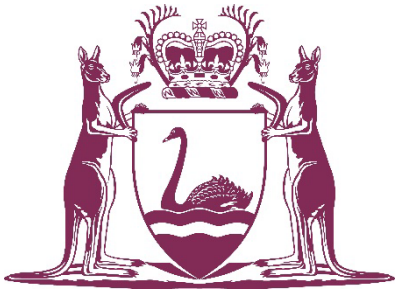
Industrial Relations Act 1979

ANNUAL REPORT 2023-2024

The Western Australian Industrial Relations Commission

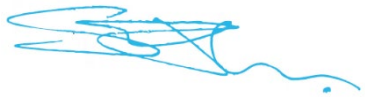


Letter to the Minister

To the Honourable Simone McGurk MLA,
Minister for Industrial Relations

Dear Minister

I am pleased to provide to you the following report relating to the operation of the *Industrial Relations Act 1979* for the year ended 30 June 2024.



Stephen Kenner
Chief Commissioner
The Western Australian Industrial Relations Commission

ABOUT THIS REPORT

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

ENQUIRIES AND FEEDBACK

For enquiries on the report or feedback, please email:

registry@wairc.wa.gov.au

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This report is published on the Commission's website:

www.wairc.wa.gov.au

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FROM THE CHIEF COMMISSIONER

The 2023-24 year has been a year of continued consolidation and progress for the Industrial Relations Commission, following substantial legislative reform in recent years.

Significant work has been undertaken to progress award scope variations, in conjunction with award reviews to modernise State awards and ensure they are fit for purpose. Further, the transition of local government into the Commission's jurisdiction from the national industrial relations system, effective from 1 January 2023, has generated substantial work for the Commission in a range of areas.

As always, I would like to thank my Commissioner colleagues and all staff of the Commission for their excellent work over the year.

Stephen Kenner
Chief Commissioner

THE COMMISSION AND TRIBUNALS

Structure of the State Industrial Relations System

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

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

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

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

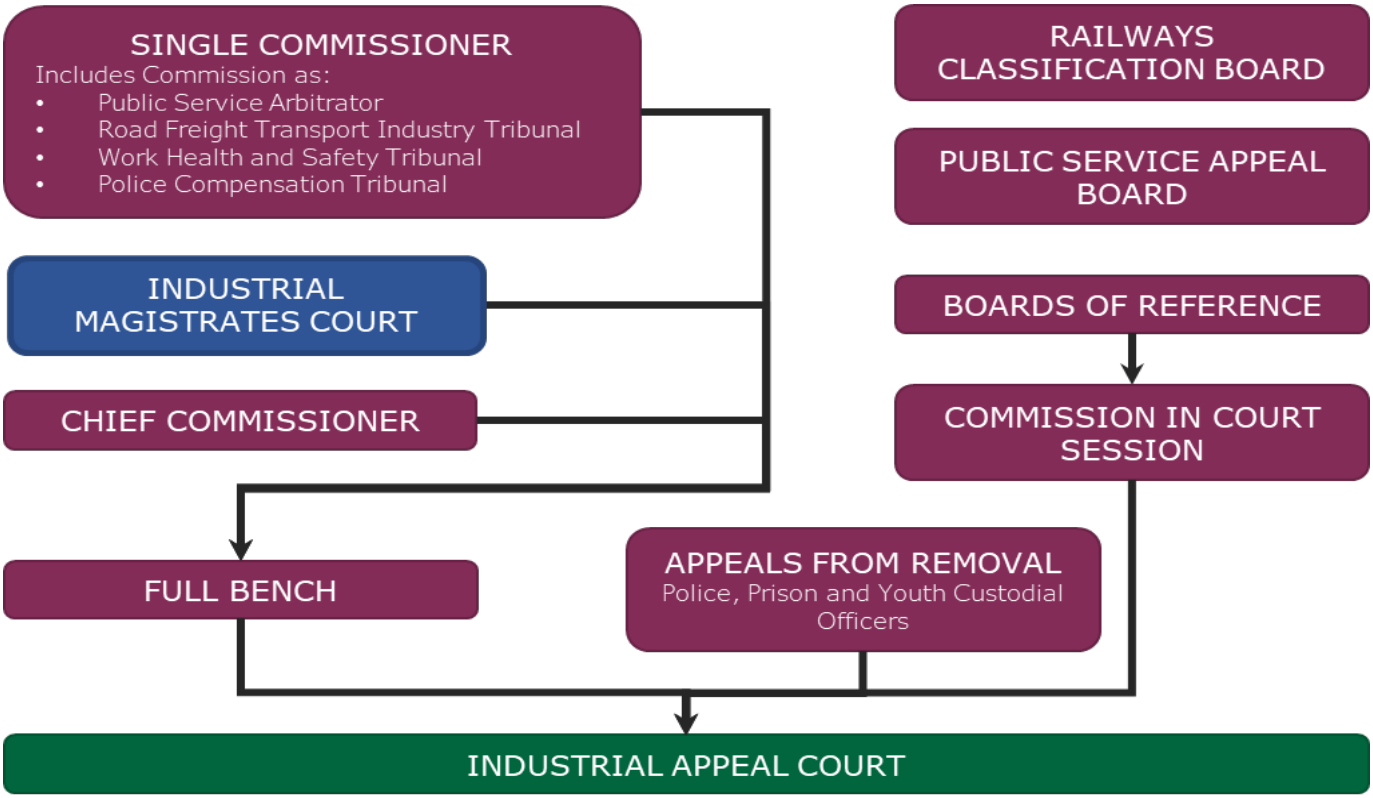

Figure 1. Structure of the State Industrial Relations System

Membership and Principal Officers

The Commission

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

Chief Commissioner	S J Kenner
Senior Commissioner	R Cosentino
Commissioners	T Emmanuel
	T B Walkington
	C Tsang
	T Kucera

The Registry

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

Registrar	S Bastian
Deputy Registrar	S Kemp

Industrial Appeal Court

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

For the period 1 July 2023 to 31 January 2024, the Industrial Appeal Court was constituted by the following members:

Presiding Judge	The Honourable Justice M J Buss
Deputy Presiding Judge	The Honourable Justice G H Murphy
Members	The Honourable Justice Kenneth Martin
	The Honourable Justice Jennifer Smith

For the period 1 February 2024 to 30 June 2024, the Industrial Appeal Court was constituted by the following members:

Presiding Judge	The Honourable Justice M J Buss
Deputy Presiding Judge	The Honourable Justice R Mitchell
Members	The Honourable Justice Jennifer Smith
	The Honourable Justice F Seaward

Industrial Magistrates

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

- Industrial Magistrate D Scaddan
- Industrial Magistrate E O'Donnell
- Industrial Magistrate B Coleman
- Industrial Magistrate R Cosentino
- Industrial Magistrate C Tsang
- Industrial Magistrate T Kucera

Chief Commissioner Kenner also holds a dual appointment as an Industrial Magistrate.

NEW DEVELOPMENTS

Awards and agreements

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

In addition, under the legislation and regulations made to support the amendments to the IR Act, local government transitioned into the State industrial relations system effective from 1 January 2023. This has led to 139 local governments and about 28,000 employees now operating in the Commission's jurisdiction.

Technological advancements

During the reporting period, the Commission continued to keep abreast of technological advancements with the potential to improve access to justice and administrative efficiencies. Examples of the Commission's continuing work and development in this arena include:

- Digital Registry. There continued to be a focus and commitment to enhancing the Commission's online lodgement portal, with a dedicated project team of specialists working on developments. Improvements focused on a better user experience for stakeholders and increased security features to ensure the portal is an effective and secure lodgement method for parties.
- Information videos. The Commission partnered with Circle Green Community Legal to enhance information resources for the public seeking support accessing the Commission and the Industrial Magistrates Court (IMC) jurisdictions. This partnership resulted in the creation of information videos on the conciliation process and procedures for the Commission, and the pre-trial conference process and procedures for the IMC. These information videos have now been published on the Commission and IMC websites respectively, and provide a comprehensive overview of what to expect, how to prepare and the process and outcomes for a conciliation or pre-trial conference.
- New IMC website launch. Launched in March 2024, the IMC's new website includes an improved visual design, multilanguage translation function and IMC specific hearing listings.

