

2009

WESTERN AUSTRALIA



Forty Sixth Annual Report
of
The Chief Commissioner of the
Western Australian Industrial Relations Commission
for the period
1 July 2008 to 30 June 2009

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

2009

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 2008 to 30 June 2009

Minister Responsible for the Administration of the Act
The Hon. Troy R Buswell BEc MLA
In his capacity as Minister for Commerce

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Membership and Principal Officers

Western Australian Industrial Relations Commission

During the year to 30 June 2009, the Western Australian Industrial Relations Commission (WAIRC) was constituted by the following members:

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

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

Public Service Arbitrators

Commissioner P E Scott continued her appointment as a Public Service Arbitrator throughout the period. This appointment is due to expire on 21 June 2011.

Senior Commissioner J H Smith continued her appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 13 January 2010.

Commissioner S J Kenner continued his appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 25 June 2010.

Commissioner S Wood continued his appointment as an additional Public Service Arbitrator. This appointment is due to expire on 9 November 2009.

Commissioner J L Harrison continued her appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 1 May 2010.

Commissioner S M Mayman continued her appointment as an additional Public Service Arbitrator. This appointment is due to expire on 9 November 2009.

Railways Classification Board

Senior Commissioner J H Smith's appointment as Chairman was not renewed during the reporting period as no application was made to the Board.

Commissioner J L Harrison's appointment as Deputy Chairman was not renewed during the reporting period as no application was made to the Board.

Appointments will be made if and when an application is made to the Railways Classification Board.

Occupational Safety and Health Tribunal

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

Registry

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

Mr J Spurling	Registrar
Ms S Bastian	Registrar Designate
Ms S Hutchinson	Deputy Registrar
Mr A Wilson	Deputy Registrar

The Western Australian Industrial Appeal Court

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

The Honourable Justice Steytler	Presiding Judge (to 31 January 2009)
The Honourable Justice Wheeler	Deputy Presiding Judge
The Honourable Justice Pullin	Ordinary Member
The Honourable Justice Le Miere	Ordinary Member

Industrial Magistrates Court

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

Mr G Cicchini

Matters Before the Commission

1. Full Bench Matters

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

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

The Honourable M T Ritter (Acting President)..... 18

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

Chief Commissioner A R Beech	10
Senior Commissioner J H Smith	10
Commissioner P E Scott	3
Commissioner S J Kenner	4
Commissioner S Wood	4
Commissioner J L Harrison.....	4
Commissioner S M Mayman	1

The following summarises Full Bench matters:

Appeals

Heard and determined from decisions of the:

Commission – s 49.....	8
Industrial Magistrate – s 84	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 53(1).....	1
Applications to amend the rules of a registered organisation pursuant to s 62	3
Applications relating to State branches of federal organisations pursuant to s 71	0
Applications to adopt rules of federal organisations pursuant to s 71A.....	0
Applications for registration of a new organisation pursuant to s 72	0
Applications seeking coverage of employee organisations pursuant to s 72A.....	0
Applications for cancellation/suspension of registration of organisations pursuant to s 73	0

Other

Proceedings for enforcement pursuant to s 84A brought by the Minister; the Registrar or a deputy registrar; an industrial inspector; or any organisation, association or employer	1
Questions of law referred to the Full Bench	1
Matters remitted by the Industrial Appeal Court	0
Number of Full Bench matters heard but not determined in 2008/2009	1

Orders

Orders issued by the Full Bench	34
---------------------------------------	----

2. Acting President

Matters before the Acting President sitting alone were as follows:

Applications for an order that the operation of a decision appealed against be stayed pursuant to s 49(11)	1
Applications for an order, declaration or direction pursuant to s 66.....	10

The following summarises s 66 applications:

Applications finalised in 2008/2009.....	9
Directions hearings	13
Applications part heard	1
Applications withdrawn by order	0
Applications discontinued by order	2

Orders

Orders issued by the Acting President from 1 July 2008 to 30 June 2009 inclusive:

Order pursuant to s 49 (11)	1
Order pursuant to s 66.....	29
Reference of rules by Full Bench under s 72A(6)	0
Application pursuant to s 92	0
Remitted from the Industrial Appeal Court	0
Rules brought to President pursuant to s 97Q	0

Consultations

Consultations with the Registrar pursuant to s 62 of the Act.....	5
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3. Commission in Court Session

The Commission in Court Session is constituted each time by three Commissioners with the exception of the 2009 State Wage order which was constituted by five Commissioners. The extent to which each Commissioner has been a member of the Commission in Court Session is indicated by the following figures:

Chief Commissioner A R Beech	3
Senior Commissioner J H Smith	1
Commissioner P E Scott	2
Commissioner S J Kenner	3
Commissioner S Wood	2
Commissioner J L Harrison.....	0
Commissioner S M Mayman.....	3

These Commission in Court Session matters comprised of the following:

State Wage Order Case – s 50A Determine rates of pay for purposes of <i>Minimum Conditions of Employment Act 1993 and Awards</i>	1
General Order – s 50	2
New Award.....	0
New Agreement	0
Variation of an Award – s 40B	0
Cancellation of an Award – s 47	0
Conference pursuant to s 44.....	0
Joinder to an Award	0

4. Federal Matters

Federal matters dealt with by WAIRC Commissioners	0
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5. Rule Variations by Registrar

Variation of Organisation Rules by the Deputy Registrar.....	5
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6. Boards of Reference

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

7. Industrial Agents Registered by Registrar

Number of new agents registered during the period.....	4
Total number of agents registered as corporate body.....	36
Total number of agents registered as individuals.....	20
Total number of agents registered as at 30 June 2009.....	56

Awards and Agreements in Force under the Industrial Relations Act 1979

Year	Number at 30 June
2006	2737
2007	2804
2008	2810
2009	2791

Industrial Organisations Registered as at 30 June 2008

	Employee Organisations	Employer Organisations
No. of organisations	48	15
Aggregate membership	174,373	4,391

Summary of Main Statistics

Western Australian Industrial Relations Commission

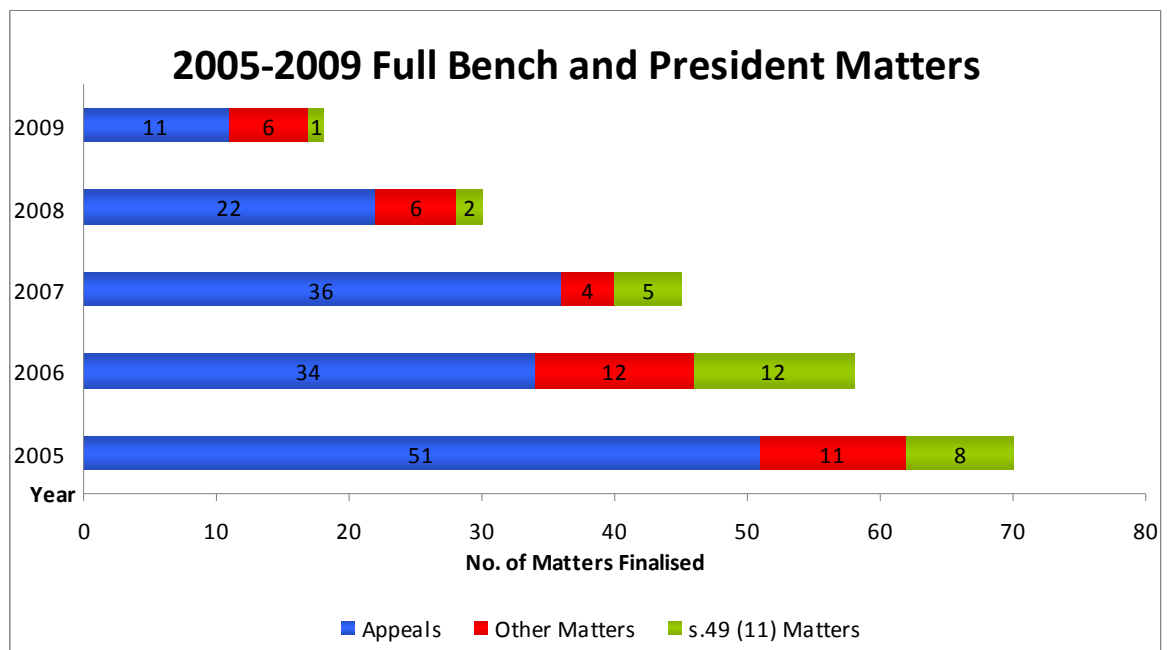
	MATTERS DEALT WITH			
	2005-2006	2006-2007	2007-2008	2008-2009
Full Bench:				
Appeals	34	36	22	11
Other Matters	12	4	6	6
Acting President sitting alone:				
S 66 Matters (finalised)	0	1	0	9
S 66 Orders issued	0	6	1	29
S 49(11) Matters	12	5	2	1
Other Matters	12	0	0	0
S 72A(6)	0	0	0	0
Consultations under s 62	2	6	3	5
Commission in Court Session:				
General Orders	2	4	2	2
Other Matters	9	9	4	1
Public Service Appeal Board:				
Appeals to Public Service Appeal Board	9	13	6	19
Commissioners sitting alone:				
Conferences ¹	259	138	62	105
New Agreements	264	76	54	44
New Awards	14	5	1	0
Variation of Agreements	1	2	0	0
Variation of Awards	157	132	63	139
Other Matters ²	93	46	54	62
Federal Matters	18	0	0	0
Board Of Reference - Other Awards (Chaired by a Commissioner)	0	1	0	0
Boards of Reference – Long Service Leave	2	3	3	0
Unfair Dismissal Matters Concluded:				
Unfair Dismissal claims	746	324	123	163
Contractual Benefits claims	259	191	86	72
Unfair Dismissal & Contractual Benefits claims together	207	16	1	2
Public Service Arbitrator (PSA):				
Award/Agreement Variations	39	25	25	35
New Agreements	19	24	13	19
Orders Pursuant to s 80E	0	1	2	1
Reclassification Appeals	143	84	37	60
TOTALS:	2311	1147	567	785

