2006
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 2005 to 30 June 2006

Minister responsible for the Administration of the Act

The Hon. J.J.M. Bowler JP MLA

in his capacity as Minister for Employment Protection

2006
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 2005 to 30 June 2006

Minister responsible for the Administration of the Act

The Hon. J.J.M. Bowler JP MLA

in his capacity as Minister for Employment Protection

TABLE OF CONTENTS

MEMBERSHIP AND PRINCIPAL OFFICERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

During the year to 30 June 2006, the Western Australian Industrial Relations Commission (WAIRC) was constituted by the following members:

President	The Honourable P J Sharkey The Honourable M T Ritter S.C. (Acting)
Chief Commissioner	A R Beech
Senior Commissioner	J F Gregor
Commissioners	P E Scott S J Kenner J H Smith S Wood J L Harrison S M Mayman

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

The Honourable President P J Sharkey retired on and from 5 October 2005. The Commission records its appreciation for his loyal and dedicated service.

The Honourable M T Ritter S.C. was appointed to the Commission on 17 October 2005. The Commission welcomes the appointment of the Acting President.

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 2007.

Commissioner J L Harrison continued her appointment as an additional Public Service Arbitrator and was appointed for a further period of one year from 29 April 2006.

Commissioner S J Kenner continued his appointment as an additional Public Service Arbitrator and was appointed for a further period of one year from 24 June 2006.

Coal Industry Tribunal of Western Australia

Commissioner S J Kenner continued his appointment as Chairperson of the Coal Industry Tribunal. This appointment is due to expire on 31 December 2006.

Railways Classification Board

Commissioner J H Smith continued her appointment as Chairperson of the Railways Classification Board throughout the period. This appointment expires on 3 April 2007.

Commissioner J L Harrison continued her appointment as Deputy Chairperson of the Railways Classification Board throughout the period. This appointment also expires 3 April 2007.

Occupational Safety and Health Tribunal

Commissioner S M Mayman continued as Chairperson of the Occupational Safety and Health Tribunal. This appointment is for the purpose 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), Deputy Registrars Ms D MacTiernan, Mr J Rossi, Ms S Tuna, and Mr A Wilson.

THE WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

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

1 July 2005 to 30 June 2006:

The Honourable Justice Steytler	Presiding Judge
The Honourable Justice Wheeler	Deputy Presiding Judge
The Honourable Justice Roberts-Smith	Ordinary Member
The Honourable Justice Pullin	Ordinary Member
The Honourable Justice Le Miere	Acting Ordinary Member

Acting Presiding Judge:

The Honourable Justice Roberts-Smith	1 December – 29 May (IAC 9/2005)

INDUSTRIAL MAGISTRATES COURT

During the reporting period, Magistrates Mr G Cicchini SM and Mr W G Tarr SM exercised jurisdiction as Industrial Magistrates.

MATTERS BEFORE THE COMMISSION

1. FULL BENCH MATTERS

The Full Bench has been constituted on each occasion either by the President, the Honourable P J Sharkey (former President), and by two Commissioners or the Acting President, the Honourable M T Ritter (current Acting President) and by two Commissioners.

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

The Honourable P J Sharkey 12

The Honourable M T Ritter (Acting President) 23

NOTE: There is an overlap in the figures resulting from the President and Acting President presiding over the Full Bench in the same matter but at different times. This occurred on two occasions due to matters outstanding at the time of retirement of the Honourable P J Sharkey.

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

Chief Commissioner A R Beech 11
Senior Commissioner J F Gregor 12
Commissioner P E Scott 13
Commissioner S J Kenner 7
Commissioner J H Smith 7
Commissioner S Wood 4
Commissioner J L Harrison 1
Commissioner S M Mayman 7

The following summarises Full Bench matters:

APPEALS

Heard and determined from decisions of the:

Commission 32
Industrial Magistrate 0
Coal Industry Tribunal 0
Public Service Arbitrator 2
Railways Classification Board 0
Occupational Safety and Health Tribunal 0

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 1
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 0

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 0
Applications for extension of time to file Notice of Appeal 8
Full Bench appeals heard but not determined in 2005/2006 4

ORDERS

Orders issued by the Full Bench 47

2. PRESIDENT / ACTING PRESIDENT

Matters before the President or 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) 12
Applications for an order, declaration or direction pursuant to s.66 1

The following summarises s.66 applications:

Applications finalised in 2005/2006 0
Directions hearings 1
Applications part heard 0
Applications withdrawn by order 0
Applications discontinued by order 1

ORDERS

Orders issued by the President or Acting President from 1 July 2005 to 30 June 2006 inclusive:
s.49(11) 10
s.66 0
s.72A(6) 0
s.92 0
Remitted from the Industrial Appeal Court 0

CONSULTATIONS

Consultations with the Registrar pursuant to s.62 of the Act 2

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 2006 General Order Wage Case whereby it 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	9
Senior Commissioner J F Gregor	9
Commissioner P E Scott	1
Commissioner S J Kenner	2
Commissioner J H Smith	8
Commissioner J L Harrison	1
Commissioner S M Mayman	2

The matters dealt with by the Commission in Court Session during the period comprised of the following:

State Wage Case – s.51 and Review of Adult Minimum Weekly Rates of Pay	0
General Order – s.50	2
New Award	0
New Agreement	0
Variation of an Award	5
Conference pursuant to s.44	0
Joinder to an Award	0
Police Appeal – s.33P of *Police Act 1892*	4

4. FEDERAL MATTERS

Federal matters dealt with by State (WAIRC) Commissioners	18
State Matters dealt with by a federal (AIRC) Commissioner	0

5. RULE VARIATIONS BY REGISTRAR

Variation of Organisation Rules by the Deputy Registrar	5

6. BOARDS OF REFERENCE

Long Service Leave – Standard Provisions	1
Long Service Leave – *Construction Industry Portable Paid Long Service Leave Act 1985*	1

7. INDUSTRIAL AGENTS REGISTERED BY REGISTRAR

Number of new agents registered 2

Total number of agents registered as corporate body 29

Total number of agents registered as individuals 31

Total number of agents registered as at 30 June 2006 60

AWARDS AND AGREEMENTS IN FORCE UNDER THE *INDUSTRIAL RELATIONS ACT 1979*

Year	Number at 30 June
1997	1661
1998	1899
1999	2071
2000	2166
2001	2316
2002	2359
2003	2499
2004	2506
2005	2759
2006	2737

INDUSTRIAL ORGANISATIONS REGISTERED AS AT 30 JUNE 2006

	Employee Organisations	Employer Organisations
No. of organisations	50	15
Aggregate membership	158171	3340

SUMMARY OF MAIN STATISTICS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

	MATTERS DEALT WITH				
	2001-2002	**2002-2003**	**2003-2004**	**2004-2005**	**2005-2006**
Full Bench:					
Appeals	53	52	41	51	34
Other Matters	7	6	13	11	12
President sitting alone:					
S.66 Matters (finalised)	19	17	6	3	0
S.66 Orders issued	24	32	11	11	0
S.49(11) Matters	8	9	10	8	12
Other Matters	0	0	5	10	12
S.72A(6)	0	0	0	0	0
Consultations under s.62	8	2	6	0	2
Commission in Court Session:					
General Orders	2	1	3	2	2
Other Matters	15	1	8	7	9
Public Service Appeal Board:					
Appeals to Public Service Appeal Board	10	15	17	17	9
Commissioners sitting alone:					
Conferences[1]	368	370	387	332	259
New Agreements	287	203	275	444	264
New Awards	4	5	14	9	14
Variation of Agreements	0	0	2	3	1
Variation of Awards	271	231	175	261	157
Other Matters[2]	53	71	76	109	93
Federal Matters	5	9	1	5	18
Boards Of Reference - Other Awards (Chaired by a Commissioner)	4	0	2	1	0
Unfair Dismissal Matters Concluded:					
Unfair Dismissal claims	1137	856	844	742	746
Contractual Benefits claims	297	233	192	261	259
Unfair Dismissal & Contractual Benefits claims together	534	539	507	436	207
Public Service Arbitrator (PSA):					
Award/Agreement Variations	20	32	21	40	39
New Agreements	44	56	15	26	19
Orders Pursuant to s.80E	28	30	0	0	0
Reclassification Appeals	19	85	105	88	143

	MATTERS DEALT WITH-*continued*				
	2001-2002	**2002-2003**	**2003-2004**	**2004-2005**	**2005-2006**
Railways Classification Board:					
Variation of Awards	0	0	0	0	0
Variation of Agreement	0	0	0	0	0
Appeals	0	0	0	0	0
TOTALS:	**3217**	**2855**	**2736**	**2877**	**2311**