THE WORK OF THE COMMISSION

Statistics snapshot

Total matters

	2022-23	2023-24	Variance
Initiated	581	710	129 (22%)
Concluded	552	569	17 (3%)

Matters concluded – jurisdiction/area

	2022-23	2023-24	Variance
Mediation	13	7	-6 (-46%)
Commissioner sitting alone	211	305	94 (45%)
Public Service Arbitrator	39	44	5 (13%)
Public Service Appeal Board	48	30	-18 (-37%)
Appeals from Removal – Police, Prison and Youth Custodial Officers	5	1	-4 (-80%)
Police Compensation Tribunal	2	0	-2 (-100%)
Road Freight Transport Industry Tribunal	1	1	0 (0%)
Work Health and Safety Tribunal	13	10	-3 (-23%)
Railways Classification Board	0	0	0 (0%)
Boards of Reference	0	0	0 (0%)
Chief Commissioner	8	7	-1 (-12.5%)
Commission in Court Session	7	3	-4 (-57%)
Full Bench	14	16	2 (14%)
Industrial Appeal Court	5	1	-4 (-80%)

Matters concluded – jurisdiction/area

	2022-23	2023-24	Variance
Industrial Magistrate	186	144	-42 (-23%)

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

	2023-24
Awards	231
Industrial Agreements	477
Total	708

Conciliation and case management

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

How long matters and disputes take to resolve by conciliation varies considerably. In the case of larger and more complex collective disputes under s 44 of the IR Act, this might entail multiple compulsory conferences over an extended period. For example, bargaining disputes for a new industrial agreement may take many weeks, even months, to bring to finality. On the other hand, individual disputes, in relation to termination of employment for example, may be resolved more expeditiously in one or only a few conferences. It is pleasing to note that over half of all matters case managed through a conciliation process are concluded within 90 days.

Conciliation – on time matter processing

	Concluded within 90 days	Concluded within 180 days
Unfair dismissal applications – s 32	64%	84%
Denial of contractual benefits applications – s 32	59%	78%
Compulsory conferences – s 44	49%	72%
Stop bullying and/or sexual harassment applications – s 51BM	67%	73%
Conference to assist bargaining – s 42E	57%	74%

Mediation

The *Employment Dispute Resolution Act 2008* (EDR Act) provides that the Commission may mediate or otherwise resolve any question, dispute or difficulty that arises out of or in the course of employment by way of a voluntary mediation process. The scope of this is wider than an 'industrial matter' as defined under the IR Act. The EDR Act has been utilised by parties to industrial disputes which are not within the jurisdiction of the Commission pursuant to the IR Act, including parties to Fair Work Commission agreements.

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

Mediation – total matters

	2022-23	2023-24	Variance
Matters lodged	15	7	-8 (-53%)
Matters concluded	13	7	-6 (-46%)

Commissioners Sitting Alone

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

In this reporting year, there was a significant increase in the number of matters dealt with by Commissioners sitting alone. These increases were primarily in the matters of unfair dismissal, denied contractual benefits, stop bullying and/or sexual harassment and new agreements.

Commissioners Sitting Alone – total matters

	2022-23	2023-24	Variance
Matters lodged	253	398	145 (57%)
Matters concluded	211	305	94 (45%)

Commissioner Sitting Alone – matters concluded

	2022-23	2023-24	Variance
Unfair dismissal applications	78	103	25 (32%)
Denial of contractual benefits applications	30	41	11 (37%)
Stop bullying and/or sexual harassment applications	5	15	10 (200%)
Conference applications (s 44)	34	39	5 (15%)
Conferences referred for arbitration (s 44(9))	1	2	1 (100%)
Apprenticeship appeals	0	0	0 (0%)
Public Service applications	10	6	-4 (-40%)
Review of decisions of the Construction Industry Long Service Leave Payments Board	1	0	-1 (-100%)
Conferences to assist bargaining (s 42E)	3	4	1 (33%)
Enterprise Orders (s 42I)	1	0	-1 (-100%)
Orders arising from s 27	1	1	0 (0%)
Exemptions (awards)	0	0	0 (0%)
Order to suspend or revoke authority of rep s 49J(5)	0	0	0 (0%)
Unspecified Grounds	0	1	1 (100%)

Commissioner Sitting Alone – awards – matters concluded

	2022-23	2023-24	Variance
New Awards	0	0	0 (0%)
Variation of Awards	11	10	-1 (-9%)
Joinders to Awards (s 38)	0	0	0 (0%)
Interpretation of Awards	0	1	1 (100%)
Cancellation of Award	3	0	-3 (-100%)
Referral of dispute (s 48A)	0	1	1 (100%)

Commissioner Sitting Alone – agreements – matters concluded

	2022-23	2023-24	Variance
New Agreements	29	45	16 (55%)
Variation of Agreements	2	0	-2 (-100%)
Retirement from Industrial Agreement	1	2	1 (100%)
Interpretation of Agreement	1	6	5 (500%)
Orders as to terms of Agreement (s 42G)	0	1	1 (100%)
Cancellation Agreement	0	0	0 (0%)
Order naming organisation or association as party to new State instrument	-	28	28

Applications by individuals

Applications alleging unfair dismissal, denial of contractual benefits, bullying and/or sexual harassment may be lodged by employees, and workers in the case of bullying and/or sexual harassment, in the Commission.

Unfair dismissal

	2022-23	2023-24	Variance
Matters lodged	67	116	49 (73%)
Matters concluded	78	103	25 (32%)

Denial of contractual benefits

	2022-23	2023-24	Variance
Matters lodged	33	47	14 (42%)
Matters concluded	30	41	11 (37%)

Stop orders – bullying and/or sexual harassment

	2022-23	2023-24	Variance
Matters lodged	11	11	0 (0%)
Matters concluded	5	15	10 (200%)

Public Service Arbitrator and Appeal Board

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

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

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

In addition to the members of the Commission who are appointed as Public Service Arbitrators and who chair Public Service Appeal Boards, those people listed in Appendix 1 – Members of the Public Service Appeal Board have served as members of Appeal Boards on the nomination of a party under s 80H of the IR Act during this reporting period.

Public Service Arbitrator – total matters

	2022-23	2023-24	Variance
Matters lodged	78	72	-6 (-8%)
Matters concluded	87	74	-13 (-15%)

Public Service Arbitrator – matters concluded

	2022-23	2023-24	Variance
Conference applications (s 44)	17	23	6 (35%)
Conferences referred for arbitration (s 44(9))	1	0	-1 (-100%)
Appeals to the Public Service Appeal Board	48	30	-18 (-37%)
Reclassification appeals	4	2	-2 (-50%)
Conferences to assist bargaining	0	0	0 (0%)
Enterprise orders (s 42I)	0	0	0 (0%)
Orders pursuant to s 80E	1	0	-1 (-100%)
Unspecified grounds	0	0	0 (0%)

Public Service Arbitrator – awards – matters concluded

	2022-23	2023-24	Variance
New Awards	0	0	0 (0%)
Variation of Awards	8	0	-8 (-100%)
Joinders to Awards (s 38)	0	0	0 (0%)
Interpretation of Awards	0	0	0 (0%)
Cancellation of Awards	0	0	0 (0%)

Public Service Arbitrator – agreements – matters concluded

	2022-23	2023-24	Variance
New Agreements	6	14	8 (133%)
Variation of Agreements	0	1	1 (100%)
Retirement from Industrial Agreement	0	0	0 (0%)
Interpretation of Agreement	2	3	1 (50%)
Orders as to terms of Agreement (s 42G)	0	0	0 (0%)
Cancellation of Agreements	0	0	0 (0%)

Occupational Safety and Health Tribunal and Work Health and Safety Tribunal

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

Commissioner Emmanuel has constituted the WHS Tribunal, under Schedule 1 cl 27(1) of the WHS Act and s 16(2A) of the IR Act. Her term continues until 31 March 2025.

The WHS Tribunal assists in the resolution of workplace health and safety issues under Western Australia's occupational safety and health laws. There has been a 44% increase in the matters referred to the WHS Tribunal over the year.