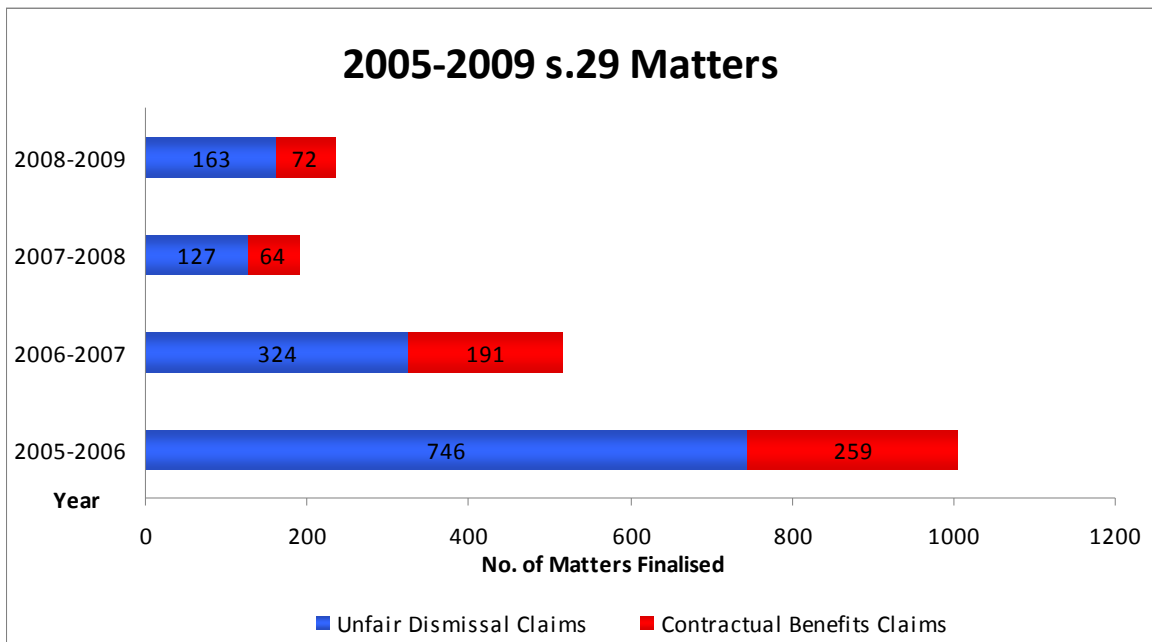
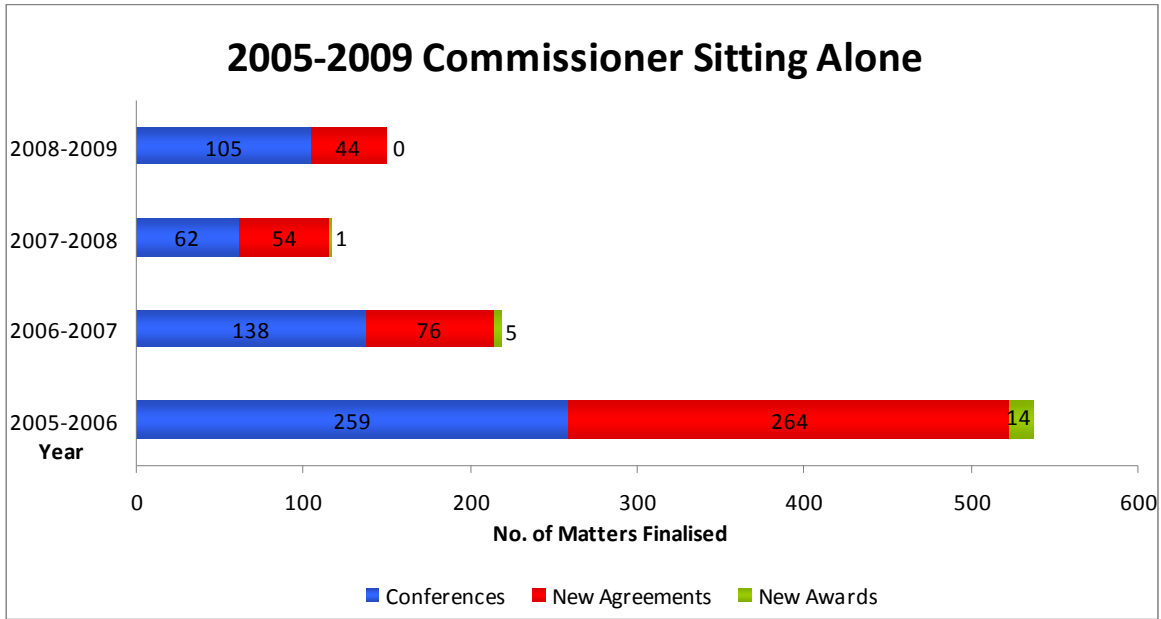
Notes

¹ CONFERENCES include the following:				
Conferences (s 44)	228	177	75	51
Conferences referred for arbitration (s 44(9))	54	23	22	8
Conferences divided	0	4	0	0
Conferences referred and divided	0	2	0	0
PSA conferences	40	44	35	39
PSA conferences referred	10	9	6	7
PSA conference divided	0	0	0	0
TOTALS	332	259	138	105

² OTHER MATTERS include the following:				
Applications	64	32	12	0
Apprenticeship Appeals	0	0	0	0
Occupational Safety & Health Tribunal #	3	13	7	0
Public Service Applications	42	42	27	39
Workplace Agreements	0	0	0	0
TOTALS	109	93	46	39

#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.





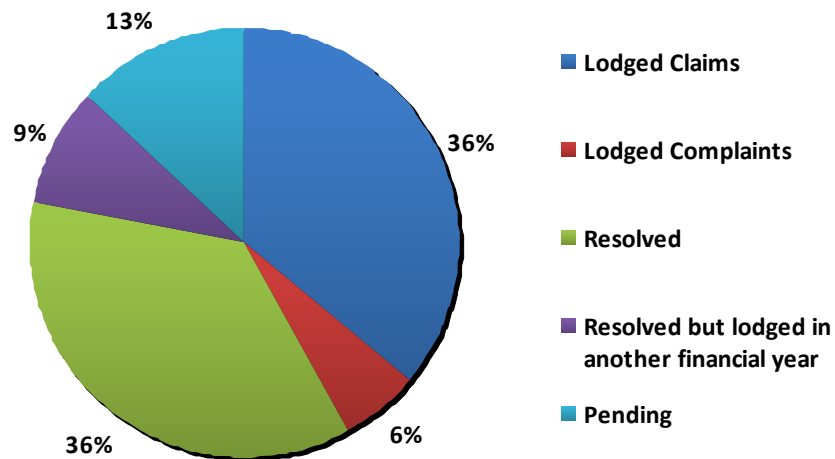
The Western Australian Industrial Appeal Court

Decisions issued by the Industrial Appeal Court during this period 8
 Orders issued by the Industrial Appeal Court during this period 7

Industrial Magistrates Court

The following summarises the Court for the period under review:

Lodged Claims	86
Complaints Lodged	2
Resolved (total).....	86
Resolved (lodged in the period under review)	64
Resolved but lodged in another financial period.....	50
Pending.....	40
Total number of resolved applications with penalties imposed	2
Total value of penalties imposed	\$10,500.00
Total number of claims/complaints resulting in disbursements	0
Total value of disbursements awarded.....	0
Claims/Complaints resulting in awarding wages	0
Total value of wages of Magistrate matters resolved during the period.....	0



The matters dealt with by the Industrial Magistrates Court related predominantly to Claims alleging breaches of industrial instruments, namely acts, awards and agreements, at both the state and federal level. Claims of this nature are heard and determined within the General Jurisdiction of the Industrial Magistrates Court. Some Claims relating to enforcement of Commission Orders were determined within this jurisdiction also.