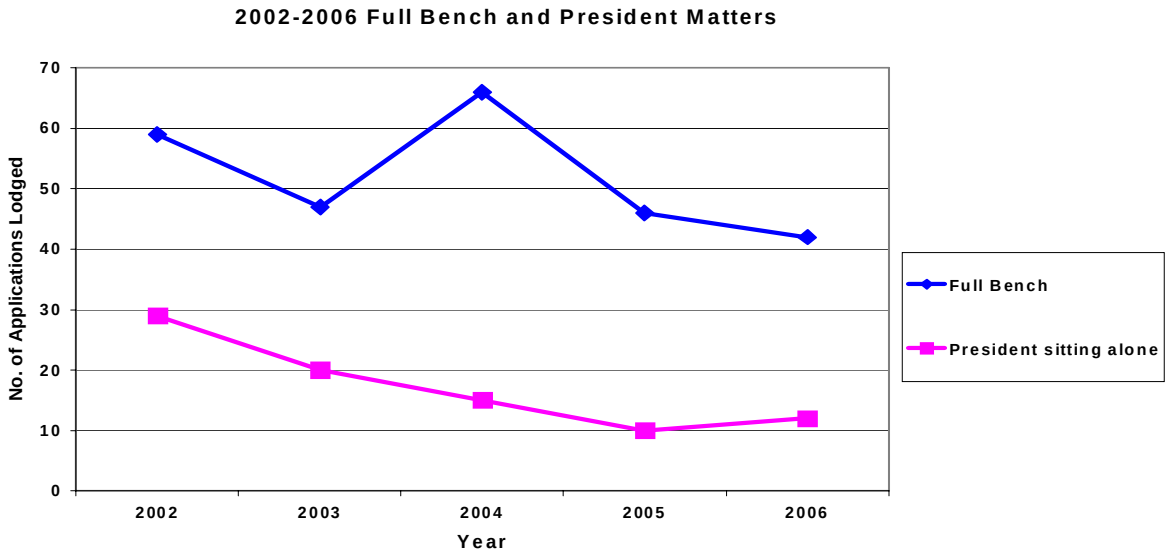
Notes

[1] **CONFERENCES include the following:**	**2001-2002**	**2002-2003**	**2003-2004**	**2004-2005**	**2005-2006**
Conferences (s.44)	274	263	249	228	177
Conferences referred for arbitration (s.44(9))	58	39	55	54	23
Conferences divided	0	0	0	0	4
Conferences referred and divided	0	0	2	0	2
PSA conferences	33	57	63	40	44
PSA conferences referred	2	11	18	10	9
PSA conferences divided	1	0	0	0	0
Railways Classification Board	0	0	0	0	0
TOTALS	368	370	387	332	**259**

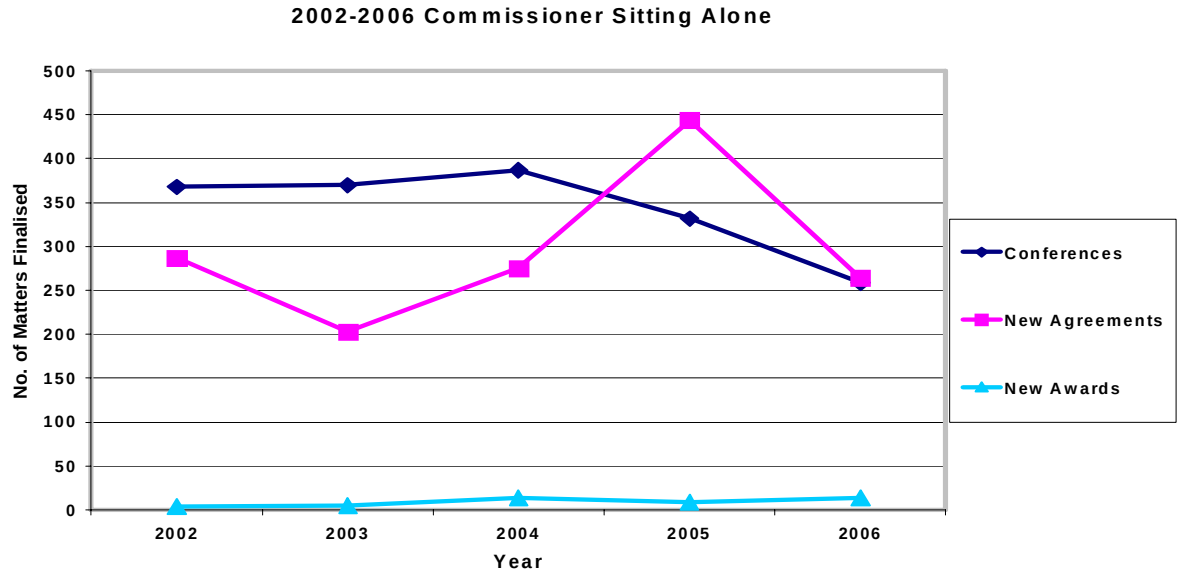
[2] **OTHER MATTERS include the following:**	**2001-2002**	**2002-2003**	**2003-2004**	**2004-2005**	**2005-2006**
Applications	40	48	52	64	32
Apprenticeship Appeals	1	2	0	0	0
Occupational Safety & Health Tribunal #	-	-	-	3	13
Coal Industry Tribunal ##	-	-	-	-	6
Public Service Applications	5	12	24	42	42
Workplace Agreements	7	9	-	-	-
TOTALS	53	71	76	109	**93**

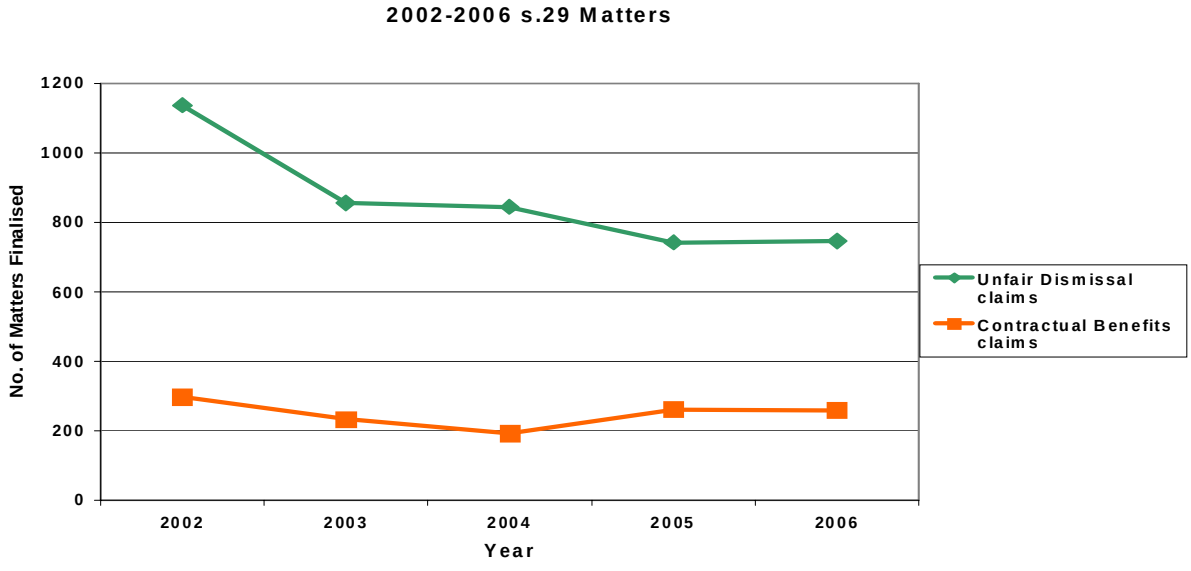
The Tribunal operates under the *Occupational Safety and Health Act 1984* and thus its operation is outside the scope of this Report. This figure records the number of applications to the Tribunal which have been finalised.

Statistics for the Coal Industry Tribunal were unreported in previous years.



NOTE: The statistics presented above cover the full range of President and Full Bench matters that were lodged in the Commission during the reporting period.





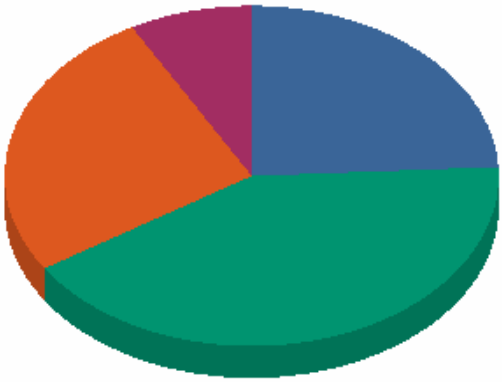
THE WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

Decisions issued by the Industrial Appeal Court during this period 8

INDUSTRIAL MAGISTRATES COURT

The following summarises the Industrial Magistrates Court for the period under review:

Lodged Claims	157
Complaints Lodged	1
Resolved (total)	271
Resolved (lodged in the period under review)	100
Resolved but lodged in another financial period	171
Pending	53
Total number of penalties imposed	10
Total value of penalties imposed	$21,265
Total number of claims/complaints resulting in disbursements	10
Total value of disbursements awarded	$2,778
Claims/Complaints resulting in awarding wages	10
Total value of wages	$78,513



Lodged Claims	24.0%
Lodged Complaints	0.2%
Resolved	41.5%
Resolved but Lodged in another financial year	26.2%
Pending	8.1%
Total:	100.0%

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

Name of Act	No. of Act	Assent Date	Commencement Date
Reprint 9: The *Industrial Relations Act 1979* as at 18 Jun 2004			
Children and Community Services Act 2004 s.251	34 of 2004	20 Oct 2004	**1 Mar 2006** (see s.2 and *Gazette* 14 Feb 2006 p.695)
Reprint 10: The *Industrial Relations Act 1979* as at 8 Jul 2005			
Industrial Relations Amendment Act 2005	14 of 2005	21 Sep 2005	**22 Sep 2005** (see s.2)

On 22 September 2005, the Act was amended by the *Industrial Relations Amendment Act 2005.* It effected changes regarding appointment of the President of the WAIRC, and powers of the Chief Commissioner and Industrial Inspectors. The Act now enables the appointment of an acting President for a period of up to two years, clarifies that Industrial Inspectors may use their investigation powers under the Act for the purposes of the *Minimum Conditions of Employment Act 1993* or any other Act that confers functions on them, and enables the Governor to both extend a Commission member's period of office and appoint a new member to that office in prescribed circumstances. The amendments also designate the Chief Commissioner as administrative head of the Commission; clarifies that the Chief Commissioner may reconstitute the Commission once proceedings have commenced; and enables the Chief Commissioner to delegate any of his powers or duties under the Act to another Commission member.