Occupational Safety and Health Tribunal – total matters

	2022-23	2023-24	Variance
Matters lodged	0	-	-
Matters concluded	5	3	-2 (-40%)

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

	2022-23	2023-24	Variance
Occupational Safety and Health Act 1984	5	3	-2 (-40%)
Mines Safety and Inspection Act 1994	0	0	0 (0%)
Petroleum (Submerged Lands) Act 1982	0	0	0 (0%)

Work Health and Safety Tribunal – total matters

	2022-23	2023-24	Variance
Matters lodged	9	13	4 (44%)
Matters concluded	8	7	-1 (-12.5%)

Work Health and Safety Tribunal – matters concluded

	2022-23	2023-24	Variance
Disqualification of health and safety representatives – s 65(1)	0	1	1 (100%)
Extension of deadline for making decision resolving issue – s 82A	1	2	1 (100%)
Issue about continuity of engagement of worker – s 89A	2	1	-1 (-50%)
Civil proceedings in relation to discriminatory or coercive conduct – s 112	1	0	-1 (-100%)
Application for external review – s 229	4	3	-1 (-25%)

Police Compensation Tribunal

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

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

Road Freight Transport Industry Tribunal

The Tribunal is established under the *Owner-Drivers (Contracts and Disputes) Act 2007*. It hears and determines disputes between hirers and owner-drivers in the road freight transport industry. Most disputes referred to the Tribunal involve claims for payment of monies owed under, or for damages for breaches of, owner-driver contracts. The Tribunal also deals with disputes in relation to negotiations for owner-driver contracts and other matters.

Commissioner Kucera and Commissioner Tsang have constituted the Tribunal over the reporting year.

As reported over the last two years on a large matter involving 28 separate applications with claims totalling some $4 million, the Tribunal has been continuing to facilitate negotiations between the parties through conferences and correspondence to assist them to reach a negotiated resolution.

Road Freight Transport Industry Tribunal – total matters

	2022-23	2023-24	Variance
Matters lodged	1	2	1 (100%)
Matters concluded	1	1	0 (0%)

Employer-employee agreements

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

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

Boards of Reference

Each award in force provides for a Board of Reference to assist in resolving certain types of disputes (s 48 of the IR Act).

There have been no Boards of Reference during this reporting period. A Board of Reference was last convened in 2012.

Railways Classification Board

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

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

Appeals from Removal – total matters

	2022-23	2023-24	Variance
Matters lodged	6	1	-5 (-83%)
Matters concluded	5	1	-4 (-80%)

Police Act 1892

Appeals pursuant to s 33P of the *Police Act 1892* (Police Act) are filed by police officers who have been removed from the Western Australian Police Force under s 8 of that Act. These appeals are heard by three Commissioners, including either the Chief Commissioner or the Senior Commissioner. If the Commission finds the officer's removal to be harsh, oppressive or unfair, the Commission may order the removal to be of no effect. Alternatively, an order for compensation may be made.

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

Prisons Act 1981

A prison officer who has been removed from office by the Chief Executive Officer, Department of Justice, may file an appeal against that decision under s 106 of the *Prisons Act 1981* (Prisons Act). The appeal provisions under the Prisons Act are very similar to those for police officers under the Police Act.

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

Young Offenders Act 1994

A youth custodial officer who has been removed from office by the Chief Executive Officer, Department of Justice, may file an appeal against that decision under s 11CH of the *Young Offenders Act 1994*. The appeal provisions and the Commission's powers are the same as those under the Prisons Act.

One appeal was referred to the Commission during the reporting year.

The Chief Commissioner

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

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

Applications involving unions seeking orders to establish an interim management committee to manage the affairs of the union continue to be prevalent. These matters also generally involve applications to make alterations to a union's rules to bring them into alignment with a counterpart federal organisation. This is often necessary because the union has a s 71 certificate which exempts them from conducting separate State elections for offices in the union. Where the rules of both the State and federal unions have not remained in alignment, there may be a need for a separate election in the State union for it to function or an interim management committee to bring the rules back into alignment.

The Registrar has continued over the reporting year, a proactive compliance process to ensure unions meet their statutory obligations under the IR Act. A significant component of this is to educate and to assist unions in meeting their obligations.

Chief Commissioner – total matters

	2022-23	2023-24	Variance
Matters lodged	21	5	-16 (-76%)
Matters concluded	8	7	-1 (-12.5%)

Chief Commissioner – matters concluded

	2022-23	2023-24	Variance
Organisation rules – s 66	6	7	1 (17%)
Employee organisations, orders as to whom they represent – s 72A(6)	0	0	0 (0%)
Registrar consultations – s 62*	2	6	4 (200%)

*The Registrar consults with the Chief Commissioner on union rule alteration applications under s 62 and, whilst these applications are not strictly speaking matters before the Chief Commissioner, this consultation process is an important function performed by the Chief Commissioner.

Figure 2. Photo of the new public lift area in Registry Services

The Commission in Court Session

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

Commission in Court Session – total matters

	2022-23	2023-24	Variance
Matters lodged	5	6	1 (20%)
Matters concluded	5	3	-2 (-40%)

Notable Commission in Court Session matters in the reporting year comprised the following:

State Wage Order

Section 50A of the IR Act requires that, before 1 July in each year, the Commission is to make a General Order setting the minimum weekly rates of pay for adults, apprentices and trainees under the *Minimum Conditions of Employment Act 1993* (WA) and to adjust the rates of wages paid under awards. The State Wage General Order affected 217 awards.

The Commission in Court Session handed down its decision in the 2024 State Wage Case on 12 June 2024. The Commission increased the State Minimum Wage by a one-off increase of 6.3%, bringing the State Minimum Wage to $917.80 per week from 1 July 2024. This took into account the 2.3% increase resulting from the realignment of the C14 to the C13 classification rate in the

Metal Trades (General) Award and the 4.0% general increase. The Commission also increased award rates by 4% from that time.

The increases applied only to employees paid the minimum wage or award rates in the State industrial relations system. Approximately 27,000 employers and more than 300,000 employees were estimated to be affected by the decision.

In making its decision, the Commission was required to balance a broad range of economic and labour market forces, and social and equity considerations.

The Commission noted that in recent State Wage Cases, the focus had been on cost of living pressures given the high inflationary environment and rising interest rates in tandem with a continuing tight labour market. On this occasion, whilst over the past two years inflation measured by the Consumer Price Index (CPI) has been very high, and well beyond the Reserve Bank of Australia target band of 2% - 3%, the CPI rate for Perth has significantly eased from its peak of 8.6% in the December quarter 2022, to 4.1% in year end terms for the March quarter 2024.

Figures 3 & 4. Photos of the 2024 State Wage Case proceedings

Location Allowances General Order

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

In accordance with the Commission's usual practice, the Commission in Court Session initiated a review of the prices components and issued a General Order to adjust the prices component ([2024] WAIRC 00282). They increased by 3.09% to reflect the increase in the Consumer Price Index for Perth (excluding housing) for the year to March 2024. The increase was effective from 1 July 2024.

The Location Allowances General Order affects 82 awards.

Organisations matters

The Commission in Court Session has dealt with several registered organisations matters over the reporting year.

The Western Australian Municipal, Administrative, Clerical and Services Union of Employees has sought orders under s 72A of the IR Act asserting its exclusive right to represent the industrial interests of employees in the outside workforce at the City of Rockingham and then, in a subsequent application, at 145 local government bodies statewide. The Construction, Forestry, Mining and Energy Union of Workers, in response, filed an application seeking orders to represent employees as carpenters, painters and plant operators if it were determined that it lacked the right to represent them in the main applications. The Commission in Court Session, recognising the commonality of issues, ordered the consolidation of these matters, with the Local Government, Racing and Cemeteries Employees Union and the Western Australian Local Government Association being granted leave to intervene. This is a very substantial case listed for hearing over four weeks, with in excess of 50 witnesses and many thousands of pages of material having been filed. The case is ongoing.

The Commission in Court Session also had a matter brought before it by The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch seeking changes to its eligibility for membership. This follows an earlier order by the Chief Commissioner to establish an interim committee of management of the union, pending the rules changes being made.

The Full Bench

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

There has been a 200% increase in the number of appeals to the Full Bench over the reporting year. Despite this increase, it is pleasing to note that over 50% of appeals continue to be finalised within a 12-month period. This period includes the time from filing an appeal, procedural steps in filing appeal books, listing the appeal for hearing, the determination of any interlocutory applications, hearing the appeal and delivering the decision.