Similarly, Complaints which fall within the prosecution jurisdiction of the Court were heard and determined by the Industrial Magistrate. These Complaints were filed pursuant to the *Children and Community Services Act 2004* and resulted in the prosecution of certain employers, where it was proven that the Act had been breached concerning employment matters relating to children.

A number of Small Claims, filed pursuant to the *Workplace Relations Act 1996* were also heard and determined by the Court during the last financial year. Small Claims will continue to remain within the general jurisdiction of the Industrial Magistrates Court pursuant to the *Fair Work Act 2009* in the future.

Commentary

1. Legislation

INDUSTRIAL RELATIONS ACT 1979

The following table conveniently summarises the names of the amending Acts.

Short title	Number and year	Assent	Commencement
Reprint 11: The Industrial Relations Act 1979 as at 3 Nov 2006 (includes amendments listed above except those in the <i>Petroleum Legislation Amendment and Repeal Act 2005</i>)			
<i>Owner-Drivers (Contracts and Disputes) Act 2007</i> s 58	7 of 2007	6 Jun 2007	1 Aug 2008 (see s 2 and <i>Gazette</i> 18 Jul 2008 p. 3329)
<i>Acts Amendment (Justice) Act 2008</i> Pt. 13	5 of 2008	31 Mar 2008	30 Sep 2008 (see s 2(d) and <i>Gazette</i> 11 Jul 2008 p. 3253)
<i>Legal Profession Act 2008</i> s 668	21 of 2008	27 May 2008	1 Mar 2009 (see s 2(b) and <i>Gazette</i> 27 Feb 2009 p. 511)
<i>Medical Practitioners Act 2008</i> s 162	22 of 2008	27 May 2008	1 Dec 2008 (see s 2 and <i>Gazette</i> 25 Nov 2008 p. 4989)
<i>Training Legislation Amendment and Repeal Act 2008</i> s 53	44 of 2008	10 Dec 2008	10 Jun 2009 (see s 2(2))
Reprint 12: The Industrial Relations Act 1979 as at 2 Jan 2009 (includes amendments listed above except those in the <i>Legal Profession Act 2008</i> and the <i>Training Legislation Amendment and Repeal Act 2008</i>)			
<i>Statutes (Repeals and Miscellaneous Amendments) Act 2009</i> s 77	8 of 2009	21 May 2009	22 May 2009 (see s 2(b))

During the period under review, the following consequential amendments were made to the *Industrial Relations Act 1979*:

On 1 August 2008, the Act was amended by the *Owner-Drivers (Contracts and Disputes) Act 2007* which amended s 113(l)(d)(ii) to include reference to the Owner-Drivers Act.

On 30 September 2008, the Act was amended by the *Acts Amendment (Justice) Act 2008* which amended ss 81CA, 81CB, 83D and 113 in relation to the Industrial Magistrate's court.

On 1 December 2008, the Act was amended by the *Medical Practitioners Act 2008* which amended ss 72B(1) and 97WR to update reference to the legislation.

On 1 March 2009, the Act was amended by the *Legal Profession Act 2008* which amended ss 7(1) and 9(1) in relation to definitions, and ss 42B(7), 51Q(4), 97UJ(5) and 112A(3) to update reference to the *Legal Profession Act 2008*. Sections 31(6) and 91(3) were repealed.

On 21 May 2009, the Act was amended by the *Statutes (Repeals and Miscellaneous Amendments) Act 2009* which amended various subsections of s 32(4) and s 90(1).

On 10 June 2009, the Act was amended by the *Training Legislation Amendment and Repeal Act 2008* which amended s 7(1) to remove references to trainees and amend the definition of an industrial matter. Amendments were also made to various subsections in ss 50A and 50B to remove references to trainees.

INDUSTRIAL RELATIONS COMMISSION REGULATIONS 2005

Citation	Gazettal	Commencement
Reprint 1: The <i>Industrial Relations Commission Regulations 2005</i> as at 16 May 2008		
<i>Industrial Relations Commission Amendment Regulations (No. 2) 2008</i>	10 Jun 2008 p. 2491-4	r 1 and 2: 10 Jun 2008 (see r 2(a)) Regulations other than r 1 and 2: 1 Aug 2008 ⁴ (see r 2(b) and Act No. 7 of 2007 s 58)
<i>Industrial Relations Commission Amendment Regulations (No. 5) 2008</i>	31 Oct 2008 p. 4767-8	r 1 and 2: 31 Oct 2008 (see r 2(a)); Regulations other than r 1 and 2: 1 Nov 2008 (see r 2(b))
<i>Industrial Relations Commission Amendment Regulations (No. 2) 2009</i>	16 Jun 2009 p. 2189-91	r 1 and 2: 16 Jun 2009 (see r 2(a)); Regulations other than r 1 and 2: 17 Jun 2009 (see r 2(b))

2. State Wage Order Case

On 11 June 2009 the Commission in Court Session delivered its decision in the 2009 State Wage order case pursuant to s 50A of the Act. Section 50A requires the Commission before 1 July in each year, to make a General Order setting the minimum weekly rate of pay applicable under the *Minimum Conditions of Employment Act 1993* (MCE Act) to adults, apprentices and trainees and, to adjust rates of wages paid under awards.

The application for the 2009 State Wage order was created on the Commission's own motion. The Commission placed public advertisements of the proceedings and received submissions from the Hon Minister for Commerce (the Minister), the Trades and Labor Council of Western Australia

(TLCWA), the Chamber of Commerce and Industry of Western Australia (Inc) (CCIWA), Western Australian Council of Social Services Inc, the Employment Law Centre of WA (Inc), the Australian Retailers Association and the Australian Hotels Association Western Australia. The Minister, TLCWA, and CCIWA appeared in the proceedings and also made oral submissions.

The evidence and material before the Commission showed a vastly different economic environment from that of the last three occasions. Labour market conditions in WA started to deteriorate from late 2008 and the world economy experienced one of the worst economic downturns since the Second World War.

After hearing submissions and considering the evidence, the Commission issued a General Order that (1) retained the current minimum wage and rates of wages paid under awards of \$557.40 for the period of 1 July 2009 until the first pay period on or after 1 October 2009, and (2) adjusted the current minimum wage and rates of wages paid under awards by an increase of \$12.30 per week from the first pay period on or after 1 October 2009.

Apart from the necessary resulting changes to the Statement of Principles, the Commission also amended Principle 9.2 given its interrelationship between the MCE Act in respect of exemptions to the minimum wage, and provisions contained within certain awards and agreements of the Commission. Principle 9.2 was amended to add the provision that no employee shall be paid less than any applicable minimum rate of pay prescribed by the MCE Act.

The computerised system for updating and maintaining awards used in 2008 was again successfully utilised in 2009. The automatic process was further enhanced and will be applied to update awards affected by the 2009 State Wage order that takes effect from the first pay period on or after 1 October 2009. The automatic process will adjust pay rates in 82% of the 319 awards affected by the State Wage order.

It is anticipated that in mid-September 2009 draft schedules of the awards, as amended by the State Wage order, will be provided on compact disc to all parties.

Staff of the Awards Review area will update all State awards so that all updated awards will be published on our website on the morning of 1 October 2009, the day that the Commission's 2009 State Wage order takes effect.

The Western Australian Industrial Relations Commission remains at the forefront in applying State Wage Case decision increases and publishing the new pay rates expeditiously as a valuable service to employers and employees in the State industrial relations system. This continues to be achieved through attention to detail, excellent internal coordination and careful planning, supported by good technology.

3. Statutory Minimum Wage under the *Minimum Conditions of Employment Act 1993*

On 11 June 2009, the Commission in Court Session, on its own motion, issued a State Wage order pursuant to s 50A of the *Industrial Relations Act 1979* increasing the minimum weekly rate of pay prescribed for the purpose of the MCE Act to \$569.70 on and from the commencement of the first pay period on or after 1 October 2009.

4. Minimum Rate for Award Apprentices 21 Years of Age and Over under the *Minimum Conditions of Employment Act 1993*

The State Wage order referred to above ordered that the minimum weekly rate of pay applicable under s 14 of the MCE Act to an apprentice who has reached 21 years of age shall be \$497.60 per week on and from the commencement of the first pay period on or after 1 October 2009.

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

Minimum weekly rates of pay for apprentices and trainees pursuant to s 14 of the MCE Act were also dealt with in the State Wage order referred to above.

Apprentices under the MCE Act refer to the class of apprentice to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into. For this class of apprentice, it was ordered that the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award*. The dates of operation are the commencement of the first pay period on or after 1 July 2009 and 1 October 2009.

Trainees under the MCE Act refer to the class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into. The Commission ordered that for this class of trainee, the minimum weekly rate of pay at the relevant Industry/Skill level is based on the *Metal Trades (General) Award*. The dates of operation are the commencement of the first pay period on or after 1 July 2009 and 1 October 2009.