On 1 March 2006, the Act was amended by the *Children and Community Services Act 2004*. The change amended s.81AA(bc) and s.81CA(1) of the Act in relation to the jurisdiction of the Industrial Magistrates Court.

Provisions that have not come into operation

Name of Act	No. of Act	Assent Date	Commencement Date
Vocational Education and Training Act 1996 s.62	42 of 1996	16 Oct 1996	To be proclaimed (see s.2)
State Superannuation (Transitional and Consequential Provisions) Act 2000 s.75	43 of 2000	2 Nov 2000	To be proclaimed (see s.2(2))
Petroleum Legislation Amendment and Repeal Act 2005 s.49	13 of 2005	1 Sep 2005	To be proclaimed (see s.2)

INDUSTRIAL RELATIONS COMMISSION REGULATIONS 2005

Citation	Gazettal	Commencement
Industrial Relations Commission Regulations 2005	12 Aug 2005 pp.3685-812	**1 Sep 2005** (see r.2)
Industrial Relations Commission Amendment Regulations 2006	28 Apr 2006 pp.1650-6	**28 Apr 2006**

MAGISTRATES COURT (GENERAL) RULES 2005

Citation	Gazettal	Commencement
Magistrates Court (General) Rules 2005	28 Apr 2005 pp.1605-49	**1 May 2005** (see r.2 and *Gazette* 31 Dec 2005 p.7127)
Magistrates Court (General) Amendment Rules 2005	8 Jul 2005 p.3160	**8 Jul 2005**

2. GENERAL ORDER WAGE CASE

On 4 July 2006, the Commission in Court Session delivered its decision in the 2006 General Order Wage Case. An application was referred to the Commission by the Trades and Labor Council of WA (TLC) under s.50(2) of the Act, whereby the Commission has the power to make General Orders relating to industrial matters on its own motion or on application.

The Commission heard from the applicant, the Minister for Consumer and Employment Protection and the Chamber of Commerce and Industry of Western Australia (CCIWA) as respondents, and the Minister for Employment and Workplace Relations (Cth) as intervenor. Submissions were also received from the Australian Young Christian Workers, Australian Council of Social Service, Western Australian Council of Social Services, Uniting Church in Australia, Combined Small Business Alliance of Western Australia, Western Australian Synod and Mr MH Dale. Additionally, the Commission requested a report from Professor David Plowman of the University of Western Australia providing information on the effects of past statutory minimum wage adjustments in Western Australia (WA).

After giving consideration to the Commission's jurisdiction and whether the matter should be adjourned pending the decision of the Australian Fair Pay Commission, the Commission in Court Session considered the evidence and material before it. The Western Australian economy continues to record significantly stronger growth than the rest of Australia and it was found that the probable impact of minimum wage increases on employment, unemployment and inflation is likely to be insignificant. The Commission issued a General Order that adjusted state awards to give a $20 per week wage increase. The current State Wage Principles were rescinded and re-made to continue in their usual form until reviewed in the future to see whether they remain appropriate.

The computerised system for updating and maintaining awards used in 2005 was further developed and refined. The automatic process covered 67% of awards in their entirety, however it is significant to note that of the 327 awards receiving the General Order update, 108 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 (6% of total manual)
- Manual insertion of the Minimum Adult Award Wage clause due to non-standard numbering format in 9 awards (8% of total manual).
- Calculation of trainee rates in 11 awards (10% of total manual).
- Unconventional calculation of adult rates of pay could not be automated in 33 awards, 7 of which were due to the requirement to have wage changes itemised e.g. separate column/entry to be added.
- Changes to effective dates in 48 awards, of which 30 awards required a date change only (28% of total manual)

Draft schedules of the awards as amended by the General Order were provided on compact disc to the Minister, TLC 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 the 7 July 2006, the day from which the Commission's General Order had effect.

3. STATUTORY MINIMUM WAGE

During the period of this Report, there was no change to the minimum wage prescribed for the purposes of the *Minimum Conditions of Employment Act 1993* which was set at $484.40 by the Commission in the 2005 reporting period. The review of this minimum wage occurs each time the Commission considers a National Wage decision. Changes to the *Workplace Relations Act 1996* (Cth) meant that there has not been a National Wage decision in 2006 to cause a review of the statutory minimum wage.

4. MINIMUM RATE FOR AWARD APPRENTICES 21 YEARS AND OVER

The minimum rate for apprentices 21 years of age and over had not changed since October 2003 because the National Wage decision does not deal with apprentice rates of pay.

The application made to the Commission by the TLC which became the General Order Wage Case referred to in section 2, sought an increase in the minimum rate for adult apprentices. The Commission increased the rate on the basis it was created, that is, at 75% of the trade rate. This gave a $15 increase bringing the rate to $421.70.

5. MINIMUM WEEKLY WAGE RATES FOR APPRENTICES AND TRAINEES UNDER THE *MINIMUM CONDITIONS OF EMPLOYMENT ACT 1993*

There was no change to these rates for the reasons given in section 3 relating to the statutory minimum wage.

6. PUBLIC SERVICE ARBITRATOR AND PUBLIC SERVICE APPEAL BOARD

Public Sector - General

In the last four annual Reports, the issues of:

1. the conflict and confusion caused by the complexity of the interrelationship between the *Industrial Relations Act 1979* ("IR Act") and the *Public Sector Management Act 1994* ("PSM Act"); and

2. the artificial delineation between the jurisdictions of the Public Service Arbitrator ("the Arbitrator"), the Public Service Appeal Board ("the PSAB") and the Commission in its general jurisdiction,

have been raised repeatedly. I regret to have to draw attention to them again in this Report.

This year the issue of the complexity and the lengthy nature of the PSM Act processes arose in *Director General, Department of Justice v. Civil Service Association of Western Australia Incorporated* (2005 WASCA 244) where the Industrial Appeal Court (IAC) dealt with the issue of the Arbitrator's and the Public Sector Standards Commissioner's powers. The IAC reiterated what the Arbitrator and the Full Bench have previously dealt with, namely that the Arbitrator does not have jurisdiction to enquire into any matter in respect of which a procedure for employees to obtain relief in respect of breaching of public sector standards is or may be prescribed.

Their Honours, Wheeler and Le Miere JJ, referred to the functions of the Commissioner for Public Sector Standards and the Recruitment, Selection and Appointment Standard, and then commented as follows:

"There is then prescribed by regulation the *Public Sector Management (Examination and Review Procedures) Regulations 2001*. The regulations deal with the notice to be given of decisions about appointments and selection. It provides that a public sector body is to give a written notice of a prescribed kind to each person who applies unsuccessfully to be appointed to fill a vacancy. A person may lodge a claim under that regulation if the person considers that a public sector body has breached a public sector standard established in respect of the recruitment, selection or appointment of employees. Such a claim may be made in relation to action taken by the body to appoint or not appoint a person to fill a vacancy, where the person is adversely affected by that action.

Other regulations then provide for the person making the claim to be given certain information, for the public sector body itself to consider and take steps to resolve the claim, and then if the claim is not resolved within a prescribed period, the public sector body is to ask the Commissioner (for Public Sector Standards) to appoint an examiner to examine the claim. The functions of the examiner are then set out. The Commissioner considers the examiner's report and may either dismiss the claim or commence a further process which could eventually lead to the public sector body either giving notice to the affected person of action which will be taken by the public sector body to remedy the matter, or give notice to the person of why no action will be taken by the public sector body (reg 24(2)).

One can see in the circumstances of this case why the CSA, on behalf of Mr Jones, chose to approach the Arbitrator, rather than invoke the regulations. The Arbitrator has power to make decisions which will give effective relief to claimants. The regulations, by contrast, plainly contemplate that as a result of a somewhat lengthy process, it will ultimately be open to the public sector body to determine that nothing whatever will be done to assist the claimant. If that result is considered by the Commissioner to be unsatisfactory, the Commissioner may well refer to it in a report pursuant to s.21 of the PSM Act, but there is no power in the Commissioner to order a different result. While those drafting the regulations no doubt expected that relevant bodies will act in good faith and will genuinely attempt to resolve a matter, one can see why an aggrieved claimant would often prefer that the final decision rest with an independent body. However, s.80E(7) is not concerned with the respective merits of the procedures, but only with whether a procedure is prescribed."

[emphasis added] (Wheeler and Le Miere JJ. Paras 49 – 51)

The IAC recognises that, due to the "somewhat lengthy process" set out in the regulations, and that there is no guarantee of a remedy for the complainant where the complaint is found to have substance, one can see why a complainant would "(choose) to approach the Arbitrator, rather than invoke the regulations" for the purposes of attempting to obtain some resolution to a complaint regarding a public sector body's conduct. As the Office of the Public Sector Standards Commissioner notes in its "Ten-Year Review" report at page 2, the role of the Commissioner for Public Sector Standards is "to report on compliance or non compliance to Parliament" rather than to "provide any process to provide individual redress".