Full Bench – total matters

	2022-23	2023-24	Variance
Matters lodged	7	21	14 (200%)
Matters concluded	12	11	-1 (-8%)

Full Bench – appeals concluded from decisions of the:

	2022-23	2023-24	Variance
Commission – s 49	6	6	0 (0%)
Industrial Magistrate – s 84	4	3	-1 (-25%)
Public Service Arbitrator – s 80G	0	1	1 (100%)
Road Freight Transport Industry Tribunal – s 43 *Owner-Drivers (Contracts and Disputes) Act 2007*	0	0	0 (0%)
Occupational Safety and Health Tribunal – s 51I *Occupational Safety and Health Act 1984*	0	0	0 (0%)
Work Health and Safety Tribunal – s 29 *Work Health and Safety Act 2020*	0	0	0 (0%)
Police Compensation Tribunal – s 33ZZD *Police Act 1892*	0	0	0 (0%)

Full Bench – other matters concluded:

	2022-23	2023-24	Variance
Order for enforcements – s 84A	2	0	-2 (-100%)
Matter of law referred – s 27(1)(u)	0	1	1 (100%)

Full Bench – on-time matter processing of appeals

	2022-23	2023-24
Appeals finalised within 6 months	40%	33%
Appeals finalised within 12 months	60%	54%
Appeals finalised >12 months	0%	0%

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

	2022-23	2023-24	Variance
Matters lodged	2	5	3 (150%)
Matters concluded	2	5	3 (150%)

Western Australian Industrial Appeal Court

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

Industrial Appeal Court – total appeals

	2022-23	2023-24	Variance
Appeals lodged	2	3	1 (50%)
Appeals concluded	5	1	-4 (-80%)

Industrial Magistrates Court

The Industrial Magistrates Court enforces Acts, awards, industrial agreements, and orders in the State industrial relations system. The Industrial Magistrates Court is also an 'eligible State or Territory court' for the purposes of the *Fair Work Act 2009* (Cth). It enforces matters arising under that Act and industrial instruments made under that Act.

The IMC Registry received a total of 171 claims that fell within the Court's general jurisdiction during the reporting year.

Industrial Magistrates Court – total matters

	2022-23	2023-24	Variance
Matters lodged	157	171	14 (9%)
Matters concluded	186	144	-42 (-23%)

Industrial Magistrates Court – applications concluded

	2022-23	2023-24	Variance
Breach of the *Industrial Relations Act 1979* and/or related Industrial Instruments	21	22	1 (5%)
Breach of the *Fair Work Act 2009* and/or related Industrial Instruments	64	45	-19 (-30%)
Breach of the *Construction Industry Portable Paid Long Service Leave Act 1985* - s 83E	62	45	-17 (-27%)
Breach of the *Long Service leave Act 1958* and/or related Industrial Instruments	7	4	-3 (-43%)
Breach of multiple Acts and/or Industrial Instruments	17	18	1 (6%)
Small Claims – s 548 *Fair Work Act 2009*	10	9	-1 (-10%)
Enforcement of Order – s 83	1	1	0 (0%)
Criminal Prosecutions – s 83E(9)	4	0	-4 (-100%)

Industrial Magistrates Court – monies ordered to be paid

	2023-24
Wages	$351,553.32
Penalties	$144,136.00
Costs	$513.92
Total	**$496,203.24**

The total wages ordered to be paid of $351,553.32 includes orders made by consent as a result of settlement discussions before a Clerk of the Court at a pre-trial conference. Excluding those amounts, the total of wages ordered is $179,241.78.

During this reporting year, 77 claims proceeded to at least one pre-trial conference. In total, 84 pre-trial conferences were held. Sixty-one claims were settled at a pre-trial conference or prior to a trial. This reflects the significant value of pre-trial conferences, in not only enabling programming orders and directions to be made, but also in providing an invaluable opportunity for the resolution of claims at an early stage.

Additionally, 59 claims were discontinued before being listed for court hearings. This includes matters where a pre-trial conference was listed but subsequently vacated. Whilst no judicial functions were performed in relation to these matters, many of them entailed significant involvement of Registry staff in liaising with parties.

Figure 5. Photo of the new public area and front counter in Registry Services

Industrial agents

The IR Act provides for the registration of industrial agents. Industrial agents, sometimes referred to as paid agents, are people or companies that carry on a business of providing advice and representation in relation to industrial matters, and who are not legal practitioners or registered organisations. During the reporting year, two new industrial agents were registered.

The Commission took note of the work of the Fair Work Commission's Paid Agents Working Group in relation to managing challenging paid agent conduct where no minimum requirements for conduct, experience or qualifications exist and supported the Department of the Registrar, Western Australian Industrial Relations Commission's submission in response.

Industrial Agents – registrations

	2022-23	2023-24	Variance
Total number of agents registered as body corporate	25	22	-3 (-12%)
Total number of agents registered as individuals	12	15	3 (25%)
Total	**37**	**37**	**0 (0%)**

Industrial organisations

Industrial organisations – Registered as at 30 June 2024

	Employee organisations	Employer organisations
Number of organisations	33	11
Aggregate membership	183,731	3,574

Right of entry

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

- To hold discussions with employees who wish to participate in discussions; and
- To request the inspection and take copies of relevant documents, and inspect a worksite or equipment, for the purpose of investigating any suspected breach of:
  - the *Industrial Relations Act 1979*; or
  - the *Owner-Drivers (Contracts and Disputes) Act 2007*; or
  - the *Long Service Leave Act 1958*; or
  - the *Minimum Conditions of Employment Act 1993*; or
  - the *Work Health and Safety Act 2020*; or
  - an award or order of the Commission; or
  - an industrial agreement; or
  - an employer-employee agreement.

Right of entry authorisations

	2022-23	2023-24	Variance
Authorisations issued	75	77	2 (3%)
Total number of authorisations	317	324	7 (2%)
Number of authorisation holders who have had their authorisation revoked or suspended by the Commission	0	0	0 (0%)
Number of authorisation holders who have had their authorisation revoked by the Registrar	73	65	-8 (-11%)

Rule alterations by the Registrar

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

During the reporting year, 6 alterations to rules were lodged with the Registrar under s 62(3) of the IR Act. These involve general variations to rules that are not required to be dealt with by the Commission in Court Session.

Award reviews

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

1. does not contain wages that are less than the minimum award wage as ordered by the Commission under s 50A;

2. does not contain conditions of employment that are less favourable than those provided by the *Minimum Conditions of Employment Act 1993*;

3. does not contain provisions that discriminate against an employee on any ground on which discrimination in work is unlawful under the *Equal Opportunity Act 1984*;

4. does not contain provisions that are obsolete or need updating; and/or

5. is consistent with the facilitation of the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises.

As reported in last year's Annual Report, the Commission has progressed a number of s 40B award reviews. Those completed in this reporting year include the:

- *Local Government Officers' (Western Australia) Award 2021*. Removal of obsolete provisions about enterprise flexibility, and provisions which impermissibly allow agreements to avoid award obligations, updating for consistency with the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) concerning taking annual leave: [2023] WAIRC 00836; (2023) 103 WAIG 1836.

- *Municipal Employees (Western Australia) Award 2021*. Removal of obsolete provisions about enterprise flexibility: [2023] WAIRC 00837; (2023) 103 WAIG 1851; updating Payment of Wages and Annual Leave clauses: [2024] WAIRC 00013; (2024) 104 WAIG 182.

- *Aboriginal Communities and Organisations Western Australian Interim Award 2011*. Removal of obsolete provisions about enterprise flexibility, removal of discriminatory provisions, updating parental leave provisions, updating rates of pay to ensure not inconsistent with statutory minimum rates: [2024] WAIRC 00038; (2024) 104 WAIG 171.

- *Farm Employees' Award*. Addition of provisions about minimum hours for non-dairy farm part-time employees and requirements for specifying terms of part-time dairy farm employees' terms at the commencement of the engagement: [2024] WAIRC 00130; (2024) 104 WAIG 339.

- *Hairdressers Award 1989*. Extensive variations to remove obsolete provisions such as provisions reflecting the now repealed regime for hairdressers' registration, updating to reflect current retail trading hours legislation, removal of provisions that are less favourable than the MCE Act, removal of discriminatory provisions and generally contemporising award terms: [2024] WAIRC 00301; (2024) 104 WAIG 778.

