular, child protection. The matter assumed significant public interest and involved an important area of government activity, that being the protection and welfare of young and vulnerable children in the community.

The issue of caseloads for child protection workers had been an ongoing issue for some years. The CSA sought interim orders from the Commission to impose a case limit cap to prevent excessive workloads occurring whilst the parties progressed an interim strategy to address, on a longer term basis, appropriate caseloads and resourcing for this part of the department's operations. This was also in the context of the State government announcing a significant budget increase for the department's funding arising from the 2006-07 budget.

As a consequence of lengthy conciliation proceedings before the Commission and consideration of national and international developments in this area of activity, and having regard to the critical importance of the care and protection of children in the community, in particular those who are vulnerable or at risk, the Commission imposed a caseload cap of an upper limit of 15 cases for each case worker which could be increased to 18 cases in appropriate circumstances. The interim

order came into effect on 10 July 2006 for an initial period of three months which period has now been extended in order to enable the parties to finalise their negotiations on a long term strategy.

16. Conclusion

I am pleased to observe that the Commission continues to operate well, and efficiently, in accordance with the Act. In my last Report to you, I commented on the effect of the Commonwealth's Work Choices legislation on the jurisdiction of the Commission. My previous Report to you was before the decision of the High Court in *New South Wales v. Commonwealth* (ibid) was known. The dismissal of the States' appeals means, for the purposes of this Report, that much of what I had written in my previous Report about that legislation is still current.

In my last Report, I observed that the Work Choices amendments do not apply to potentially between 40% and 48.5% of the State's workforce. The coverage of the Commission's jurisdiction was again referred to in the 2007 State Wage order proceedings. It showed that the proportion of the State's workforce employed in unincorporated business and in direct State government employment decreased slightly from 40.1% to 38.6% (the table upon which this conclusion is based can be seen at 87 WAIG 1488). It can thus be said with some measure of confidence that slightly less than 40% of the State's workforce remains in the State industrial relations system. Of these, approximately 30% are in the private sector and approximately 8% are in direct State government employment.

The proportion of employees in local government, or employees of State corporations which might not be constitutional corporations, who are also in the State system is still not yet known and is likely to be determined on a case by case basis. It will not be until the conclusion of the five year transitional period in 2011 that a more precise estimate may be able to be made regarding the numbers of "transitional employers" who will revert to the State system.

The coverage of the State industrial relations system therefore remains significant. It is, however, predominantly in unincorporated businesses in the private sector, and direct State government employment.

The predominance of small to medium sized unincorporated businesses remaining within the State's jurisdiction means that the State government's recent decision to support in principle a mediation and alternative dispute resolution function for the Commission, to be made available by the Commission upon the request of employers or a group of employers, or employees or a group of employees, is especially welcomed. The need for mediation and alternate dispute resolution in those areas within the Commission's jurisdiction will, I suspect, be well used over time.

The workload of the Commission is necessarily changed away from incorporated businesses by force of the Commonwealth's Work Choices legislation. The decrease in the number of applications made from the private sector has been offset to some extent by the return to the State jurisdiction of State government employees whose employment conditions were regulated by federal instruments. Of note, employees of the Fire and Emergency Services Authority, and government school teachers, have now registered Enterprise Bargaining Agreements in the Commission.

The significant decrease in the number of claims of unfair dismissal referred to the Commission is noted elsewhere in this Report. It brings with it a decrease in the workload of Commissioners, although it may be misleading to judge the workload of the Commission upon the numbers of claims of unfair dismissal. For example prompt action by the Commission convening conferences urgently averted industrial action on the first day of the school year in 2006 and assisted in the resolution of industrial issues relating to motor vehicle licensing inspectors. The work of the Commission in setting minimum wages for both non-award covered, and award covered, employment should not be underestimated. Unlike the position federally, the Commission has been able to publish its pay scales in an accurate and widely disseminated form in advance of the operative date of the wage increase. This efficiency, I am sure, is much appreciated. The Commission still retains a significant background workload not just in the public sector, but also in dealing with industrial matters notified to the Commission in other areas of its jurisdiction. I also draw to your attention that the number of appeals to the Full Bench has increased slightly from 2005-2006. Claims by employees that they have been denied a benefit under their contract of

employment have reduced to a far lesser extent than claims of unfair dismissal. I note that you have announced an intention to introduce legislation to address the effects of the Commonwealth's Work Choices legislation upon the jurisdiction of the Commission. I consider that this reflects the fact that the Commission serves an important and necessary purpose for employers and employees in WA. The legislative changes proposed are likely to be able to be dealt with within the existing resources of the Commission.

During the year the Commission re-structured the home page on its website. This was done entirely "in house" using the Commission's own IT staff and, while differing views may often be held about the design and layout of a website, I consider the result to be excellent. The Commission consulted with a sample of frequent users of the website and incorporated into the final result a number of their helpful suggestions. Of particular note is the ease with which the decisions of the Commission may now be searched using either of two well-known proprietary search engines.

In November 2006 Senior Commissioner Jack Gregor retired. Jack's long and meritorious service was recognised in a formal farewell sitting. The Commission invited the President of the Australian Industrial Relations Commission, the Hon. Justice GM Giudice to sit with it for the occasion to also mark Jack's consequential retirement as a dual appointment Commissioner of that Commission. The proceedings were broadcast live over the web and a recording of it is able to be viewed on the Commission's website. I record that the WA government also made a presentation to Jack at his farewell thanking him for his long and dedicated service to the State.

I record here my own appreciation for Jack's work under the Act both for his wide experience in all industries in the State and also for the assistance he has given me and my colleagues.

Following Jack's retirement, there is now no member of the Commission who holds a dual appointment with the Australian Commission. I consider that to be an unfortunate position. It is, I think, desirable from the point of view both of the State as a whole, and its citizens, that there be as much harmonisation as possible between the two jurisdictions. This will undoubtedly assist in reducing uncertainty about the differences between the two jurisdictions. To that end, the closer working relationship between the two jurisdictions which is fostered by dual appointments is to be encouraged.

I do note for the record that in October 2006 the Commonwealth Minister for Local Government vested in the Commission his powers of review relating to workplace safety on Christmas Island. This relates particularly to the operation of the Occupational Safety and Health Tribunal within the Commission.

I take the opportunity to thank my colleagues for their advice and support during the year. The Registrar, John Spurling provides considerable assistance to me, for which I thank him and his staff.



A.R. Beech
Chief Commissioner
21 September 2007