In 2002, the Minister Assisting the Minister for Public Sector Management announced to Parliament that, rather than proceeding with a selected package of reforms for the PSM Act for which drafting approval had been given, it had been decided to review selected issues including:

"• the jurisdiction and powers of the WAIRC and their relationship with the jurisdiction and powers of the Commissioner for Public Sector Standards;

- relief for employees where there has been a breach of public sector standards;

…"

Mr Noel Whitehead was appointed to undertake the review (Hansard – 36th Parliament, Second Session 2002–03, p.11376). Mr Whitehead consulted widely and reviewed the previous reviews and reports. He

noted that it was prudent to provide a means for aggrieved public sector employees to be provided with a remedy, and where appropriate, provision for enforcement. He noted that the Commissioner for Public Sector Standards did not support an enforcement role for that Office. Mr Whitehead endorsed a proposal by the Department of Consumer and Employment Protection for a "gateway" model that requires the process under the Review Regulations to first be exhausted, then enabling the employee to make application to this Commission. He said that this "would be preferable to a wholesale return of all breach claims to the WAIRC, … (would) limit(s) accessibility to the WAIRC … (and) it would only be in rare circumstances after the review process had been completed by the Commissioner (for Public Sector Standards), that matters would ultimately be referred by claimants to the WAIRC."

As noted above, this Commission has expressed concerns on a number of occasions about the length of time taken for processes set out in the PSM Act to be exhausted before employees may receive some remedy or simply have their cases resolved. The "gateway" model would require that the process under the Review Regulations be exhausted by an individual applicant to enable him/her to have access to this Commission. This will add yet a further step to an already lengthy, time consuming and bureaucratic process merely to seek relief.

I now turn to the second issue, namely the artificial delineation between the jurisdictions of the Arbitrator, the PSAB and the Commission in its general jurisdiction. The different processes and powers of the respective jurisdictions mean that public sector employees do not have the same access to the Commission or the remedies as are available to other employees in the following ways:

(a) The PSAB has no power to conciliate and can only hear and determine an appeal, whereas the Commission and the Arbitrator have such conciliation powers which enables them to assist the parties to resolve disputes;

(b) The PSAB has no power to make interim orders such as orders preventing the dismissal of an employee pending certain procedures such as the appeal, whereas the Commission and the Arbitrator do have such powers;

(c) The PSAB has no equivalent powers to those of the Commission to provide a remedy such as compensation where a dismissal is found to be unfair and reinstatement is not practicable.

(d) The length of time necessary for the formation of the PSAB due to the requirement for a new Board to be established for each new appeal and the delays are often on the part of the government employer nominating a representative to sit on the PSAB.

These issues have also been the subject of comment and recommendations by a number of reviews and reports (*The Fielding Review (1995), The Kelly Review (1997)* and *The Cawley Report (2003)*). In addition there was a review of the *Public Sector Management (Examination and Review Procedures) Regulations 2001* by Nexus Strategic Solutions.

In this reporting year there have been a number of instances where employees have filed applications in the Commission's general jurisdiction when they ought to have made an appeal to the PSAB. This has required a formal and at times lengthy process for the purpose of determining the appropriate jurisdiction. When the jurisdiction was found to be that of the PSAB, then the employees had to make fresh applications, by which time their right to appeal to the PSAB was out of time. The PSAB then had to consider whether to extend the time set out in the Regulations for the filing of the appeal: see *Hospitality and Miscellaneous Union, Western Australian Branch v. Murdoch University* (FB) (2005 WAIRC 02998), (2005 WAIRC 03358) and (2006 WAIRC 04695) and *Li Liu v. Public Transport Authority of Government of Western Australia* (2005 WAIRC 02481).

Other problems referred to above, which have arisen in previous years, have arisen again this year. The relationship between the general jurisdiction of the Arbitrator and the specific jurisdiction of the PSAB again received attention in *The Civil Service Association v. Chief Executive Officer Disability Services Commission* ((2005) 85 WAIG 3082). Here, the Arbitrator dealt with a matter concerning the proposed dismissal of a member of the applicant Union. Prior to the matter being dealt with by the Arbitrator, the employee was dismissed. The employee then commenced an appeal to the PSAB.

In the meantime, the Civil Service Association of Western Australia Incorporated (CSA) sought from the Arbitrator an interim order reinstating the employee. The Arbitrator's jurisdiction and power to make such an order was queried and was formally decided. The Arbitrator concluded that the jurisdiction and powers of the Arbitrator and the PSAB were separate and distinct holding that there were no conciliation powers available to the PSAB and that the power of the PSAB to deal with dismissal matters was specific and exclusive. An appeal to the Full Bench on this issue was not proceeded with and there have been no decisions of the Arbitrator to the contrary.

The fact that the PSAB has been held to have exclusive jurisdiction over the dismissal of government officers but cannot conciliate such matters nor consider interim relief is an area that needs to be remedied. Further, the PSAB's jurisdiction is in the nature of an appeal which is somewhat different to the jurisdiction of the Arbitrator and the Commission generally: see *Krishna Thavarason v. The Water Corporation* (2006) 86 WAIG 1434.

This case also highlighted the issue of the remedy available in the case of an appeal to the PSAB being successful. The PSAB upheld an appeal from an officer of the Water Corporation. However, s.23A of the IR Act has no application to proceedings before the PSAB. Section 80I(1) of the Act gives the PSAB power to "adjust" the matter. The PSAB had to consider the meaning of "adjust" for the purposes of s.80I(1) of the Act. In part reliance on dicta in the judgment of the IAC in *State Government Insurance Commission v. Johnson* (1997) 77 WAIG 2169, and having concluded that the employment relationship should not be restored, the PSAB held that the power to "adjust" the decision of the respondent was wide enough to empower an order by the PSAB that the respondent extend the period of pay in lieu of notice paid to the appellant. Notably however, such a power cannot have regard for any of the matters expressly provided for in s.23A of the Act, which the Commission in its general jurisdiction would consider.

Another case which highlights the complexity of matters in the public sector is *The Civil Service Association of Western Australia Incorporated v. The Commissioner of Police, Western Australia Police* (2005) 85 WAIG 4019. This matter involved a claim to the Arbitrator that an employee employed in an administrative position on a fixed term contract be offered conversion to permanent status under a government guideline known as the Premier's Circular 2002/17 ("the Circular"). The issue for determination by the Arbitrator was whether an employee employed as a "public service officer" under s.64(1)(b) of the PSM Act was eligible for the offer.

The Arbitrator considered in some detail the relevant provisions of the PSM Act in particular those provisions in s.64(1), dealing with the ability of an employing authority to engage a public service officer on a fixed term basis. The Arbitrator also considered in some detail the relevant provisions of the Circular, in particular, the distinction to be drawn between a "public service employee" and a "public sector employee", when read with the terms of the PSM Act. Also considered was the distinction in the PSM Act itself between a "public service officer" and an employee in the "public sector".

The Arbitrator concluded that in the case of a "public service employee" who was appointed under s.64(1)(b) of the PSM Act as a fixed term employee, if that employee was "correctly" appointed, then he or she would not be eligible for conversion to permanent status. In the case in point, whether the employee was "correctly" appointed depended upon whether he was properly appointed on a "one-off" relief basis under the terms of the Public Service Award 1992 ("the Award"). The Arbitrator concluded that the employee concerned was correctly appointed under the Award and therefore under the Circular, was not eligible for "conversion" to permanent officer status.

The complexity of employment arrangements also arose in respect of another application for so called "conversion" to indefinite tenure in *Civil Service Association of Western Australia Inc v. General Manager, Forest Products Commission* (2006) 86 WAIG 1338. In this case, the employee's employment arrangements had become so complex over a period of years, and the terms used were unfamiliar to him, that it was not reasonable to have expected him to know that he had permanent status.

These cases have been highlighted, together with the fact of these issues having been raised in past Reports, as the background to my recommendation in this Report that action be taken including:

1. Action to enable government employees to refer claims regarding employment-related matters to this Commission in a manner which will enable a speedy resolution, including through conciliation, without the requirement for lengthy and tortuous processes, including those which are required under the current system of them pursing their complaints through the *Public Sector Management (Examination and Review Procedures) Regulations 2001*.

2. Streamlining access to the Commission by public sector employees. This may best be achieved by the abolition of the constituent authorities of the Arbitrator and the PSAB, and enabling employees to have access to the Commission's general jurisdiction. This is consistent with previous reviews and reports (see the *Fielding Review (1995)* and the *Cawley Report (2003)*). This would enable powers regarding conciliation, interim orders and compensation to be utilised to achieve more efficient, effective, timely and equitable outcomes.

7. AWARD REVIEW PROCESS

Analysis of Award Variation Orders

During the year, 119 award variation orders were issued by the Commission under s.40 of the Act, 104 by consent and 15 following arbitration. Of these variation orders, 15 amended area and scope provisions, however the majority dealt with the updating of allowances and adjustments in accordance with the Wage Fixing Principles.

A further 12 of the variation orders were comprehensive and included updates as per the intent of s.40B of the Act, which included varying provisions that were in conflict with the *Minimum Conditions of Employment Act 1993, Industrial Relations Act 1979, Workplace Relations Act 1996* (Cth), *Superannuation Guarantee (Administration) Act 1992* (Cth), *Occupational Safety and Health Act 1984* and the *Equal Opportunity Act 1984* and the associated Regulations to these Acts. Amendments to the awards included the insertion of gender neutral language, standardising award clauses and in some instances applying a new numbering style.