Award scope variations

Significant progress has been made over the reporting year in relation to award scope reviews identified in last year's Annual Report. In this reporting year, orders were made varying the scope clauses of the following awards:

- *Restaurant, Tearoom and Catering Workers Award*
- *Cleaners and Caretakers Award*
- *Contract Cleaners Award*
- *Farm Employees' Award*
- *Clerks (Hotels, Motels and Clubs) Award*
- *Clerks (Commercial, Social and Professional Services) Award*
- *Clerks (Wholesale & Retail Establishments) Award*
- *Metal Trades (General) Award*

The effect of the variations in some of these matters has been to provide more comprehensive award coverage.

As the *Hairdressers Award* and the *Shop and Warehouse (Wholesale and Retail Establishments) Award* were comprehensively reviewed under s 40B during the reporting year, it is expected that the scope of these awards will also be varied at a hearing scheduled for August 2024. The Commission will consider whether to extend the scope of the *Hairdressers Award* to beauty industry employees more generally, who are currently not award covered.

The Commission in Court Session is also due to review the scope of the *Transport Workers (General) Award* and the *Clerks (Unions and Labor Movement) Award 2004* in August and September 2024 respectively. Foreshadowed variations to the scope of the *Transport Workers (General) Award* will rope in mobile food vendors, paving the way for the cancellation of the *Transport Workers (Mobile Food Vendors) Award 1987*.

The Department of Energy, Mines, Industry Regulation and Safety have continued to provide considerable assistance to the Commission in the award scope variation process, for which the Commission is grateful.

ACCESS TO JUSTICE

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

The Commission's pro bono scheme

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

Seven applicants were referred to the scheme, with one of the seven ultimately choosing not to proceed with seeking assistance from the scheme. Of these seven applicants, one was assessed as ineligible to receive assistance, and the Pro Bono Scheme Coordinator subsequently referred the applicant to Circle Green Community Legal (CGCL). One referral to the Scheme is in the process of receiving assistance. For the 2024-25 year ahead, the Pro Bono Coordinator will be focusing on expanding the number of law firms participating in the Scheme and providing assistance to vulnerable applicants and respondents.

The pro bono scheme continues to be an important initiative in enabling access to justice. Thanks are given to those law firms and industrial agents who continue to participate in the scheme.

Circle Green Community Legal and John Curtin Law Clinic

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

Where CGCL can provide direct assistance to employees coming before the Commission, the JCLC has offered to help small business employers.

Information videos

As noted above, the Commission partnered with CGCL to enhance information resources for the public seeking support accessing the Commission and the IMC jurisdictions. This partnership resulted in the creation of information videos on the conciliation process and procedures for the Commission, and the pre-trial conference process and procedures for the IMC. These information videos have now been published on the Commission and IMC websites respectively, and provide a comprehensive overview of what to expect, how to prepare and the process and outcomes for a conciliation or pre-trial conference.

COMMUNITY ENGAGEMENT

Professional development

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

- Commissioner Emmanuel attended the National Judicial College of Australia 'Writing Better Judgments' II programme – June 2024.
- Commissioner Tsang attended the National Judicial College of Australia 'Oral Decisions' programme – May 2024.
- Commissioner Kucera attended the College of Law 'Sexual Harassment' seminar – August 2023 and the Resolution Institute NMAS Mediation Training – August 2023.

Events supported by the Commission

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

- Commissioner Emmanuel attended the Annual Firefighters Retirement Dinner – April 2024.
- Commissioner Kucera attended the "Women in IR Breakfast" – October 2023.

Members of the Commission also presented at seminars and conferences:

- The Chief Commissioner presented at the Australian Services Union Western Australian Branch Annual Delegates Conference – October 2023.
- Senior Commissioner Cosentino was a coach for the Law Society Practical Advocacy Weekend – October 2023; presented at the Piddington Society Mediation programme March 2024; and presented at the Piddington Society and Industrial Relations Society of Western Australia Workplace Investigations Conference – March 2024.
- Commissioner Emmanuel presented at a careers day at a primary school "A day in the life of a Commissioner" – July 2023.
- Commissioner Tsang presented at the UnionsWA Lawyers and Industrial Officers Network Annual Conference – February 2024 and the Women Lawyers of Western Australia CPD's in May 2024.
- Commissioner Kucera presented at the UnionsWA Lawyers and Industrial Officers Network Annual Conference – February 2024.

Work experience at the Commission

As reported last year, the Commission continues to provide opportunities for students to undertake familiarisation and work experience at the Commission. Under the supervision of a Commissioner, they attend hearings and conferences, undertake research and receive inductions through various parts of the Commission, the Registry and the IMC.

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

DISPUTES AND DECISIONS OF INTEREST

Disputes of interest

The prisons, police and the fire and emergency services portfolios have been particularly busy in this reporting year, mainly in relation to bargaining disputes brought under s 44 of the IR Act. Almost all were resolved through extensive conciliation. Predominantly, disputes related to enterprise bargaining, interpretation of industrial agreements, entitlements, consultation in relation to change and fitness for work.

Bargaining

Prior to a portfolio change on 1 November 2023, Commissioner Emmanuel dealt with significant bargaining disputes in the portfolios of Police, Prison Officers, Youth Custodial Officers and Firefighters.

Police

Commissioner Emmanuel convened nine conferences after the Western Australian Police Union of Workers (Police Union) filed a s 44 application on 22 August 2022. Members of the Police Union accepted the second offer put by the Commissioner of Police on 13 July 2023, and a replacement agreement was registered on 22 August 2023, seven working days after the application for a new industrial agreement was filed. Key issues for the parties included the right to disconnect, career breaks, shift penalties and workload management, particularly in the context of retaining staff.

Prison Officers

This matter began at the Commission on 30 January 2023 with a log of claims of over 40 items, and many key claims, including wages, overtime, allowances, purchased leave, adaptive routine and shift swaps. In addition to the eight conferences convened in the first part of the year, six further conferences were convened between July and August 2023, including through a period of sustained industrial action. Members of the Western Australian Prison Officers' Union of Workers accepted the Minister for Corrective Services' second offer on 29 September 2023 and a replacement agreement was registered on 21 November 2023, five working days after the application for a new industrial agreement was filed.

Fire and Emergency Services

Commissioner Emmanuel convened 10 conferences after the Department of Fire and Emergency Services filed a s 44 application on 31 January 2023. The matter began at the Commission with a log of claims of over 126 items, and many key claims including wages, overtime rates, annual leave loading, FTE numbers and superannuation were made. The conferences were convened during a period of sustained industrial action. The Department's second offer was accepted by members of the United Professional Firefighters Union of Western Australia on 16 September 2023, and a replacement agreement was registered on 6 December 2023, four working days after the application for a new industrial agreement was filed. The Commission's expediency in registering this agreement ensured firefighters were able to receive the Government's cost of living payment.

Decisions of interest

Full Bench matters

Meaning of the Public Service Award 1992's provisions about representational rights

The Civil Service Association v Director General as the Employing Authority, Department of Justice [2023] WAIRC 00986; (2023) 104 WAIG 11

In an appeal from the IMC, the Full Bench was required to consider the meaning of the *Public Service Award 1992's* provisions about representational rights.

The appellant is an employee association. It was the nominated representative of two of the respondent's employees for the purpose of dealing with disciplinary processes involving the employees.

The appellant commenced proceedings against the respondent in the IMC, alleging that it had breached the Award's representational rights provisions when the respondent emailed an invitation to the employees to attend a meeting about the disciplinary matters, without communicating directly with the Civil Service Association as the employee's nominated representative. Clause 36A(3) of the Award says that an employer 'will recognise the choice of representative made by an officer, which may include a union representative, a union official or an employee of the union'. However, the appellant alleged the respondent's conduct was in breach of cl 36A(4) of the Award, not cl 36A(3). Clause 36A(4) says that when an employer has been notified in writing that a representative acts for an officer, and certain information is contained in the notice, then 'the employer must recognise that person's representational capacity in all future dealings on that matter'.

At first instance, the Industrial Magistrate accepted the appellant's argument that cl 36A(4) imposed a mandatory obligation on the respondent to recognise the appellant's representational capacity. But her Honour dismissed the appellant's claim because her Honour was satisfied that the appellant's representational capacity was recognised when the respondent informed the employees, in writing, that they were entitled to have a union representative attend the meeting with them. In appealing from the dismissal of the claim, the appellant alleged that the Industrial Magistrate had incorrectly interpreted cl 36A(4).