6. Public Service Arbitrator and Public Service Appeal Board

Public Sector - General

The Public Service Arbitrator continued to deal with a wide range of matters applicable to the public sector generally. Several conferences were held to deal with applications in respect of employees' rights and entitlements. An appeal was heard by a teacher who was disciplined under the provisions of the Public Sector Management Act 1994. Public sector awards were varied by consent and public sector industrial agreements were registered.

The Arbitrator is able to respond promptly to impending industrial disputes in the public sector. The Public Service Arbitrator dealt promptly with a request made on 28 January 2009 by the Department of Education and Training for an urgent compulsory conference regarding proposed industrial action to be taken by employees engaged as school support staff in government schools throughout the State on 2 February 2009. The Arbitrator was informed that the issue in dispute concerned the workload, staffing levels and resources available to school support staff in government schools. The Arbitrator sought to assist the parties by issuing a recommendation, however this was not accepted by the union concerned. The Arbitrator, having regard for the public interest and the interests of the parties directly involved and to prevent any further deterioration of industrial relations in respect of the matters in question, issued an order on 30 January 2009 that the industrial action not occur and that the issues in dispute be the subject of further proceedings in the Commission ((2009) 89 WAIG 359).

Reclassification Issues

The Public Service Arbitrator continues to oversee the progress of reclassifications of specified callings positions throughout both the government health sector and the public sector generally. These processes have been lengthy due to the need for the parties to identify all of the positions throughout the multitudes of agencies of the public sector; to ensure that job description forms reflect the current requirements and are up- to- date; to review the levels of work value change which have occurred within those specified callings and to identify and deal with any groups which claim that they ought to be included within the specified callings.

Award Review Process

A number of public sector awards have been reviewed and updated according to the requirements of the *Industrial Relations Act 1979* (WA) and the review of the major public sector awards is almost complete.

Decisions of Interest of the Public Service Arbitrator

The Civil Service Association of Western Australia Inc. v. Director General, Department of Education and Training (2009) 89 WAIG 220

The Arbitrator considered whether the respondent was required by procedural fairness to provide two employees alleged to have committed minor breaches of discipline with a copy of a report of the investigation into the allegations, pursuant to s 83 of the *Public Sector Management Act 1994*.

The Arbitrator found that the scheme of the *Public Sector Management Act 1994* and *Public Sector Management Regulations 1988* required that procedural fairness be afforded to the employees in that process. Even though the investigation was not necessarily the final step in the disciplinary process, any unfairness in that step could not necessarily be remedied by a later hearing because of the potential for detrimental consequences such as to the employees' employment records including that the employees had been charged with a minor breach of discipline.

The failure to provide the employees with the findings of fact and reasons for making those findings meant that they may not have been in a position to consider whether they should object to the findings and put forward matters relevant to penalty. The Arbitrator ordered that the employees be provided with edited copies of the investigation report relating to those findings made against them.

Willers and Others v. WorkCover, Western Australian Authority (2009) 89 WAIG 402

The arbitrators employed in the Dispute Resolution Directorate of WorkCover WA sought a reclassification of their positions. The respondent opposed the applications and sought leave to be represented by a legal practitioner in the hearing. The Arbitrator noted that the applicants' claims required consideration of the work performed by, and the powers of, those positions with positions said to be comparable being judicial officers, tribunal members and other public officials in this State and others together with the legislative scheme of the exercise of judicial and arbitral powers by various offices. It was in the context of the system of courts, tribunals and administration in this State that the applicants made their claim relating to the classification of their positions. Accordingly the Arbitrator granted the respondent's application to be represented by a legal practitioner.

Director General, Department of Premier and Cabinet v. Mr Chris Read (2009) 89 WAIG 553

The Director General of the Department of Premier and Cabinet referred to the Arbitrator a dispute with Mr Read as to his substantive classification. Consideration of his position included the circumstances under which he had moved to the Office of the Parliamentary Commissioner for Administrative Investigations and his subsequent transfer to the Department of Premier and Cabinet. Mr Read claimed that he had suffered significant detriment as a consequence of being a whistle blower and that agreements had been reached with him as to how he was to be treated in terms of his classification.

The Arbitrator noted that Mr Read agreed that the Department had been supporting him since June 2002 when he had not been capable of looking for a permanent position and that his medical and rehabilitation treatment had been paid for by the employer. The issue to be determined was whether an agreement that Mr Read and his representative reached with the Department contemplated that Mr Read would receive the actual rate of pay of a Level 7.3 employee or if his rate of pay was to revert to that of a Level 6.4 employee under salary maintenance.

The Arbitrator found that the agreement was for him to be paid at Level 7.3 and that it contemplated that he would receive future pay increases.

Appeal to the Full Bench from a Decision of the Public Service Arbitrator

Civil Service Association of Western Australia Incorporated v. Commissioner Corruption & Crime Commission and the Minister for Public Sector Management (2009) 89 WAIG 4

The Arbitrator had dealt with a claim regarding the entitlements of Mr Glen Ross, a member of the appellant. Mr Ross was a permanent public service officer who was later appointed to the staff of the Corruption and Crime Commission (the CCC). The CCC subsequently abolished the position and terminated Mr Ross's employment. The parties were in dispute as to whether Mr Ross had entitlements under the *Public Sector Management (Redeployment and Redundancy) Regulations 1994 (WA)* (the Regulations), and what his rights were in relation to the level of position at which he could return to the public service. The Full Bench found that the redeployment provisions of the Regulations did not apply to Mr Ross after the cessation of his employment with the CCC but otherwise found that the Arbitrator erred in failing to find that the CCC did not act in accordance with r 4AA and 4A(2) of the Regulations. However the Full Bench ultimately dismissed the appeal, finding that there was no entitlement to payment of notice and severance pay.

Public Service Appeal Board

Membership of the Public Service Appeal Board

During the year the following persons were nominated by parties to appeals to the Public Service Appeal Board (the Board), and sat as members of the Board:

Mr D Hounsome	Mr P Mahler	Mr D Eacott
Mr C Floate	Ms L McKay	Ms B Conway
Mr R Grigoroff	Mr G Bucknall	Mr S Seeds
Mr B Dodds	Mr G Richards	Ms R Lavell
Mr W Green	Mr H Needham	Mr A Ferguson
Mr E Isailovic	Mr P Maher	Mr D Solosy
Ms E McQueen	Mr J Frame	Mr K Trent
Mr J Mercadante		

Formation of the Public Service Appeal Board

Last year's Annual Report noted difficulties in the formation of the Boards. According to the provisions of the Act each appeal requires the formation of a new Board. In the formation of Boards this year, one case involved significant delay in both parties making nominations of members to participate on the Board on the basis that it was initially understood that the appellant did not wish to proceed with the appeal. Putting that particular appeal aside, it took an average of 6.3 days for employee nominations to be received and an average of 11.7 days for employer nominations, within a range of 1 to 19 days for employee nominations and 1 to 26 days for employer nominations.

As most of the nominees are new to the process an induction and briefing is necessary prior to the Board actually commencing to deal with the matter.

The Board has no conciliation powers. Conferences or hearings then proceed for scheduling and directions purposes. The delays in the creation of each Board and in the preliminary processes make dealing with urgent matters problematic. Such delays do not apply to matters before the Commission or the Arbitrator who are able to make first contact with the parties within days or hours of the lodgement of documents. Legislative change is necessary to enable the process for dealing with claims before the Board more efficient and timely.

Decisions of Interest of the Public Service Appeal Board

Christopher Platt-Hepworth v. Disability Services Commission (2008) 88 WAIG 760

The appellant and the respondent reached a compromise agreement after the appellant had filed an appeal against the respondent's decision to dismiss him. The agreement required, amongst other things, that the appellant file a Notice of Discontinuance of the appeal. He did not do so, rather he sought that the appeal be heard on the basis that subsequent to reaching the agreement, and the respondent meeting its side of that agreement, he had received legal advice to the effect

that there was merit to his appeal, and that the decision to reach agreement had been rushed. However, there was no suggestion that he had reached that agreement under duress.

The Board decided that it would be contrary to the objects of the Act and to equity and good conscience to continue to deal with the appeal. The appeal was dismissed.

Colin Hill v. The Commissioner, Corrective Services (2008) 88 WAIG 1896

The appeal was lodged out of time. The appellant visited the Commission's registry four days after the expiration of the 21 day time period allowed for the lodgement of the appeal, but delayed lodgement for a further 22 days.

The Board found that the appeal had no merit and that while the respondent's processes were inadequate in some respects, it had acted reasonably and fairly when the appellant left the country, failed to properly explain his absences from work, acted in a demanding and unreasonable manner and deliberately set out to mislead the respondent.

The application for the extension of time was dismissed.