There were 9 new awards registered, 11 existing awards cancelled and 4 award interpretations issued by the Commission during the year.

There are 48 applications on the Commission's own motion pending, to modernise and update award provisions. The applications seek to include the insertion into the awards of statutory provisions in respect of the *Minimum Conditions of Employment Act 1993*, and other requirements. In some instances the award or specific award provisions have not been varied by the parties for many years. Some of these applications could not be completed until the amendments to employment conditions made by the *Labour Relations Legislation Amendment Act 2006* became known.

8. RIGHT OF ENTRY PERMITS

***Industrial Relations Act 1979*—Part II, Division 2G, s.49J**

Organisation	Permits Issued 2002/03	Permits Issued 2003/04	Permits Issued 2004/05	Permits Issued 2005/06
Australian Collieries' Staff Association, Western Australian Branch	1	-	-	-
Australian Liquor, Hospitality & Miscellaneous Workers Union	78	30	20	26
Australasian Meat Industry Employees' Union, Industrial Union of Workers, Western Australian Branch	3	-	1	-
Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch	8	-	10	4
Australian Rail, Tram & Bus Industry Union of Employees, Western Australian Branch	2	1	-	-
Australian Workers' Union, West Australian Branch, Industrial Union of Workers	12	5	5	2
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch	12	2	2	3
Civil Service Association of Western Australia Incorporated	30	23	18	7
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia, Engineering & Electrical Division	8	1	7	1
Construction, Forestry, Mining and Energy Union of Workers	27	5	5	9
Federated Brick, Tile and Pottery Industrial Union of Australia (Union of Workers) Western Australian Branch	1	-	-	-
Forest Products, Furnishing & Allied Industries Industrial Union of Workers, WA	10	5	3	-
Health Services Union of Western Australia (Union of Workers)	-	9	2	-
Hospital Salaried Officers Association	9	-	-	-
Independent Schools Salaried Officers' Association of WA, Industrial Union of Workers	5	4	2	-
Media, Entertainment & Arts Alliance of Western Australia (Union of Employees)	2	1	-	-
Plumbers & Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers	2	-	-	-
Sales Representatives' & Commercial Travellers' Guild of WA, Industrial Union of Workers	6	-	1	2
State School Teachers' Union of Western Australia (Incorporated)	19	-	4	2
Association of Professional Engineers, Australia (Western Australian Branch), Organisation of Employees	1	2	-	-
The Breweries & Bottleyards Employees' Industrial Union of Workers of Western Australia	-	-	1	-
The Food Preservers' Union of Western Australia, Union of Workers	7	1	2	3
Independent Education Union of Western Australia, Union of Employees	-	-	2	8
The Shop, Distributive and Allied Employees' Association of Western Australia	19	3	9	8
The West Australian Hairdressers' & Wigmakers' Employees' Union of Workers	12	-	2	2
Australian Medical Association (WA) Incorporated	-	-	4	2
The Western Australian Clothing and Allied Trades' Industrial Union of Workers, Perth	5	-	5	4
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	7	1	1	2
United Firefighters Union of Western Australia	2	-	-	1
Western Australian Grain Handling Salaried Officers' Association (Union of Workers)	-	1	-	-
Western Australian Prison Officers' Union of Workers	5	7	-	1
Western Australian Railway Officers' Union	2	-	-	-
The Western Australian Police Union of Workers	1	-	-	-
Total	**296**	**101**	**106**	**87**

Number of permits that have been issued (gross total)..... 622

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) 515

Number of people who have had more than one permit 73

Number of people who presently hold a permit..... 310

Number of permits that are current..... 361

Number and names of permit holders who have had their permit removed or suspended by the Commission..... Card # 72 Joseph McDonald - suspended once & revoked
..... Card # 85 Campbell McCullogh - suspended once

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
- A combination of both in the same application (to 31 August 2005)

For the purposes of this analysis, the three 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 although the volume of these applications shows a decline.

	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006
Unfair Dismissal	1141	827	762	703	700
Denial of Contractual Benefits	289	198	238	245	285
Both in same application	593	537	468	345	54
TOTAL	2023	1562	1468	1293	**1039**

Section 29 Applications Finalised

	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006
Unfair Dismissal	1137	856	844	742	748
Denial of Contractual Benefits	297	233	192	261	259
Both in same application	534	539	507	436	207
TOTAL	1968	1628	1543	1439	**1214**

Section 29 Applications Lodged Compared with All Matters[1] Lodged

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

	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006
All Matters Lodged	3627	3276	2953	2633	2061
Section 29 Applications Lodged	2023	1562	1468	1293	**1039**
Section 29 as Percentage (%) of All Matters Lodged	56%	48%	50%	49%	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 just under half of all the matters dealt with.

	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006
All Matters finalised	3558	3127	2822	3012	2475
Section 29 Applications finalised	1968	1628	1543	1439	**1214**
Section 29 as Percentage (%) of All Matters finalised	55%	52%	55%	48%	49%

Section 29 Matters – Method of Settlement

The following table shows that approximately 85% of s.29 matters were settled without recourse to formal arbitration.

	Unfair Dismissal	Contractual Benefits	Both	Total	%
Arbitrated claims in which order issued	107	41	25	173	14.3%
Settled after proceedings before the Commission	298	101	69	468	38.6%
Matters referred for investigation resulting in settlement	199	53	80	332	27.3%
Matters discontinued/dismissed before proceedings commenced in the Commission	114	54	32	200	16.5%
Matters withdrawn/discontinued in Registry	30	10	1	41	3.4%
Total finalised in 2005-2006 reporting year	748	259	207	**1214**	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 at the end of 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.

Representation	Male	Female	No Data	Total	% Male	% Female	% No Data	% Total
Industrial Agent	56	49	1	**106**	9.5%	12.5%	1.7%	**10.2%**
Legal Representation	101	50	1	**152**	17.2%	12.8%	1.7%	**14.6%**
Personal	367	244	0	**611**	62.4%	62.2%	0.0%	**58.8%**
Other	27	23	0	**50**	4.6%	5.9%	0.0%	**4.8%**
No Data Provided	37	26	57	**120**	6.3%	6.6%	96.6%	**11.5%**
TOTAL	**588**	**392**	**59**	**1039**	**100%**	**100%**	**100%**	**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	10	7	0	**17**	1.7%	1.8%	0.0%	**1.6%**
17 to 20	19	28	0	**47**	3.2%	7.1%	0.0%	**4.5%**
21 to 25	46	68	0	**114**	7.8%	17.3%	0.0%	**11.0%**
26 to 40	210	127	0	**337**	35.7%	32.4%	0.0%	**32.4%**
41 to 50	131	84	0	**215**	22.3%	21.4%	0.0%	**20.7%**
51 to 60	121	46	0	**167**	20.6%	11.7%	0.0%	**16.1%**
Over 60	23	13	0	**36**	3.9%	3.3%	0.0%	**3.5%**
No Data Provided	28	19	59	**106**	4.8%	4.8%	100.0%	**10.2%**
TOTAL	**588**	**392**	**58**	**1039**	**100%**	**100%**	**100%**	**100%**

Employment Period

It is significant to note that 22.3% of all applicants were employed for less than 3 months.

Period of Employment	Male	Female	No Data	Total	% Male	% Female	% No Data	% Total
Under 3 months	132	100	0	**232**	22.4%	25.5%	0.0%	**22.3%**
4 to 6 months	84	47	0	**131**	14.3%	12.0%	0.0%	**12.6%**
7 to 12 months	99	72	0	**171**	16.8%	18.4%	0.0%	**16.5%**
1 to 2 years	85	62	0	**147**	14.5%	15.8%	0.0%	**14.1%**
2 to 4 years	58	41	0	**99**	9.9%	10.5%	0.0%	**9.5%**
4 to 6 years	40	16	0	**56**	6.8%	4.1%	0.0%	**5.4%**
Over 6 years	44	39	1	**84**	7.5%	9.9%	1.7%	**8.1%**
No Data Provided	46	15	58	**119**	7.8%	3.8%	98.3%	**11.5%**
TOTAL	**588**	**392**	**59**	**1039**	**100%**	**100%**	**100%**	**100%**

Salary Range

Salary Range	Male	Female	No Data	Total	% Male	% Female	% No Data	% Total
Under $200 P/W	91	68	2	**161**	15.5%	17.3%	3.4%	**15.5%**
$201 to $600 P/W	83	151	0	**234**	14.1%	38.5%	0.0%	**22.5%**
$601 to $1000 P/W	228	122	0	**350**	38.8%	31.1%	0.0%	**33.7%**
$1001 to $1500 P/W	115	34	1	**150**	19.6%	8.7%	1.7%	**14.4%**
$1501 to $2000 P/W	55	13	0	**68**	9.4%	3.3%	0.0%	**6.5%**
Over $2001 P/W	15	3	0	**18**	2.6%	0.8%	0.0%	**1.7%**
No Data Provided	1	1	56	**58**	0.2%	0.3%	94.9%	**5.6%**
TOTAL	**588**	**392**	**59**	**1039**	**100%**	**100%**	**100%**	**100%**

Category of Employment

72% 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	43	45	0	**88**	7.3%	11.5%	0.0%	**8.5%**
Casual Full Time	5	1	0	**6**	0.9%	0.3%	0.0%	**0.6%**
Casual Part Time	6	4	0	**10**	1.0%	1.0%	0.0%	**1.0%**
Fixed Term	17	5	0	**22**	2.9%	1.3%	0.0%	**2.1%**
Full Time	135	81	1	**217**	23.0%	20.7%	1.7%	**20.9%**
Permanent	86	31	0	**117**	14.6%	7.9%	0.0%	**11.3%**
Permanent Full Time	261	149	2	**412**	44.4%	38.0%	3.4%	**39.7%**
Permanent Part Time	3	39	0	**42**	0.5%	9.9%	0.0%	**4.0%**
Probation	14	9	0	**23**	2.4%	2.3%	0.0%	**2.2%**
Part Time	5	17	0	**22**	0.9%	4.3%	0.0%	**2.1%**
No Data Provided	13	11	56	**80**	2.2%	2.8%	94.9%	**7.7%**
TOTAL	**588**	**392**	**59**	**1039**	**100%**	**100%**	**100%**	**100%**

Reinstatement Sought

47% of applicants did not seek reinstatement when they lodged their application.