The Full Bench embarked on its own consideration of the meaning of cl 36A(4). It formed a different view to the Industrial Magistrate, finding that cl 36A(3) contained the substantive obligation in relation to representation, whereas cl 36A(4) did not impose any proactive or additional obligation. Rather, cl 36A(4) provided the process for triggering and enabling observance of the obligation in cl 36A(3). As this construction is not one which would have resulted in the appellant's success at first instance, the appeal was dismissed.

Period of employment unbroken by expiry of first contract when subsequent contract with the same employer commenced the day following the expiry of the first contract

Arc Holdings (WA) Pty Ltd (ACN 076 523 487) v Industrial Inspector Chiara Catalucci [2024] WAIRC 00247; (2024) 104 WAIG 636

The Full Bench considered whether to grant the appellant an extension of time to appeal a decision of the Industrial Magistrates Court. In doing so, it considered the merits of the proposed grounds of appeal. The decision at first instance upheld a Compliance Notice which required the appellant to pay an amount of accrued but untaken long service leave to its employee.

In the proceedings at first instance, the appellant argued that the employee was not due long service leave as he had not completed the relevant qualifying period of continuous employment. It was agreed that the employee was employed by the appellant as an apprentice pursuant to a written employment contract starting on 23 October 2012 to 1 January 2016 (First Contract). It was agreed that this First Contract automatically came to an end at the expiry of its term on 1 November 2017. It was also agreed that the employee was employed by the appellant as an electrician after he completed his apprenticeship from the day following the day the First Contract expired, 2 November 2017 pursuant to a second contract of employment which was entered into (Second Contract).

The crux of the appellant's case was that there was a break in continuous employment between the end of the First Contract and the commencement of the Second Contract, by virtue of the expiry of the First Contract. The proposed grounds of appeal focused on:

a. the correct construction of 'continuous employment' in the *Long Service Leave Act 1958* (WA) (LSL Act);

b. the effect of s 6 of the LSL Act; and

c. whether 'continuous employment' had the same meaning as 'continuous service' under the *Fair Work Act 2009* (Cth).

However, the appellant did not take issue with the correct meaning of 'continuous employment' being a period of unbroken service to an employer by an employee. What the appellant failed to adequately explain is why an employee's period of service starts and ends with each engagement as understood in the common law of employment, or why a period of continuous employment cannot be made up of a series of periods of service, with no break between them.

The appellant's counsel submitted that the position at law is that when a contract expires resulting in the termination of employment, there ceases to be an employment contract and there ceases

to be an employment relationship. The Full Bench noted that is an uncontroversial proposition. But in the instant case, the employee continued to be employed by the appellant under the Second Contract. There was no break in the period of employment between the First Contract and the Second Contract. The employment under the Second Contract commenced the day following the expiry of the First Contract. The Full Bench observed that on the agreed facts, it is clear that the employee's period of employment was not broken when the First Contract expired. Accordingly, the proposed appeal grounds were without merit, such that the extension of time application should be dismissed.

Referred questions of law regarding registration of the City of Cockburn Enterprise Agreement 2022

City of Cockburn v Western Australia Municipal, Administrative, Clerical and Services Union of Employees (WASU), Local Government, Racing And Cemeteries Employees Union (LGRCEU), Minister for Industrial Relations, Western Australian Local Government Association, The Construction, Forestry, Mining and Energy Union of Workers [2023] WAIRC 00787; (2023) 103 WAIG 1723

The *City of Cockburn Enterprise Agreement 2019 – 2022*, initially registered under the *Fair Work Act 2009* (Cth), became a new State instrument on 1 January 2023, on the transfer of local government from the federal to the State industrial relations system. Section 80BB(2) of the *Industrial Relations Act 1979* (WA) treats the Agreement as registered under s 41 of the Act. The City of Cockburn negotiated the *City of Cockburn Enterprise Agreement 2022* (Agreement) to replace the existing instrument, seeking registration under s 41 of the Act. The Agreement, under consideration for registration, raised questions over two clauses.

Clause 5 of the Agreement aimed to establish a comprehensive framework, excluding certain awards and intending to govern all employee terms and conditions. The specific issue concerned cl 5.2, which asserted the Agreement's superiority over inconsistent award terms. The question was whether the registration of the Agreement, including cl 5, would be inconsistent with the IR Act.

Clause 6 introduced Individual Flexibility Arrangements, allowing employers and employees to mutually vary specific terms of the Agreement. The central issue was whether the registration of the Agreement, including cl 6, would be inconsistent with the IR Act.

With the Chief Commissioner's consent, the following questions of law regarding these clauses were referred to the Full Bench under s 27(1)(u) of the IR Act.

Question 1: Clause 5 – Operation of the Agreement

The City of Cockburn argued that cl 5 aligned with the IR Act's goal of promoting collective bargaining, emphasising its comprehensive coverage of employee terms and conditions without relying on other industrial instruments. The Full Bench concluded that registering the Agreement, including cl 5, would not be contrary to the IR Act. Section 41(9) underscores the equal standing of awards and industrial agreements, with no hierarchical relationship. The legislative intent supports parties' autonomy in crafting enterprise-level agreements.

Question 2: Clause 6 – Individual Flexibility Arrangements (IFA)

The City of Cockburn argued that cl 6 was consistent with the IR Act. Others, including the Minister, contended that the IFA clause undermined the statutory scheme by allowing individual agreements without adequate protection, potentially circumventing fairness standards. The Full Bench determined that the IFA clause, as proposed, was inconsistent with the IR Act's scheme, purporting to enable individuals not party to the industrial agreement to vary its terms, contrary to the legislative scheme. Registering the Agreement with cl 6 would be inconsistent with the IR Act.

Question 3: Validity of Clauses if Registered

The WASU, the LGRCEU, and the CFMEUW asserted that cl 6 would be invalid if registered, with the Minister contending it could also be void under s 114 of the IR Act. The Full Bench concluded that if cl 6 was included for registration, it would be invalid and have no effect.

Question 4: Commission's Power to Require Variation

The City of Cockburn, the WASU, the LGRCEU, and the CFMEUW presented arguments on the Commission's power to require variation to an agreement under the IR Act. The Minister argued against the Commission's authority beyond s 41(3). The Full Bench determined that the Commission cannot require variation beyond the requirements of s 41(3), aligning with the legislative history, which supports the Commission's minimal role in registration of industrial agreements. The Full Bench noted that provisions like those in cl 6 could result in contraventions of the IR Act, exposing employers to enforcement action.

Full Bench affirms Commission's jurisdiction

The State School Teachers' Union of W.A. v Governing Council of North Metropolitan TAFE [2023] WAIRC 00191; (2023) WAIG 477

The Full Bench has upheld an appeal in relation to an application regarding the termination of the applicant union member's employment as a lecturer with the respondent.

At the first instance, the appellant union lodged an application on behalf of its member, a lecturer at the respondent institution who was terminated from his employment. The application sought interim and final relief, including reinstatement or re-employment and continuity of service. The respondent argued that the Commission lacked jurisdiction to hear the matter, as the appellant union's member had standing to appeal his dismissal under s 78(2) of the *Public Sector Management Act 1984* (PSM Act) instead. It was argued this provision constituted an "appeal" for the purposes of s 23(3)(d) of the IR Act, thereby ousting the Commission's jurisdiction to hear the matter. Commissioner Tsang upheld the respondent's arguments and dismissed the application for want of jurisdiction.

The appellant contested the Commission's decision, contending that the term "refer" in the PSM Act should be distinguished from "appeal" in the IR Act, thus maintaining the Commission's broader jurisdiction. Conversely, the respondent contended that the Commission's jurisdiction is excluded by specific regimes covering disciplinary matters and appeals in other legislation. It argued that a broad interpretation of "appeal", encompassed any review application to a higher tribunal.

The appeal primarily revolved around whether the legislative framework establishes separate mechanisms for handling disciplinary matters and appeals, with the Commission's jurisdiction being available only when there is no such separate scheme in place. The Full Bench concluded s 78 of the PSM Act was not such a provision, upheld the appeal and quashed the original decision.