Thomas Brocklehurst v. Director General of Health (2008) 88 WAIG 1890

The appellant applied for an extension of time in which to appeal against the respondent's decision to charge him with a breach of discipline relating to an alleged assault of another employee. The appellant also challenged the constitution of the Board in that Mr Warren Green had been nominated by the respondent. The applicant suggested some improper influence over the board by an officer of the respondent but did not suggest any connection between Mr Green and any other person associated with the respondent's decision. The appellant's objection to Mr Green's participation on the Board was dismissed.

The application for an extension of time was also dismissed on the basis that there was no statutory entitlement to appeal to the Board a decision to charge an officer with a breach of discipline pursuant to the *Public Sector Management Act 1994*. The right to appeal arises only with the finding of a breach of discipline and the imposition of a penalty at the conclusion of the disciplinary process.

Diana Mary Dorothea Ridge v. Director General, Department of Culture and the Arts (2008) 88 WAIG 2184

The appellant appealed against the respondent's decision to reduce her hours of work without her consent. The respondent said that this was necessary because the contract of employment had become frustrated due to Ms Ridge's physical incapacity and it had simply given her proper notice of a change of roster which would meet her level of incapacity and its available work hours.

The Board found that the contract was not frustrated as there were other avenues contained in her contract of employment which had not been explored. An order was issued reinstating the full-time contract of employment.

Michael Christian Nicholas v. Department of Education & Training (2009) 89 WAIG 817

The appellant was granted an extension of time in which to lodge an appeal against the respondent's decision to dismiss him. The appeal was filed three working days out of time, and the reason for the delay was the appellant's declining health. The Board also found that there was some merit to the appellant's appeal. The extension of time was granted.

Stephen Mann v. The Employing Authority, Government Employees Superannuation Board (2009) 89 WAIG 587

The appellant sought an extension of time in which to lodge an appeal against the respondent's decision to terminate his employment. The length of delay in filing the appeal was in excess of four and a half months and was due to the appellant initially proceeding in the Australian Industrial Relations Commission which was found not to have jurisdiction.

The appellant alleged that the merits of his appeal included a failure on the part of the respondent to provide him with natural justice in its investigation of allegations against him.

The Board found that the appellant had not demonstrated how he had been denied natural justice.

The application for extension of time in which to file an appeal was dismissed.

Henryk Dworzanski v. Ann Nolan, Director General Department of Industry and Resources (2009) 89 WAIG 807

The appellant appealed against the respondent's decision to dismiss him due to substandard performance. The Board found that the respondent had undertaken a reasonable assessment process to determine whether the appellant's performance was sub-standard. It had gone further and found alternative duties to give him an additional opportunity to demonstrate an adequate standard of performance, but he did not achieve that standard.

The respondent also engaged an independent person to review a range of issues complained of by the appellant, and also arranged an independent assessment of the appellant's "cognitive abilities, potential, interests, behaviour style dimensions and management style" as part of its efforts to find alternative employment.

The appeal was dismissed.

Appeal to the Full Bench from a Decision of the Public Service Appeal Board

Colin Hill v. The Commissioner, Corrective Services (2009) 89 WAIG 417

The Full Bench of the Commission confirmed the decision in *State Government Insurance Commission v. Johnson* (1996) 76 WAIG 4142, that the Full Bench has no jurisdiction to hear an appeal from a decision of the Board.

7. Award Review Process

The Award Review section provides information and award services to the Commission and is responsible for the maintenance of electronic records of all State awards and industrial agreements. This information is available to the public via publication in the Western Australian Industrial Gazette (WAIG) and on the Commission's website.

Throughout the year under review, the section continued the review of all state industrial awards with the assistance and co-operation of the Minister, TLCWA and CCIWA.

The section also deals with award and agreement enquiries and provides copies of Commission orders evidencing these matters. Throughout the year approximately 2000 back-rate enquiries were received from the general public, employers, practitioners, employees, students and government departments. The reasons for enquiries ranged from checking for current and historical rates of pay, workers' compensation claims, claims for underpaid wages, taxation audits, child support obligations and disputed estate claims.

In 2008/09 the section processed 54 new industrial agreements, one award was cancelled and 122 award variations were finalised with relevant notices prepared and published on the Commission's website and in the WAIG. The majority of award variations dealt with the adjustment of allowances pursuant to State Wage Fixing Principles. As part of the award updating process in accordance with s 40B of the Industrial Relations Act 1979, the wages provisions of several awards, including four major hospitality industry awards, were updated by the removal of historical wage rate columns and the retention of the current wage rates only.

Award Review staff continued to actively support the Registry, Records section and the Department's telephone call centre. The section also continued to manage the function of archived award and agreement information for enquirers.

The section assisted the Commission in the production and application of the 2008 and 2009 State Wage General Orders and ensured that the new pay rates, where applicable, were available to the public and published on the Commission's website by the effective date of the wage increases.

This achievement continues to place the WAIRC at the forefront of the application of wage increases to awards and publication of the new pay rates. The speed and accuracy of the publication of the rates has proved to be invaluable to employers and employees and assists in the prevention of industrial disputes.

The level of efficiency is due to the detailed award knowledge, expertise and planning of staff of the Award Review section assisted by the Information Technology Branch. Additionally, the Chief Commissioner's Associate and Registry staff continued to provide considerable assistance in this process.

8. Right of Entry Permits Issued

Organisation	2005/06	2006/07	2007/08	2008/09
Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch	4	3	6	2
Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch, The	0	1	6	0
Australian Workers' Union, West Australian Branch, Industrial Union of Workers, The	2	1	1	3
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch, The	3	2	6	1
Civil Service Association of Western Australia Incorporated, The	7	13	20	14
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	1	0	1	0
Construction, Forestry, Mining and Energy Union of Workers, The	9	7	7	6
Food Preservers' Union of Western Australia, Union of Workers, The	3	1	1	0
Forest Products, Furnishing & Allied Industries Industrial Union of Workers, WA, The	0	1	1	0
Health Services Union of Western Australia (Union of Workers)	0	0	3	0
Independent Education Union of Western Australia, Union of Employees, The	8	5	3	1
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	26	33	13	38
Media, Entertainment and Arts Alliance of Western Australia (Union of Employees)	0	0	4	0
Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, The	0	0	1	0
Sales Representatives' and Commercial Travellers' Guild of W.A. Industrial Union of Workers	2	1	0	0
Shop, Distributive and Allied Employees' Association of Western Australia, The	8	2	5	6
State School Teachers' Union of W.A. (Incorporated), The	2	0	3	4
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	2	0	1	2
United Firefighters Union of Australia, West Australian Branch	1	0	1	1
Western Australian Branch of the Australian Medical Association, The	2	0	0	0
Western Australian Clothing and Allied Trades' Industrial Union of Workers, Perth, The	4	0	0	0
Western Australian Prison Officers' Union of Workers	1	0	19	9
Western Australian Railway Officers' Union	0	2	2	2
TOTAL	87	72	98	89

Number of permits that have been issued since 8 July 2002 (gross total).....903
 Number of people who presently hold a permit..... 327
 Number of permits that are current 359
 Number and names of permit holders who have had their permit removed or suspended
 by the Commission in the current reporting period..... 0

9. Claims by Individuals – Section 29

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

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

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

Section 29 Applications Lodged

Applications alleging unfair dismissal continue to represent the most significant proportion of the types of applications that are lodged under s 29, the reduction in the numbers of these applications continues.

	2005-2006	2006-2007	2007-2008	2008-2009
Unfair Dismissal	700	154	127	184
Denial of Contractual Benefits	285	124	64	64
TOTAL	1039	278	191	248

Section 29 Applications Finalised

	2005-2006	2006-2007	2007-2008	2008-2009
Unfair Dismissal	748	324	123	163
Denial of Contractual Benefits	259	191	86	72
Both in same application	207	16	1	2
TOTAL	1214	531	210	257

Section 29 Applications Lodged Compared with All Matters¹ Lodged

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

	2005-2006	2006-2007	2007-2008	2008-2009
All Matters Lodged	2061	829	849	839
Section 29 Applications Lodged	1039	278	191	248
Section 29 as (%) of All Matters Lodged	50%	33.50%	22.5%	29.5%

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

Section 29 applications represented more than half of all the matters dealt with.

	2005-2006	2006-2007	2007-2008	2008 - 2009
All Matters Finalised	2475	1239	593	804
Section 29 Applications Finalised	1214	531	210	237
Section 29 as Percentage (%) of All Matters Finalised	49%	43%	35%	29.5%

Section 29 Matters – Method of Settlement

The following table shows that approximately 76% of s 29 matters were settled without recourse to formal arbitration.