Reinstatement Sought	Male	Female	No Data	Total	% Male	% Female	% No Data	% Total
Yes	173	101	0	**274**	29.4%	25.8%	0.0%	**26.4%**
No	274	218	1	**493**	46.6%	55.6%	1.7%	**47.4%**
No Data Provided	141	73	58	**272**	24.0%	18.6%	98.3%	**26.2%**
TOTAL	**588**	**392**	**59**	**1039**	**100%**	**100%**	**100%**	**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	7	7	3	**17**	2.6%	1.4%	1.1%	**1.6%**
17 to 20	9	30	8	**47**	3.3%	6.1%	2.9%	**4.5%**
21 to 25	19	75	20	**114**	6.9%	15.2%	7.4%	**11.0%**
26 to 40	85	176	76	**337**	31.0%	35.7%	27.9%	**32.4%**
41 to 50	60	110	45	**215**	21.9%	22.3%	16.5%	**20.7%**
51 to 60	57	67	43	**167**	20.8%	13.6%	15.8%	**16.1%**
Over 60	17	11	8	**36**	6.2%	2.2%	2.9%	**3.5%**
No Data Provided	20	17	69	**106**	7.3%	3.4%	25.4%	**10.2%**
TOTAL	**274**	**493**	**272**	**1039**	**100%**	**100%**	**100%**	**100%**

10. EMPLOYER-EMPLOYEE AGREEMENTS (EEAs)

***INDUSTRIAL RELATIONS ACT 1979* PART VID**

Applications to Lodge EEAs for Registration

Number of EEAs Lodged	2004-2005	2005-2006
Meeting Lodgement Requirements	164	75
Not Meeting Lodgement Requirements	11	6
Total	**175**	**81**

EEAs Lodged for Registration and Finalised

Outcome	2004-2005	%	2005-2006	%
Refused	22	14%	16	22%
Registered	135	83%	47	64%
Withdrawn	5	3%	10	14%
Total	**162**	**100%**	**73**	**100%**

NOTE – This table does not include applications not meeting lodgement requirements.

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	2004-2005	%	2005-2006	%
Female	23	17%	24	51%
Male	112	83%	23	49%
Total	**135**	**100%**	**47**	**100%**

Registered EEAs by Age	2004-2005	%	2005-2006	%
Employees 18 years of age or over	133	99%	45	96%
Employees under 18 years of age	2	1%	2	4%
Total	**135**	**100%**	**47**	**100%**

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

	2004-2005	% of Total Registered EEAs	2005-2006	% of Total Registered EEAs
Number of Registered EEA where the employee had a disability	20	15%	8	17%

EEAs Registered by Term of Agreement

Term of EEA	2004-2005	%	2005-2006	%
<1 year	7	5%	1	2%
1 to 2 years 25 12%	10	7%	3	6%
2 to 3 years	118	87%	43	91%
Total	**135**	**100%**	**47**	**100**

11. APPEALS PURSUANT TO SECTION 33P OF THE *POLICE ACT 1892*

During the reporting period, three appeals pursuant to s.33P of the *Police Act 1892* were lodged. One was discontinued following conferences convened in the Commission, and the other two matters remain unresolved at the end of the period.

One appeal was lodged but not finalised in the last reporting period after the Commission granted a twelve month adjournment under s.33T of the *Police Act 1892* on 17 June 2005. This appeal remains open with a conference set for early in the next reporting period.

Three appeals finalised during this period were lodged during the 2003-2004 reporting year. Of these, two matters were dismissed and the other was discontinued.

12. INFORMATION TECHNOLOGY

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

Throughout 2005/2006 extensive progress has been made on making the Commission more accessible online.

An online application system is now available to assist persons to make the majority of Commission applications online. Applications can be lodged online and paid for via an electronic gateway. Parties are provided copies of all documents lodged in this way in a format that is flexible and resembles its paper counterpart.

2006 also saw the successful implementation of video streaming via the web. The 2006 General Order Wage Case hearing and the decision were transmitted over the web and viewed by people throughout Australia. This technology was a next step from the previous year's investment in digital court recording equipment and proved to be both inexpensive and popular.

Development

Through the year a new system "Emerald" was developed to track all output from the Commission and process it in a way that, with minor input from an operator, the Industrial Gazette could be generated automatically. The Emerald system has the potential to reduce operating costs as well as significantly reduce the time it takes to prepare a Gazette. The Emerald system has generated several of the Gazettes published in 2006.

Issues surrounding the Apophylite system led to a significant revisioning and redevelopment from which a new system "Crystal" emerged. Crystal is designed to deliver the benefits of an XML encoded award system thus enabling rapid amendment of awards in the event of a General Order. The Crystal System was successfully used for the 2006 General Order Wage Case. It is hoped to expand this system to include online subscription services in 2007 that will enable an automatic notification of award amendments to interested parties.

Infrastructure

A unified messaging system has been procured to enable greater integration between the voice system and email system. Integration of these systems should be complete by the end of 2006. This system will complement our earlier investment in portable Blackberry devices late last year. Together these systems will provide an unprecedented level of access to information and communication for Commission members.

13. OTHER MATTERS

Transport – Passenger Railcar

A high level of disputation between the Public Transport Authority (PTA) and the Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch (ARTBIU) occurred over nine months which required ongoing assistance by the Commission to resolve. The matters in dispute substantially arose out of negotiations between the PTA and the ARTBIU to modernise and update awards and to negotiate new industrial agreements. Other disputes arose in relation to rostering issues.

In late 2005, the parties sought to negotiate the terms of potentially three new awards and three industrial agreements. During the year, seventeen compulsory conferences were held, one site inspection was held and four return to work orders were made.

Negotiations faltered in late December 2005. In early January 2006, an application was made by the ARTBIU to cancel the Public Transport Authority Railcar Drivers (Transperth Train Operations) Enterprise Order 2004 ("the Enterprise Order") and for an order to return to the Government Railways Locomotive Enginemen's Award 1973-1990, No. 13 of 1973 ("the Locomotive Enginemen's Award"). The application was dismissed and a declaration issued on 9 January 2006 that the Enterprise Order continued in force beyond its date of expiry on 31 December 2005.

In February 2006, the parties reached agreements to:

(a) update and modernise the Railway Employees Award No 18 of 1969;

(b) make two new awards to apply to railcar drivers, the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006 and the Public Transport Authority (Transwa) Award 2006;

(c) cancel the Locomotive Enginemen's Award; and

(d) register three industrial agreements to apply to railcar drivers and railway employees.

An agreement was also reached with the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Workers Union of Australia (CEEEIPPAWU) and the

Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch (AFMEPKIU) to register a new industrial agreement to apply to railway employees who are tradesmen employed by the PTA.

The ARTBIU also entered into an industrial agreement with the private contractor who supplies customer service officers to work on the Prospector and the Avon Link. That agreement was registered in March 2006.

Transport – General

Consent amendments were made to the main transport awards in early 2006, including the Transport Workers (General) Award No. 10 of 1961. Prior to the amendments being made, six conciliation conferences were held in respect of these awards.

During the year, nine industrial agreements in this industry were registered.

In relation to industrial disputes, six compulsory conferences were convened and one matter was referred for arbitration.

Media and Arts

Three industrial agreements were registered which apply to this industry.

Local Government

Two industrial agreements were registered which apply to this industry.

Five compulsory conferences in respect of industrial disputes were convened and three of these matters were referred for arbitration.

Meat Industry

One industrial agreement was registered which applies to this industry.

Wine Industry

An application to vary the Wineries Award 1969 sought wide ranging amendments and involved modernising and updating the Award to reflect current arrangements in the wine industry in this State (*The Australian Workers Union, West Australian Branch v. Goundrey Wines and Others* (2005) 85 WAIG 3741). The majority of matters dealt with proceeded by consent. However, a significant issue for determination by the Commission involved the deletion of the exemption in the scope of the Award for employers who produced less than 500 tonnes of grape in each vintage year. This proposed variation would bring most of the wine producers in this State within the scope of the Award.

The Commission considered the relevant principles as to varying awards under s.40 of the Act including those where awards are sought to be varied to extend them to employers for a first time. The Commission, having considered that the exemption in the Award originally introduced in 1969, should be removed, the applicant having established that there was no good reason for the continuation of the exemption, ordered that the Award be varied to extend it to the whole of the wine industry in Western Australia. In other respects, the Award was updated and modernised to reflect contemporary conditions in the wine industry.