Commission in Court Session

Restaurant Tearoom and Catering Workers' Award Scope Varied

Commission's Own Motion v (Not applicable) [2023] WAIRC 00801; (2023) WAIG 1752

The Commission in Court Session, having invited the relevant parties to consult on awards suitable for scope review, initiated proceedings under s 37D of the IR Act to vary the *Restaurant Tearoom and Catering Workers' Award*. The proposed variations aimed at clarifying and improving the award's scope provisions, introducing contemporary terminology, and ensuring consistency with other scope reviews.

The Commission, after following the required procedures, received no opposition to the proposed variations. The Minister and UnionsWA supported the changes, while the Western Australian Local Government Association (WALGA) sought additional variations to exclude local government authorities from the award's scope. However, the Commission rejected WALGA's argument, stating that the proposed variations did not extend the award's coverage and did not bind employers or employees not already covered by it. The Commission emphasised that WALGA failed to establish that another appropriate award covered hospitality workers employed by local government authorities.

After considering the terms of the legislation, and the approach to be taken in these kinds of applications, the Commission in Court Session ordered the amendments to the award with the changes intended to enhance clarity, introduce contemporary terminology, and maintain consistency with other scope reviews under the new legislative provisions.

Single Commissioner matters

No entitlement to contractual notice period or compensation in lieu of notice where termination of employment was not at the employer's initiative

Christopher Frawley v Construction, Forestry, Maritime, Mining and Energy Union and another [2023] WAIRC 00708; 103 WAIG 1636

The applicant was an organiser for the respondent. He claimed that the way his employment with the respondent came to an end amounted to a denial of a contractual benefit, namely, employment for a four-year fixed term. He sought compensation for his loss of wages, resulting from this alleged breach.

The respondent said that the applicant was not contractually entitled to employment for a fixed term. The respondent also said that even if he was, the applicant was no longer employed because he resigned on 26 July 2022 and then reached an agreement with the respondent about how the termination would take effect. Therefore, there was no repudiatory conduct or breach of contract by the Union.

Senior Commissioner Cosentino accepted the applicant's argument that it was an implied term of his employment contract that it was coterminous with the holding of his elected position of organiser. In effect, his employment was for a term of four years, subject to the office being vacated as a result of death, resignation, retirement, dismissal or any other reason.

However, the Senior Commissioner also found that on 26 July 2022 the applicant told the respondent's Assistant Branch Secretary that he had resigned, and that he accepted that was the situation when he subsequently met with the Branch Secretary and agreed to substitute a mutual termination on terms that were financially favourable to him compared with him having simply resigned. His resignation was superseded by a mutual agreement for termination. The fact that the Union issued a letter referring to the end of the employment being because of redundancy did not alter the fact that the termination was not at the respondent's initiative, that is, the applicant was not dismissed. As a result, the applicant was not entitled to a contractual notice period or compensation in lieu of notice.

Commission determines wage increases and allowances where parties failed to reach agreement

City of Albany, Western Australian Municipal, Administrative, Clerical and Services Union of Employees v (Not Applicable) [2024] WAIRC 00210; 104 WAIG 703

The City of Albany and the Western Australian Administrative, Clerical and Services Union of Employees jointly applied to register the *City of Albany Industrial Agreement 2023* and made application for the Commission to determine wage rate increases and monetary allowances.

The parties agreed on most terms of the proposed 2023 Agreement but differed on wage increases, allowance adjustments, and post-nominal expiry date provisions. The Union advocated for higher wage increases and post-expiry wage increases linked to Perth's Consumer Price Index (CPI), citing consistency with past agreements and the need to counter rising living costs. It highlighted the City's financial strength and positive economic outlook as supporting factors. Conversely, the City proposed fixed percentage increases, citing budgetary certainty and the volatile inflationary environment.

Regarding allowances, the Union sought increases on July 1 of 2023, 2024, and 2025, based on wage adjustments or Perth CPI, citing past practices. However, historical evidence revealed variations in past agreements, with some providing fixed increases or CPI-based adjustments. Concerning post-nominal expiry date increases, the Union proposed a clause for inflation-linked wage increases if no new agreement was reached or initiated by the City after the nominal expiry date. However, the City opposed this, citing past challenges and potential hindrances to bargaining efforts.

Senior Commissioner Cosentino made orders that the Agreement include annual wage increases of 4.5%, 4% and 4% across three years, a one-off payment for Outside Employees, wage-related allowance increases corresponding to wage increases, and expense related allowance increases in accordance with annual changes in expenses. The Senior Commissioner decided against the inclusion of post-nominal expiry date increases, noting that such clauses could impede bargaining.

Public Service Appeal Board

Reinstatement of employee impracticable on basis employee unable to perform former duties

Gianna Tati v Commissioner of Police as Chief Executive Officer of the Police Department [2024] WAIRC 00075; (2024) 104 WAIG 289

The appellant was employed by the respondent as a Level 2 Administrative Officer until May 2023 when she was dismissed for failing to retire on the grounds of ill health. At a directions hearing in late July 2023, the Board adjourned the matter until late October 2023 to allow the appellant to get further medical evidence. She did not provide the medical evidence by that date and the matter was programmed for hearing.

On 14 December 2023, after requests from the respondent and the Board, the appellant provided an independent medical report by a Consultant Psychiatrist dated 9 August 2023 (IME Report) to the respondent, which the respondent said confirmed that the appellant was totally unfit for work for the foreseeable future and therefore the Board could not reinstate the appellant. The appellant wanted to rely instead on a document produced by her General Practitioner entitled 'WorkCover WA – PROGRESS certificate of capacity' (WorkCover Certificate).

The appellant submitted that the Consultant Psychiatrist was swayed by earlier medical reports and would not want to 'wrong' the respondent. In effect the appellant said the Board should prefer the General Practitioner's opinion to that of the Consultant Psychiatrist.

To decide this matter, the Board had to decide whether it was impracticable to reinstate the appellant if she were able to show that her dismissal was unfair.

Beyond being a medical practitioner, the Board had no information about the General Practitioner's qualifications and expertise. The WorkCover Certificate was very brief, general and not particularly helpful in the circumstances. The Board considered the IME Report more persuasive evidence than the appellant's opinion about her fitness for work, the WorkCover Certificate and the other materials the appellant relied on. The Board preferred the IME Report to the extent of any inconsistency in the evidence about the appellant's fitness for work.

In the Board's view, the IME Report made it clear that the appellant was totally unfit to perform the inherent requirements of her position. The Board did not consider its power would extend to ordering the respondent to pay for a further medical report and was satisfied that there was sufficient medical evidence before it to establish that the appellant could not be reinstated. Ordering compensation or re-employment more generally within the public sector would have been beyond power. Ordering reinstatement would have been impracticable and not in accordance with

equity and good conscience, because the appellant was totally unfit to perform her former position and doing so would pose a significant risk to the appellant's psychological health and safety. Accordingly, the application was dismissed.

Work Health and Safety Tribunal

Order for costs and payment of witness expenses refused

Consolidated Pastoral Company Pty Ltd & Hancock Prospecting Pty Ltd v WorkSafe Commissioner [2024] WAIRC 00101; (2024) 104 WAIG 446

In September 2020, a WorkSafe inspector issued improvement notices (Improvement Notices) to the applicants. The Improvement Notices said that the applicants' employees are 'exposed to a hazard, namely riding a horse without a helmet which may result in the rider falling from a horse and receiving impact to the head which could lead to serious injury or death.' The applicants referred the Improvement Notices to the Tribunal for further review. Ultimately, the parties agreed that the Tribunal should order that the respondent's decision to affirm the Improvement Notices be revoked and the Improvement Notices be set aside.

The applicants asked the Tribunal to order the respondent to pay their expert witness expenses of $118,399.02, including disbursements, which the respondent objected to. They said that although s 27(1)(c) of the *Industrial Relations Act 1979* (WA) (IR Act) expressly precludes the award of costs of legal practitioners or an agent of a party, it expressly permits the award of other costs and expenses to a party. The Tribunal's jurisdiction to award other costs and expenses in matters under the *Occupational Safety and Health Act 1984* (WA) is 'unconfined save that it must be exercised consistently with the principles enunciated in s 26 of the IR Act and having regard to the objects of the OSH Act.' Further, the applicants argued that the WorkSafe inspector did not have reasonable grounds for issuing the Improvement Notices and nor did the respondent for affirming them, and criticised the respondent for taking three years 'to obtain proper expert evidence and counsel's opinion on that evidence'.