	Unfair Dismissal	Contractual Benefits	Both	Total	%
Arbitrated claims in which order issued	39	17	1	57	24.0%
Settled after proceedings before the Commission	70	33	1	104	43.9%
Matters referred for investigation resulting in settlement	1	0	0	1	0.5%
Matters discontinued/dismissed before proceedings commenced in the Commission	43	18	0	61	25.7%
Matters withdrawn/discontinued in Registry	10	4	0	14	5.9%
Total Finalised in 2007 - 2008 Reporting Year	163	72	2	237	100%

Demographic Data for Section 29 Applications

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

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

Representation

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

	Male	Female	No Data	Total	% Male	% Female	%No Data	%Total
Industrial Agent	10	16	0	26	38.5	61.5	0	10.5
Legal Representation	9	8	0	17	52.9	47.1	0	6.8
Personal	98	80	0	178	55.1	44.9	0	71.8
Other	8	12	0	20	40.0	60.0	0	8.1
No Data Provided	1	1	5	7	14.3	14.3	71.4	2.8
TOTAL	126	117	5	248	50.8	47.2	2.0	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	2	0	0	2	100	0	0	0.8
17 to 20	2	7	0	9	22.2	77.8	0	3.6
21 to 25	4	18	0	22	18.2	81.8	0	8.9
26 to 40	50	32	0	82	61.0	39.0	0	33.1
41 to 50	23	26	0	49	46.9	53.1	0	19.8
51 to 60	28	30	0	58	48.3	51.7	0	23.4
Over 60	11	2	0	13	84.6	15.4	0	5.2
No Data Provided	6	2	5	13	46.2	15.4	38.4	5.2
TOTAL	126	117	5	248	50.8	47.2	2.0	100

Employment Period

It is significant to note that 23.6% of all applicants were employed for less than 3 months compared to 19.4% in the 2006/2007 reporting period.

Period of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Under 3 months	29	22	0	51	56.9	43.1	0	20.6
4 to 6 months	25	18	0	43	58.1	41.9	0	17.4
7 to 12 months	18	26	0	44	40.9	59.1	0	17.7
1 to 2 years	16	9	0	25	64.0	36.0	0	10.1
2 to 4 years	17	16	1	34	50.0	47.1	2.9	13.7
4 to 6 years	5	9	0	14	35.7	64.3	0	5.6
Over 6 years	12	16	0	28	42.9	57.1	0	11.3
No Data Provided	4	1	4	9	44.4	11.2	44.4	3.6
TOTAL	126	117	5	248	50.8	47.2	2.0	100

Salary Range

	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under \$200 P/W	9	8	0	17	52.9	47.1	0	6.9
\$201 to \$600 P/W	2	33	0	35	5.7	94.3	0	14.1
\$601 to \$1000 P/W	41	41	0	82	50.0	50.0	0	33.1
\$1001 to \$1500 P/W	38	20	1	59	64.4	33.9	1.7	23.8
\$1501 to \$2000 P/W	23	12	0	35	65.7	34.3	0	14.1
Over \$2001 P/W	13	3	0	16	81.2	18.8	0	6.4
No Data Provided	0	0	4	4	0	0	100	1.6
TOTAL	126	117	5	248	50.8	47.2	2.0	100

Category of Employment

67% 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	4	9	0	13	30.8	69.2	0	5.3
Casual F/Time	2	0	0	2	100	0	0	0.8
Casual P/Time	1	7	0	8	12.5	87.5	0	3.2
Fixed Term	0	3	0	3	0	100	0	1.2
Full Time	25	30	0	55	45.5	54.5	0	22.2
Permanent	15	8	0	23	65.2	34.8	0	9.3
Permanent F/Time	70	39	1	110	63.6	35.5	0.9	44.4
Permanent P/Time	2	13	0	15	13.3	86.7	0	6.0
Probation	3	0	0	3	100	0	0	1.2
Part Time	0	4	0	4	0	100	0	1.6
No Data Provided	4	4	4	12	33.3	33.3	33.4	4.8
TOTAL	126	117	5	248	50.8	47.2	2.0	100

Reinstatement Sought

61.3% of applicants did not seek reinstatement when they lodged their application compared with 36.3% in the 2006/2007 period.

Reinstatement Sought	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Yes	33	36	1	70	47.2	51.4	1.4	28.2
No	73	75	0	148	49.3	50.7	0	59.7
No Data Provided	20	6	4	30	66.7	20.0	13.3	12.1
TOTAL	126	117	5	248	50.8	47.2	2.0	100

Reinstatement Sought by Age Group

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

Age Groups	Yes	No	No Data	Total	%Yes	%No	%No Data	%Total
Under 16	0	2	0	2	0	100	0	0.8
17 to 20	2	7	0	9	22.2	77.8	0	3.6
21 to 25	4	15	3	22	18.2	68.2	13.6	8.9
26 to 40	15	60	7	82	18.3	73.2	8.5	33.1
41 to 50	23	23	3	49	46.9	46.9	6.2	19.8
51 to 60	17	34	7	58	29.3	58.6	12.1	23.4
Over 60	5	5	3	13	38.5	38.5	23.0	5.2
No Data Provided	4	2	7	13	30.8	15.4	53.8	5.2
TOTAL	70	148	30	248	28.2	59.7	12.1	100

10. Employer-Employee Agreements (EEAs)

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

INDUSTRIAL RELATIONS ACT 1979 PART VID

Applications to Lodge EEAs for Registration

Number of EEAs Lodged	2005-2006	2006-2007	2007-2008	2008-2009
Meeting Lodgement Requirements	75	43	54	9
Not Meeting Lodgement Requirements	6	3	2	0
Total	81	46	56	9

EEAs Lodged for Registration and Finalised

Outcome	2005-2006	%	2006-2007	%	2007-2008	%	2008-2009	%
Refused	16	22%	4	8	6	16%	2	17%
Registered	47	64%	35	69	29	78%	10	83%
Withdrawn	10	14%	12	23	2	6%	0	0%
Total	73	100%	51[#]	100%	37	100%	12	100%

Note – # The Total Number of EEAs finalised in 2007-2008 includes some EEAs that were lodged in 2006-2007 but not finalised during the 2006-2007 period.

Guidelines and Principles for No Disadvantage Test

There were no changes to the Guidelines and Principles for the No Disadvantage Test. During the year, no applications were made under s97VZ 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	2006-07	%	2007-08	%	2008-09	%
Female	17	49%	14	48%	6	60%
Male	18	51%	15	52%	4	40%
Total	35	100%	29	100%	10	100%

Registered EEAs by Age	2006-07	%	2007-08	%	2008-09	%
Employees 18 years of age or over	35	100%	29	100%	10	100%
Employees under 18 years of age	0	0%	0	0	0	0%
Total	35	100%	29	100%	10	100%

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

	2006-07	% of Total Registered EEAs	2007-08	% of Total Registered EEAs	2008-09	% of Total Registered EEAs
Number of Registered EEAs where the employee had a disability	2	6%	0	0%	2	20%

EEAs Registered by Term of Agreement

Term of EEA	2006-07	%	2007-08	%	2008-09	%
<1 year	0	0%	13	45%	3	30%
1 to 2 years	24	69%	2	7%	2	20%
2 to 3 years	11	31%	14	48%	5	50%
Total	35	100%	29	100%	10	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 adjourned to June 2010 pending the outcome of an appeal to the Court of Criminal Appeal. Hearings on preliminary matters were held in the other two appeals with the outcomes of the hearings of the substantive appeals to be listed for the next reporting period.

A programming hearing was held for the appeal that was lodged and adjourned in the previous reporting period. The hearing of this substantive appeal was listed for a date in the next reporting period.

12. Mediation Applications pursuant to the *Employment Dispute Resolution Act 2008*

The *Employment Dispute Resolution Act 2008* (EDR Act) was proclaimed on 1 December 2008. It provides that the Commission can be asked to mediate any question, dispute or difficulty that arises out of or in the course of employment. This is wider than "industrial matter" under the *Industrial Relations Act 1979*. It is intended to apply to all workplaces, whether employment relations are covered by Commonwealth or State industrial relations systems as it is not part of the Industrial Relations Act.

During the reporting period, eleven requests for mediation were lodged. Of these, two were discontinued, four were closed and five are pending.

It is of interest to note that the Commission conducted one mediation involving an employee of a local government authority who had been suspended with pay. The mediation involved extensive and lengthy discussions between the parties and with and without the Commission. The matter was finally resolved and the employee returned to work. This use of the EDR Act meant that any issue of whether the Commission had jurisdiction under the Industrial Relations Act was avoided.

13. Referral of Disputes pursuant to the *Owner-Drivers (Contracts and Disputes) Act 2007*

The Road Freight Transport Industry Tribunal was established on 1 August 2008 on the proclamation of the *Owner-Drivers (Contracts and Disputes) Act 2007*. The Act was passed to promote a safe and sustainable road freight transport industry by regulating the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so. The Act regulates employees, sub-contractors, corporations and partnerships that carry on the business of transporting goods.