General

A minimum rates adjustment to the Animal Welfare Industry Award outstanding since 1991 was finalised by consent in early 2006. Further, a 2004 application to update and modernise this award

was also completed by consent in early 2006 by the making of amendments to a substantial number of provisions of the Award. Prior to doing so, a number of conferences had been convened in early 2005 and in the 2005/2006 financial year, seven conciliation conferences were held in respect of these matters.

In early 2006, amendments were also made by consent to update and modernise the Laundry Workers' Award 1981, the Dry Cleaning and Laundry Award 1979 and the Cleaners and Caretakers (Car and Caravan Parks) Award 1975. These applications were also filed in 2004 and conciliation conferences were held in respect of these matters at the same time as the conferences were held in respect of the Animal Welfare Industry Award.

Dealing with Urgent Matters

The ability of the Commission to respond urgently when required is critical. The occasions when it is required are often unable to be predicted. Often an application is made by a party for the Commission to convene proceedings. On occasions, parties in negotiations for new agreements prefer to conduct a public campaign without wishing to involve the Commission. In such cases, if it is necessary in the public interest, the Commission is likely to convene proceedings on its own motion in the absence of an application being made to the Commission.

In the reporting period, a threatened disruption to the commencement of the school year on February 1, 2006 by government school registrars and other administrative employees was averted by the prompt action of the Commission in convening an urgent conference. An application for a conference was filed in the Registry at 5:00 pm on Monday, 30 June and a conference convened for 10:00 am the next day resulted in an agreement which averted the proposed industrial action to coincide with the commencement of the school year.

The Commission has continued to assist the parties to a dispute involving government education assistants to progress outstanding issues regarding the reclassification of relevant employees by convening further conferences when the parties have had difficulties.

In August 2005, a dispute regarding a shift work ban on the metropolitan passenger rail service resulted in an urgent conference being convened within 24 hours of the application being filed in the Registry. As a result of that conference the parties subsequently met and reached agreement on the roster to apply.

A deterioration in industrial relations between the Fire and Emergency Services Authority of Western Australia and the United Firefighters' Union of Western Australia resulted in bans being imposed. Neither party sought the intervention of the Commission. Nevertheless, the Commission asked both parties to meet in the Commission informally and they did so on three occasions in May 2006 which resulted in a more positive environment between the parties and a lifting of the bans. Subsequently, the dispute between them led to a formal application being made for an urgent conference which was held within two hours of the application being filed. The Commission assisted the parties to reach an in-principle agreement on a wage outcome. Discussions have been ongoing with the Commission's assistance.

14. DECISIONS OF INTEREST

Joint Employment

In the 2005 Report I referred to a decision of the Full Bench which dealt with the concept of joint employment when deciding whether an employee is an employee of a labour hire company and/or a client of that labour hire company. The issue came before the Commission constituted by a single Commissioner in a decision on 13 September 2004 (84 WAIG 3400) and then before the Full Bench of the Commission in a decision dated 10 June 2005 (85 WAIG 1924). I noted that an appeal

against the decision of the Full Bench had been lodged in the IAC but had yet to be heard at the time of writing the Report.

I now report that the decision of the IAC was delivered on 29 March 2006 ([2006] WASCA 49). The IAC allowed the appeal as it related to the decision of the Full Bench that required BHP Billiton to employ the employee as and from 7 May 2004; that matter was, in turn, remitted to the Commission at first instance. The issue of joint employment was not dealt with by the IAC and accordingly remains an issue still to be comprehensively dealt with in the future.

In a subsequent related decision ([2006] WASCA 49 (S), 17 May 2006), the IAC, by majority, held that s.16(1) of the *Workplace Relations Act 1996* (Cth), and r.4.55 of the *Workplace Relations Regulations 2006* (Cth) should be understood as providing that s.16(1) does not apply to the *Industrial Relations Act 1979* to the extent that the latter Act permits the IAC to review, upon the grounds set out in s.90 of the Act, the correctness of a decision of the Full Bench of the WAIRC. The IAC, therefore, had power to make orders on the appeal notwithstanding s.16(1) of the *Workplace Relations Act 1996* (Cth).

Deducting Tax from Commission Orders

The taxation implications of an order made by the Commission that an employer pay a sum of money to a former employee as compensation for an unfair dismissal came before the Industrial Appeal Court in *Paul Andrew Bennett and Craig Bradley Dix T/as Fitness Painting & Property Maintenance v Higgins* [2005] WSCA 197; (2005) 85 WAIG 3653. The employer deducted tax from the sum specified in the order to be paid. The Court unanimously held that the Commission order should be interpreted as operating against the background of compliance with Commonwealth tax law. That is, the amount that was required under s 12-85 and s 16-5 of Sch 1 to the *Tax Administration Act 1953* (Cth) to be withheld from the compensation payment and paid by the employer to the Commissioner of Taxation would be regarded, consistently with s 16-20 of Sch 1 to that Act, as having been paid to the employee for the purposes of compliance with the Commission order.

Ordering Costs

In *The Construction, Forestry, Mining and Energy Union of Workers v. SNC (SA) Inc and Other* (2006) 86 WAIG 1148, the original proceedings related to the applicant seeking right of entry at the Burrup Peninsula Ammonia Plant project in the state's North West. In those proceedings, the Commission made a declaration to the effect that authorised officials of the applicant union had the legal right to enter those premises under the Act, despite the terms of the *Workplace Relations Act 1996* (Cth). The respondents commenced proceedings in the Federal Court of Australia, in an attempt to prevent the applicant exercising its right of entry in accordance with the Act. Those proceedings were ultimately unsuccessful with the rights declared by the Commission being affirmed.

Consequently, the applicant brought an application for costs against the respondents under s.27(1)(c) of the Act. It was said by the applicant that it had incurred substantial costs as a consequence of the conduct of the respondents during the proceedings which they sought to recover. A number of issues of some significance arose in the proceedings. Firstly, it was contended by the respondents that the amendments to the *Workplace Relations Act 1996* (Cth) effected by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) precluded the Commission from dealing with the applicant's claim. After considering the relevant legal principles and the terms of the *Workplace Relations Regulations 2006* (Cth), the Commission considered that the applicant's claim was not precluded as argued and that the terms of Chapter 2 Part 1 Division 2 Reg 1. 2 (2) of the *Workplace Relations Regulations 2006* (Cth) relating to compliance with an obligation under a law of a state, brought the applicant's claim within the transitional provisions applicable to the Work Choices legislation. Accordingly, on its proper interpretation, the applicant's claim was able to proceed.

Secondly, it was argued that given the issues in the case involved federal issues under the *Workplace Relations Act 2006* (Cth), they being rights of entry under that legislation, then the restrictive costs provisions of s.347 of the *Workplace Relations Act 1996* (Cth) had application. The Commission dealt with that issue at some length and concluded that the Commission was a "court of a State" for the purposes of s.39 of the *Judiciary Act 1903*, as exercising and being invested with federal jurisdiction. This was relevant to whether the terms of s.347 of the *Workplace Relations Act 1996* (Cth) could have any application to the proceedings before the Commission. The Commission considered however, even though the Commission was so constituted, that the terms of s.347 were not available to the respondents as it only applied to a claim for costs brought against a party instituting proceedings and not a party defending proceedings.

Having regard to all of the circumstances of the case, and applying the Commission's established principles in relation to claims for costs under s.27(1)(c) of the Act, the Commission concluded that a costs award should not be made.

Standing of Union to Initiate Proceedings

In *The Construction, Forestry, Mining and Energy Union of Workers and Other v. Kemerton Silica Sand Pty Ltd* (2005) 86 WAIG 571, a preliminary issue arose as to whether employees of the respondent engaged in the operation of various items of plant including a dredge, were eligible to be members of one of the applicant unions, the Construction, Forestry, Mining and Energy Union of Workers (CFMEUW), and whether therefore, that union had standing to enter into an industrial agreement with the respondent.

The Commission considered the evidence as to the duties performed by the relevant employees and applied established principles for the interpretation of union constitution rules. Additionally, the Commission considered the historical definition of "Engine Drivers" for the purposes of the eligibility rules of the then Federated Engine Drivers' and Firemens' Association (FEDFA) which subsequently was incorporated into the eligibility rules of the CFMEUW. In applying those principles, the Commission considered that the employees concerned, engaged in part in the operation of a dredge at the respondent's silica sand operations, and also in plant operations work, were eligible to be members of the CFMEUW and therefore, that union had standing to make an industrial agreement with the respondent.

The Commission, having determined that preliminary issue was then invited by the parties to make recommendations as to matters upon which parties could not agree for the incorporation into an industrial agreement which was then registered under s.41 of the Act.

Definition of "Employee"

Natasha Jade Watkins v. Ganehill Pty Ltd (2006) 86 WAIG 1557 involved a claim by the applicant that she was unfairly dismissed by the respondent employer. A preliminary issue arose as to the Commission's jurisdiction to deal with the matter as it was alleged that the applicant was engaged in the provision of domestic services in a private home and therefore was not an employee under s.7 of the Act. The Commission dealt with at some length the history to the definition of "employee" as introduced into the Act in 1987, containing the exemption for those engaged in "domestic services in a private home". The Commission considered that it could have regard to these Parliamentary materials in interpreting the provisions of the Act and came to the view, applying the dictionary meanings of "domestic" that the applicant was so engaged.