The applicants argued that not awarding costs of expert evidence would allow the respondent to weaponise the costs of challenging Improvement Notices as a means of enforcing its policy mandate, even where there is no proper evidentiary foundation for the policy mandate. The respondent cited a consistent stream of authority where the Tribunal has said that costs will not be awarded except in exceptional cases.

The respondent submitted that given the public interest character of the WorkSafe inspector's and the respondent's power under review, the regulator should not be inappropriately deterred from taking reasonable regulatory action in the public interest, nor from defending an appeal against such action, because of the potential for an adverse costs order. By contrast, the respondent submitted that it may well be appropriate for a costs order to be made where the regulator has behaved unreasonably in taking such action or some other exceptional circumstances arise.

The Tribunal was bound by s 26(1) of the IR Act to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms. It was not in dispute that the power in s 27(1)(c) of the IR Act had to be exercised according to the circumstances of the case. The Tribunal did not consider this case involved extreme, special or exceptional circumstances that justified an order for costs. The Tribunal was not persuaded that the respondent caused the applicants to incur the costs unnecessarily or unreasonably, and did not consider that it would be in accordance with equity and good conscience to order the respondent to pay any of the applicants' witness expenses. The application for costs was dismissed.

Stay of improvement notice granted under s 229B of the Work Health and Safety Act 2020 (WA)

CITIC Pacific Mining Management Pty Ltd v WorkSafe Commissioner [2024] WAIRC 00100; (2024) 104 WAIG 461

In February 2024, a WorkSafe inspector issued an improvement notice to the applicant requiring it to resubmit its December 2023 quarterly report and provide extracts of any relevant procedures from the Mines Safety Management System to show how such information will be correctly reported in the future by 29 March 2024 (Improvement Notice). The applicant applied to the Tribunal for an external review under the *Work Health and Safety Act 2020* (WA) (WHS Act) and sought a stay of the Improvement Notice, which the respondent did not oppose.

The Tribunal's power to order a stay under s 229B of the WHS Act had not been considered before and there were few decisions arising under similar legislation in other jurisdictions. The WHS Act does not prescribe the matters to be considered by the Tribunal when deciding whether to grant a stay under s 229B. The decision under review is an administrative decision of a regulatory decision-making authority, and not an order made by a court or tribunal after the hearing and determination of contested proceedings.

If the applicant were required to implement the measures in the Improvement Notice by 29 March 2024, then the appeal would be rendered nugatory. In this case, even with the respondent's agreement to extend the time for compliance until the external review was completed by the Tribunal, the effect of the applicant having to display the Improvement Notice in a prominent place at the workplace affects the integrity of the appeal and the balance of convenience. Accordingly, the stay was necessary to preserve the integrity of the litigation. In terms of public interest, the Improvement Notice did not require the applicant to take improvement measures to address a hazard requiring immediate attention to safeguard workers. Rather it required the applicant to change the way it reports the number of days lost from work during the quarter as a result of relevant incidents in its quarterly reports. Accordingly, a stay would not create unacceptable risks for workers and others in the workplace. The Tribunal was satisfied that the balance of convenience favoured the grant of the stay. An order issued staying the operation of the Improvement Notice.

Industrial Magistrates Court

Full Bench decisions found to be binding upon Industrial Magistrates Court

Terence Tamiana v Team Global Express Pty Ltd ACN 084 157 666 [2024] WAIRC 00185; (2024) 104 WAIG 543

This matter considered whether a decision of the Full Bench of the Western Australian Industrial Relations Commission was binding on the Industrial Magistrates Court.

The applicant, Mr Tamiana, sought payment for pro-rata long service leave, asserting continuous employment by the respondent, Team Global Express Pty Ltd (Team Global) and its predecessor, Toll Transport Pty Ltd (Toll Transport).

Team Global contended that Mr Tamiana was employed by Toll Personnel Pty Ltd (Toll People) from 23 February 2015 to 13 March 2016; Toll Transport from 14 March 2016 to 31 July 2021; and Team Global from 31 July 2021 to 24 May 2022. On that basis, Team Global accepted that Mr Tamiana's service with Toll Transport was continuous with his employment with Team Global but did not recognise his prior service with Toll People. As a result, Team Global's position was that Mr Tamiana did not meet the requisite threshold of seven or more years' of 'continuous employment with one and the same employer' to qualify for pro-rata long service leave under the *Long Service Leave Act 1958* (WA), relying on *Baker Hughes Australia Pty Ltd v Venier* [2016] WAIRC 00843 (*Baker Hughes*).

Mr Tamiana submitted that whilst *Baker Hughes* was persuasive and relevant for the Court, it was not binding on the Court as:

1. Neither the *Industrial Relations Act 1979* (WA) (IR Act) nor any other Act states that decisions of the Full Bench are binding on the Court.

2. The Court is a 'court' whilst the Full Bench is not.

3. Reference to the Court being bound by a Full Bench decision in *Melrose Farm Pty Ltd t/as Milesaway Tours v Milward* [2008] WASCA 175 was obiter.

Team Global contended that a decision of the Full Bench is binding on the Court, as the Full Bench is a court of record in accordance with the IR Act, and the IR Act provides that an appeal lies from a decision of the Court to the Full Bench, thereby creating an appellate hierarchy.

Industrial Magistrate Tsang held that the IR Act expressly outlines at s 84(2) the indispensable requirement of appeal and appellate hierarchy from decisions of the Court to the Full Bench. Further, her Honour held that the IR Act expressly states that the Western Australian Industrial Relations Commission, the Full Bench, and the Court are all courts of record. As such, Industrial Magistrate Tsang found that Full Bench decisions, including *Baker Hughes*, are binding on the Court.

Consideration of principles for determination of pecuniary penalty

Shop Distributive & Allied Employees Association v Baljit Kaur Pty Ltd [2024] WAIRC 00040; (2024) 104 WAIG 204

The Shop Distributive & Allied Employees Association (SDA) brought enforcement proceedings under s 83 of the Industrial Relations Act 1979 (WA) against the respondent, which operated the Vibe Service Station in Bridgetown. The SDA alleged the respondent had underpaid its member, Ms Rowcliffe Carson over a one-year period, the total sum of $25,907.44 (underpayment).

The respondent failed to respond to the proceedings or appear in court, as a result of which the Court entered a default judgment against the respondent. The respondent was given three opportunities to appear and to respond to the proceedings and to provide an explanation for the underpayment.

Industrial Magistrate Kucera considered the principles to be applied when determining an appropriate pecuniary penalty pursuant to s 543(3) of the *Fair Work Act 2009* (Cth) (FW Act) in circumstances where a default judgment is entered. Industrial Magistrate Kucera considered the respondent had done nothing to rectify the underpayment, and that Ms Rowcliffe Carson had experienced significant financial strain as a result. It was found the breach was deliberate, senior management was engaged in the contraventions, the respondent had not exhibited contrition, and only partial corrective action had been taken.

His Honour found that the maximum penalty the Court could impose was $82,500 as s 557 of the FW Act (Course of Conduct) applied. Due to the seriousness of the contravening conduct, the main consideration when determining penalty was the need for specific and general deterrence. Industrial Magistrate Kucera determined the fine could not be set at a level that it would be viewed by the respondent or others as an acceptable cost of doing business. A penalty of $55,000, was imposed, equivalent to two thirds of the maximum penalty.

The maximum penalty was not ordered because the respondent had since started paying Ms Rowcliffe Carson the correct hourly rate of pay and the respondent had not previously engaged in contravening behaviour of this type. His Honour ordered a portion of the penalty was to be paid to Ms Rowcliffe Carson with the balance to be paid to the claimant (SDA) under s 546(3) of the FW Act.

APPENDICES

Appendix 1 – Members of the Public Service Appeal Board

Ms B Anderson	Ms T Fowler
Mr M Aulfrey	Mr B Hawkins
Mr J Batchelor	Mr D Hill
Ms K Borzel	Mr M Jozwicki
Mr N Cinquina	Mr G Lee
Ms B Conway	Mr J Raja
Mr S Dane	Ms C Sellars
Ms F Donaldson	Ms R Sinton
Mr M Edwards	Ms B Skalko
Mr M Finnegan	Ms S Smith

Appendix 2 – Pro Bono Providers

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