The Road Freight Transport Industry Tribunal received its first application under the Act on 16 September 2008. Since the filing of that application a further 17 applications have been filed within this reporting period. The first application concerned a dispute about an alleged breach of contract. The matter was finally resolved after three lengthy conferences convened by the Tribunal. Of the remaining 17 applications:

- (a) One concerned a dispute about the conduct of negotiations to enter into sub-contracting arrangements;

- (b) One concerned a dispute about an alleged unilateral change to sub-contracting arrangements.
- (c) Fifteen applications concerned claims for payments of money owing to sub-contractors.

Of the 17 applications seven have been resolved or are in the process of being settled and 10 are pending.

14. Other Matters

Transport

Passenger Railcar

The level of disputation between The Australian Rail Tram and Bus Industry Union of Employees, West Australian Branch (ARTBIU) and the Public Transport Authority (PTA) in 2008/2009 increased from the level of activity in 2007/2008. During this year the Commission received five applications seeking the convening of urgent conferences where industrial action was pending. This resulted in the Commission convening nine formal conciliation conferences and the issue of one informal document recording an agreement and one interim order prohibiting a mid-week stop work meeting.

The increased level of activity arose out of the fact that industrial agreements for urban and country rail car drivers, coach operators and other railway employees including transit officers expired at the end of 2007. Bargaining for new agreements commenced in early 2008 and extended through to early and mid 2009. Four new industrial agreements were registered in 2009 to cover these employees. None of these agreements covered urban rail car drivers. In late 2007 the Union gave notice to withdraw from the 2006 industrial agreement, Public Transport Authority Railcar Drivers (Transperth Train Operations) Enterprise Agreement 2006, that covered urban rail car drivers. From early 2008 the conditions of employment of urban rail car driver were regulated by the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006. Despite extensive negotiations between the Union and the PTA the parties were unable to reach agreement to put in place a new agreement for urban rail car drivers. Consequently at the end of 2008/2009 the conditions of employment of urban rail car drivers remain under the 2006 Award.

The ongoing dispute about rostering and compensation payments agreed to be paid to coach operators for work carried out in 2008 was finally resolved this year and resulted in new arrangements for aggregation being placed in the 2009 industrial agreement, Public Transport Authority (Transwa) Enterprise Agreement 2009.

Another dispute arose about the agreement to make the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award in 2006. This dispute raised different issues to the dispute about the Award that was dealt with in 2007/2008. The dispute this year resulted in an application to vary the Award by the Union which has been arbitrated. The Commission also varied allowances in the 2006 Award by consent.

The Commission also dealt with seven applications involving disputes about disciplinary matters. Five of these matters were resolved following conciliation conferences and two matters were arbitrated.

Other Government

This part of the transport industry is relatively small and has traditionally had a low level of disputation. The only activity in this area was to register an industrial agreement to cover Ministerial Chauffeurs.

Transport - General

An extremely low level of disputation in this industry continued in this year.

Education

State School Teachers

The Commission assisted the SSTU and DET on a range of issues including disciplinary action taken against teachers and disputes about the termination of teachers.

The Commission also assisted the parties to finalise an industrial agreement. When negotiations (both before and outside of the Commission) to finalise a replacement industrial agreement for school teachers and administrators were unsuccessful, the Commission issued a declaration that bargaining between the parties had ended and DET then asked the Commission to arbitrate an Enterprise Order. In late July 2008 an in-principle agreement was reached between the parties on the terms of an industrial agreement, subject to ratification by SSTU members, however this agreement was rejected by SSTU members and after the matter was relisted for hearing further conciliation took place before the Commission. In early November 2008 a further in-principle agreement was reached between the parties and on 16 December 2008 the Commission registered the *School Education Act Employees' (Teachers and Administrators) General Agreement 2008*.

TAFE Lecturers

The Commission held a number of conferences to assist the SSTU and DET to reach agreement on a replacement industrial agreement and when the parties were unable to reach agreement on 3 July 2008 the Commission issued a declaration that bargaining between the parties had ended. DET then lodged an application for an Enterprise Order and in response the SSTU sought an interim Enterprise Order. In December 2008 the parties reached an in-principle agreement with respect to an industrial agreement, subject to a vote of SSTU members, and on 28 April 2009 the Commission registered the *Western Australian TAFE Lecturers' General Agreement 2008*.

Education Assistants

From December 2007 onwards the Commission assisted the LHMU and DET with a dispute over whether a number of Education Assistants employed by DET should have their fixed term contracts converted to that of permanent status. The Commission convened several conciliation conferences and after further discussions were held the parties reached agreement with respect to the status of some Education Assistants. The remaining dispute between the parties about the permanent status of Ethnic Education Assistants was then heard and determined by the Commission.

School Support Officers

Since February 2009 the Commission has assisted DET and the CSA in relation to a dispute about the workloads of school support officers. A number of conferences have been held before the Commission and the matter is ongoing.

Local Government

The fundamental issue whether particular local government authorities are a trading corporation and not subject to the jurisdiction of this Commission by operation of s 6 and s 16 of the *Workplace Relations Act 1996* (Cth) continues to be raised as a threshold issue in most matters.

Whether a particular local government authority is a trading corporation was raised in ten matters this year. Eight applications proceeded to hearing and one was discontinued following a conference convened by the Commission. The other matter is pending. The Commission also dealt with one unfair dismissal application where jurisdiction was not raised by the parties. This matter was settled following a conference between the parties and their solicitors.

Corrective Services

The Commission convened a number of conciliation conferences between the CSA and the Department of Corrective Services to resolve a dispute between the parties about the workloads of Community Corrections Officers, Senior Community Corrections Officers, Juvenile Justice Officers, Senior Juvenile Justice Officers, Case Support Officers and Senior Case Support Officers and a consent order issued in April 2008 containing the terms of an agreed workplace management strategy. The parties reported back to the Commission on the implementation of this strategy in October 2008 and April 2009 and an amended workplace management strategy was filed in the Commission in April 2009.

Fire and Emergency Services

Since October 2008 the Commission has been assisting the UFFUWA and FESA with a dispute over staffing levels and practices in FESA's communication centre. A number of conferences have been held in the Commission to resolve this dispute and the matter remains before the Commission.

15. Decisions of Interest

Eric Bell v. Shire of Dalwallinu (2008) 88 WAIG 1867

The applicant, who was employed as a driver/plant operator, filed a claim in the Commission for alleged unfair dismissal. The respondent argued that the Commission did not have the jurisdiction to deal with the applications because the respondent is a constitutional corporation as defined by s 4 of the *Workplace Relations Act 1996* (Cth). It demonstrated that it engaged in trading activities. The Commission noted that whether a corporation is a trading corporation is ultimately a question of fact and degree, and that when all of the trading activities are considered collectively, even though they are not the primary activities of the Shire, the trading activities engaged in at the time the applicant's employment was terminated were substantial. The applicant's claim was dismissed.

The Registrar of the Western Australian Industrial Relations Commission v. Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (2008) 88 WAIG 1937

This matter was an application for enforcement of an order pursuant to s 84(A) of the *Industrial Relations Act 1979*. An order was made by the Commission on 1 February 2008 in application C 20 of 2007. The respondent filed a statement of answer admitting there had been two breaches of the order and sought the right to make submissions to mitigate any contemplated penalty. Section 84A(4)(a) of the *Industrial Relations Act* requires the Full Bench to have regard to the seriousness of the contravention or failure to comply, any undertakings that may be given as to future conduct, and any mitigating circumstances. The contraventions were found to be quite deliberate, wilful and calculated. Mitigating factors were also considered with regard to the factors set out in *The Registrar of the Western Australian Industrial Relations Commission v The State School Teacher's Union of WA (Incorporated)* (2008) 88 WAIG 333. An order was made that the contraventions were proved and that the respondent was to pay a penalty of \$800 to the State of Western Australia.

Lydia Patrice Selkirk v. Mr Scott Lieschke, Managing Director of Lieschke Pty Ltd (ABN 72 003 111 180) as Trustee for the Lieschke Personnel Trust (2008) 88 WAIG 2033

The applicant, who was employed as a chiropractic associate, filed claims in the Commission for alleged unfair dismissal and denied contractual benefits. The respondent argued that the Commission did not have the jurisdiction to deal with the applications because the respondent is a constitutional corporation and s 16(1) of the *Workplace Relations Act 1996* excludes the Commission from dealing with such claims. The applicant argued that the respondent is not a constitutional corporation, asserting that it does not satisfy the tests for a trading corporation and therefore is not a trading corporation. The Commission dismissed the applicant's claims as it decided that the respondent, who employs a person to provide professional services, is a trading corporation even though the employee may not engage in trading within the meaning of s51(xx) of the Australian Constitution.

Mark Greame Ireland v. Commissioner, Corrective Services of the Department of Corrective Services (2008) 88 WAIG 2154

The Commission held in an unfair dismissal claim brought by a former prisoner who was imprisoned in a State prison, that whilst a prisoner, the applicant did not have the status of an employee and thus could not be dismissed from his prison based employment under the *Prisons Act 1981 (WA)*. The Commission considered the legal status of prisoners compared to the legal status of an employee in an employee-employer relationship. The Commission concluded that the relationship between a prisoner and the State, under the *Prisons Act 1981 (WA)* and associated Regulations, lacked the character of employment applying the established legal tests.