The next issue was whether in terms of the qualification in paragraph (f) of the definition of employee, which does not extend the exclusion to the provision of domestic services in a private home by an employer, not the owner or occupier of the private home, who provides that owner or occupier with domestic services, applied. The Commission considered the common law meaning of "occupier" in the absence of a definition in the Act and came to the conclusion that the respondent was an occupant of the private home and furthermore, that the applicant was not being provided as

"services" to the respondent. The Commission took the view that having regard to the Parliamentary materials considered by it as to the history of the definition of "employee" as introduced in 1987, that this requires the provision of domestic services on a commercial basis, which was not the situation in the instant case.

15. CONCLUSION

Changes to the *Workplace Relations Act, 1996*

On 27 March 2006 the Federal Government's Work Choices amendments to the *Workplace Relations Act, 1996* came into effect. The potential significance of the Work Choices amendments to the State's power to regulate industrial relations within the State is potentially so profound that the State, in conjunction with the other States, has challenged the legislation in the High Court. The decision of the High Court is not known at the time of writing this Report.

The amendments are profound and complex and the rather brief period of time between 27 March 2006 and 30 June 2006, the period covered by this Report, did not see any testing of their limits. Accordingly, it is far too early to state with any certainty what the effects of the Work Choices amendments will be upon the operation of the Act. Nevertheless, it is appropriate that I commence my concluding comments by referring to it.

It is particularly relevant to note here that the Work Choices amendments purport to override the Act in so far as it applies to employers which are constitutional corporations under the *Constitution Act* (Cth) and their employees except in relation to certain specified "non-excluded" matters.

Therefore, the Work Choices amendments do not affect the Act's coverage of the industrial relations of those employers in the State which are:

- corporations which are not trading, financial or foreign corporations,
- partnerships,
- trusts, or
- sole traders,

which were previously covered by State awards or agreements. Further, the Act's coverage of the industrial relations of those employers in the State which are trading, financial or foreign corporations remains in relation to the specified "non-excluded" matters.

In relation to trusts, it is reasonably clear that where the trustee is a natural person or a number of natural persons, the employer is not a constitutional corporation. Where the trustee is a corporation the issue will become whether the corporation is a trading, financial or foreign corporation.

Also, some unincorporated businesses may well be employers who were covered by federal awards or agreements. These "transitional employers" (as they are now defined in the *Workplace Relations Act 1996*) remain within the federal system for a transitional period of 5 years. If a transitional employer does not become a constitutional corporation by the end of that transitional period, or if before the end of that transitional period it makes an agreement under the Act, it will revert to the State system.

The effect of the Work Choices amendments on the coverage of the Act was the subject of submissions from the State Government, the Commonwealth Government, the Trades and Labor Council, Chamber of Commerce and Industry (WA) and the Council of Small Business Associations in the 2006 General Order Wage Case (referred to at page 15 of this Report). The submissions took into account that the data relevant to this issue are from the May 2004 Employee Earnings and Hours survey of the Australian Bureau of Statistics; while these data are the most accurate available, it is acknowledged that more reliable data is needed.

The data shows employees by industry by type of legal organisation. In general terms, the data shows that possibly 31.5% of private sector employees are employed by businesses which are unincorporated and remain covered by the Act. The majority of these employees are likely to be in the industry sectors of Accommodation, Cafes and Restaurants, Personal and Other Services, and Health and Community Services. There are also likely to be some but fewer numbers in the Construction, Retail and Wholesale Trade, Property and Business Services, Cultural and Recreational Services, Education and Manufacturing sectors.

The data shows that a further 8.6% of the State's employees are employed directly by the State Government and therefore they remain covered by the Act. Employees of State government corporate trading concerns (a further 8.5% of the State's workforce) may be covered by the Work Choices amendments; whether each and every State government corporate trading concern is a constitutional corporation remains to be determined on a case-by-case basis, and at the moment a number of them are likely to be covered by federal instruments and be "transitional employers".

At this rather early stage therefore, I estimate that the Work Choices amendments do not apply to potentially to between 40% and 48.5% of the State's workforce. A more precise estimate may be able to be made by the time of my next Report in 2007; however the numbers of "transitional employers" which revert to the State system will not be able to be known until after the 5 year transitional period expires in 2011.

It is also far too early to see what effect there will be upon the Commission's workload. Any initial reduction in the numbers of applications made to the Commission will assist parties to matters in the Commission by reducing the time taken to list matters, especially where a hearing of more than two days is likely to be necessary.

For employers that are unincorporated, and those that are incorporated businesses that are not trading, financial or foreign corporations, and their employees, the Act continues to operate as previously: thus, claims of unfair dismissal or of denied contractual benefits, conciliation conferences and the registration of industrial agreements will continue as previously, although I anticipate an initial reduction in the numbers of applications made to the Commission that involve employers that are constitutional corporations.

The reduction may be initially due to confusion regarding the application of the Work Choices amendments. When Work Choices was introduced there seemed to be a popular understanding that it created one industrial relations system. I suspect there is now a more informed understanding that it did not do so. With that more informed understanding will also come a greater awareness of the actual extent to which the Commission remains available to employers, employees and organisations in this State.

By way of example, the Commission's jurisdiction to enquire into and deal with a claim by an employee that he or she is entitled to a benefit under his or her contract of employment which has been denied them by their employer remains unchanged where the employer is unincorporated and it has not yet been determined whether the Commission's jurisdiction to enquire and deal with such a claim where the employer is a constitutional corporation is now overridden by the Work Choices amendments.

I also wish to draw to your attention at least some issues regarding the future operation of the Commission.

Mediation

The Commission is increasingly being asked to act in a mediation capacity. In some cases, the request is part of a formal fair treatment process within a business. Increasingly, the role is underpinned by the Commission being nominated to resolve disputes under individual or collective agreements made under the *Workplace Relations Act, 1996*. The Commission endeavours to respond positively to these requests; I consider they assist a Commissioner to keep herself or himself acquainted with industrial affairs and conditions as the Act obliges them to do.

I therefore recommend that consideration be given to amending the Act to provide for a workplace mediation role for the Commission. This role will be separate from its present conciliation function which arises only when a formal application is filed in the Commission. The mediation role should be available upon request by an employer, employee or organisation and be able to be made in writing and without the need for a formal application to be filed in the Commission. The role would not involve the Commission exercising the conventional powers of conciliation or arbitration other than with the express request of the parties to the mediation. Where mediation before the Commission results in agreement, the Commission may be empowered to register the agreement to give it a statutory force.

Streamlining the Registration Process

The formal agreement-making processes within the Commission could also be streamlined to provide for a faster and more certain registration process. For example, the Commission is required by s.29A of the Act to publish in the next available issue of the Industrial Gazette the area and scope provisions of a proposed industrial agreement. There is only a limited power given to the Chief Commissioner in s.29(2a) of the Act to direct that publication need not occur.

This requirement to publish necessarily results in some delay in the registration process and I query whether the delay is warranted. There has not during the period of this Report, nor the preceding Report for which I was responsible, been any interventions or objections resulting from the publication from persons who had not been served with the proposed agreement and in my respectful observation, any safeguards embodied in the requirement to publish may be met by amending the Act to provide for a broader discretion to be given to the Chief Commissioner to decide whether or not the area and scope provisions of a proposed agreement should be published.

Regulations

As noted at page 14, on 12 August 2005 the *Industrial Relations Commission Regulations 2005* came into effect. These Regulations repealed the *Industrial Relations Commission Regulations 1985*. They updated current regulations, deleted redundant regulations and introduced new regulations which provide for, amongst other things, the lodging of forms electronically via the Commission's website.

However, the *Industrial Relations Commission Regulations 2005* could not consolidate all the following regulations into one set of regulations:

- the *Industrial Relations (General) Regulations 1997*
- the *Industrial Relations (Industrial Agents) Regulations 1997*
- the *Industrial Relations (Employer-employee Agreements) Regulations 2002*
- the *Industrial Relations (Superannuation) Regulations 1997*
- the *Industrial Arbitration (Union Elections) Regulations 1980*
- the *Industrial Relations Commission (Government School Teachers Tribunal [Elections]) Regulations 1985*
- the *Industrial Relations Commission (Railways Classification Board [Elections]) Regulations 1985*.

This is because the power to make regulations for the Act is not only vested in the Chief Commissioner: the power to make regulations relating to the Commission's jurisdiction is also vested in the Governor in ss 29AA(5), 42(3)(d), 42M, 48B(3), 49D(3)(a), 51R(3)(d), 97YJ, 112A(5) and 113 (3b). It may be appropriate for consideration to be given to amending the Act to permit the Chief Commissioner, after consultation with the members of the Commission, to make all regulations with respect to any of the purposes that relate to the Commission. This will permit a review and consolidation of these regulations into the *Industrial Relations Commission Regulations 2005*.

In conclusion I express my thanks to the President of the Australian Industrial Relations Commission, the Honourable Justice Giudice for calling meetings of Heads of the Tribunals on two occasions during this reporting period, and his courtesy in permitting me to observe a statutory meeting of members of the AIRC. The information gained during such meetings is most valuable and greatly assists the closer working together of the two Commissions in this State which I consider is of benefit to the community.

I thank my colleagues in the Commission for their assistance throughout the year and also the Registrar John Spurling and registry staff for the support given to the Commission. I also record my appreciation of the helpful staff of Verbatim Reporters who provide the transcription of the Commission's proceedings.

A.R. Beech
Chief Commissioner
21 September 2006