The decision of the Commission at first instance was upheld on appeal to the Full Bench in *Mark Greame Ireland v. Ian Johnson CEO of the Department of Corrective Services (2009) 89 WAIG 421*.

The decision of the Full Bench is the subject of a further appeal to the Industrial Appeal Court which reserved its decision in June 2009.

Marina Saldanha v. Fujitsu Australia Pty Ltd (2008) 89 WAIG 76

The applicant had filed a claim for denied contractual benefits and the respondent argued the Commission did not have the jurisdiction to deal with the application because the Act is excluded by the Commonwealth Workplace Relations Act. The Commission referred questions of law to the Full Bench concerning the jurisdiction of the Commission to deal with contractual benefit claims of past or present employees of constitutional corporations. The Full Bench held that claims for enforcement of contractual benefits where an employee is employed by a constitutional corporation (a trading or financial corporation) are excluded by operation of s 16 of the Workplace Relations Act.

Aboriginal Legal Service of Western Australia (Inc) v. Lawrence (2009) 89 WAIG 243

In this long running dispute, the Industrial Appeal Court dismissed an appeal from a decision of the Full Bench of the Commission, to the effect that the appellant organization was not a trading or financial corporation for the purposes of s 51(xx) of the Commonwealth Constitution. Therefore, the respondent's claim was not excluded from the Commission's jurisdiction under s 16 of the Workplace Relations Act 1996 (Cth).

In this case the Court, by a majority (Steytler P and Pullin J; Le Miere J dissenting) considered the established tests as to whether a corporation is a constitutional corporation applying the tests established by the High Court. The majority concluded that the activities of the Aboriginal Legal Service entailed the performance of services with a welfare or public interest purpose and not trading activities.

Pooley & Ors v. Commissioner of Police (2009) 89 WAIG 479

The appellants, who were police officers, resigned from and ceased employment after the nominal expiry date of their 2003 enterprise agreement but prior to the registration of their 2006 industrial agreement. The appellants claimed in the Industrial Magistrates Court an entitlement to increased salary provisions contained in the 2006 industrial agreement, however their claims were dismissed. They each appealed to the Full Bench of the Commission, which also dismissed the appeals. They

then appealed to the Industrial Appeal Court. The Court dismissed their appeals, finding that an industrial agreement only applies to persons who are employees at the date of registration of the industrial agreement and thereafter whilst the industrial agreement is in force.

Commissioner Department of Corrective Services v Western Australian Prison Officers Union of Workers (2009) 89 WAIG 1013

The Commission dealt with a dispute between the Prison Officers' Union and the Department of Corrective Services regarding manning levels and work loads in State prisons. The issue ultimately before the Commission, became a claim for an additional incentive overtime payment to encourage greater numbers of prison officers working in State prisons to work rostered overtime.

The Commission found that the State prisoner population was and has continued to be, significantly above the design capacity of State prisons. Additionally, at the time of the dispute, prison officer recruitment had not kept pace with the required manning levels for staffing State prisons.

As an interim measure, the Commission granted the Union's claim in part, and made an order for an overtime incentive payment to operate for a three month trial period from October to December 2008 inclusive. An evaluation of the trial was undertaken by both the Prison Officers' Union and the Department of Corrective Services. As a result of which, an application has now been made to vary the Prison Officers' Award to provide for an additional overtime incentive payment in circumstances where the prison muster of a prison exceeds a prescribed level and the prison staffing is below a prescribed level.

This matter is to be determined by the Commission in due course.

16. Conclusion

Although the Commission continues to deal efficiently with the matters brought to it, and which arise under the *Industrial Relations Act 1979*, the significantly reduced volume of applications to the Commission arising initially from the 2006 amendments to the *Workplace Relations Act* (the "Work Choices" amendments) has continued. It is unlikely to be increased under the Commonwealth's *Fair Work Act 2009* which came into affect on 1 July 2009.

I referred in my last report to you that the numbers of applications to the Commission by employees alleging that they have been denied a benefit under their contract of employment, suggests a continuing awareness in the community of this remedy in the Commission. During the course of the period covered by this report, a Full Bench of the Commission held that the effect of the Work Choices amendments was that the Commission was no longer able to deal with a claim for a denied contractual benefit against an employer who is a constitutional corporation. However, the position may well change as a result of the *Fair Work Act 2009*. Section 27(2)(o) of that Commonwealth Act, as read with Section 26 and 27 of that Act, appears to exclude from Commonwealth coverage claims for enforcement of contracts of employment. Although sections 26 and 27 have yet to be tested, the effect of those provisions may be that the Commission has the jurisdiction to continue to deal with claims of denied contractual benefit made by employees against an employer who is a constitutional corporation. This may have the effect of restoring to the Commission the jurisdiction removed by the "Work Choices" amendments. In doing so it will restore to the Commission the jurisdiction it has had since 1980 to permit employees to bring a

claim in their own name to the Commission that they have been denied a benefit under their contract of employment. In the absence of that right, such a claim may only be brought by the

employee being a member of a union, or having the claim brought in general jurisdiction of the Commission by an Industrial Inspector on behalf of the employee.

I also referred to the requirement for the Commission now to determine whether or not it has jurisdiction in matters generally because of the operation of Commonwealth legislation. In the case of *Lawrence v. Aboriginal Legal Service of WA Inc* to which I referred in my report to you last year, the decision of the Industrial Appeal Court was delivered on 10 December 2008. The consequence of that decision was that Mr Lawrence's claim of unfair dismissal was held to be within the jurisdiction of the Commission and the matter was remitted to the Commission to be dealt with on its merits. At the point at which this occurred, and the Commission disposed of the matter, almost three years had passed since Mr Lawrence had lodged his application in the Commission. That is an extraordinary time for parties to wait to have a claim determined. It was the first occasion when the overriding effect of the Work Choices legislation was required to be considered by the Commission and as such, I do not anticipate that all claims where this issue of jurisdiction arises will take such a period of time before the Commission is able to consider the matter on its merits.

Nevertheless, in my respectful view, the time frame illustrates the potential which may arise when the issue of jurisdiction is raised because the issues of law involved in determining whether a charitable organisation, or a local government authority is a trading corporation are complex and require a considerable review of the activities of the organisation.

The proclamation on 1 December 2008 of the *Employment Dispute Resolution Act 2008* does provide an alternative which will allow parties, if they agree to do so, to put to one side the issue of jurisdiction and agree to the Commission mediating the merit of the matter under the EDR Act. It is quite early days in the life of this legislation and its potential has, in my view, yet to be fully realised by employers and employees in the State. I have included a brief report on the operation of this legislation in this report.


I have also included for the first time a report on the operation of the Road Freight Transport Industry Tribunal which came into existence on 1 August 2008. Its operation, although not under the Act, shows a utilization of the Tribunal constituted by a Commissioner in the private sector transport industry and I consider it appropriate to include it in this report for that reason.

I record that on 5 December 2008 the Attorney-General's Department of the Commonwealth delegated powers through section 8G of the *Christmas Island Act 1958*, and the *Cocos (Keeling) Islands Act 1955* which will allow members of the Commission who sit as the Occupational Safety and Health Tribunal to carry out their functions under those acts in the Territories of Christmas Island and the Cocos Keeling Islands.

During the period covered by this report, Commissioner Mayman continued her appointment to the advisory panel to conduct a National Review into Model Occupational Health and Safety Laws and was absent from the Commission until the completion of the final report on 30 January 2009.

I also record that in November 2008 I was appointed a Deputy President of the Australian Industrial Relations Commission as a dual appointee in accordance with section 14A of the Act. In doing so, I became the only member of the Commission to hold a dual appointment with the Australian Commission since the retirement of the then Senior Commissioner Jack Gregor in 2006. The Australian Industrial Relations Commission will cease to exist at the end of this year and the Act does not make any provision for dual appointees to Fair Work Australia, the tribunal established under the *Fair Work Act 2009*. I draw to your attention the desirability of permitting such dual appointments in the interests of the harmonisation of State and Commonwealth industrial relations. In this context, I record my appreciation to the Hon G M Giudice, President of the Australian Commission for convening meetings of the heads of the Federal and State Commissions to discuss matters of mutual concern.

The overriding effect of the Commonwealth legislation on the work of the Commission has been felt in all of its operating areas, and those of the Department of the Registrar which provides the registry services to the Commission. I consider the tireless work of the Registrar and Chief Executive of the Department, John Spurling, in endeavoring to reduce the operating costs of the Commission where possible whilst not diminishing the services provided to the Commission worthy of commendation.

 **(Sgd.) A.R. BEECH**

A.R. Beech
Chief Commissioner
15 September 2009