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2011  
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 2010 to 30 June 2011

Minister Responsible for the Administration of the Act  
The Hon. S. O'Brien, MLC  
In his capacity as Minister for Commerce

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## Membership and Principal Officers

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### Western Australian Industrial Relations Commission

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During the year to 30 June 2011, the Western Australian Industrial Relations Commission (WAIRC) was constituted by the following members:

<b>Presidents</b>	The Honourable J H Smith ( <i>Acting</i> ) The Honourable Justice R L Le Miere ( <i>Acting</i> ) (to 27 August 2010)
<b>Chief Commissioner</b>	A R Beech
<b>Senior Commissioner</b>	P E Scott ( <i>Acting</i> )
<b>Commissioners</b>	S J Kenner J L Harrison S M Mayman

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

### Public Service Arbitrators

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Acting Senior Commissioner P E Scott continued her appointment as a Public Service Arbitrator throughout the period. This appointment is due to expire on 21 June 2013.

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 2012.

Commissioner J L Harrison continued her appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 2 May 2012.

Commissioner S M Mayman continued her appointment as an additional Public Service Arbitrator. This appointment is due to expire on 9 November 2011.

### Railways Classification Board

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Commissioner S J Kenner was appointed as Chairman on 8 February 2011 for a period of two years. This appointment is due to expire on 10 February 2013.

### Occupational Safety and Health Tribunal

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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* and s 16(2D) of the *Industrial Relations Act 1979* ("the Act").

## Registry

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

Mr J Spurling	<b>Registrar</b>
Ms S Bastian	<b>Registrar Designate</b>
Ms S Hutchinson	<b>Deputy Registrar</b>

## The Western Australian Industrial Appeal Court

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

The Honourable Justice C J L Pullin	<b>Presiding Judge</b>
The Honourable Justice M J Buss	<b>Deputy Presiding Judge</b>
The Honourable Justice R L Le Miere	<b>Ordinary Member</b>
The Honourable Justice K J Martin	<b>Ordinary Member</b>

## Industrial Magistrates Court

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

Mr G Cicchini  
Ms M Boon

## Matters Before the Commission

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### 1. Full Bench Matters

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The Full Bench has been constituted on each occasion by an Acting President and by two Commissioners.

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

The Honourable J H Smith (Acting President) .....	32
The Honourable Justice R L Le Miere (Acting President).....	1

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

Chief Commissioner A R Beech .....	12
Acting Senior Commissioner P E Scott.....	15
Commissioner S J Kenner .....	19
Commissioner J L Harrison.....	17
Commissioner S M Mayman .....	3

The following summarises Full Bench matters:

### Appeals

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Heard and determined from decisions of the:

Commission – s 49.....	6
Industrial Magistrate – s 84 .....	5
Coal Industry Tribunal .....	0
Public Service Arbitrator.....	10
Railways Classification Board.....	0
Occupational Safety and Health Tribunal .....	0

### Organisations – Applications by or Pertaining to

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Applications to register an organisation pursuant to s 53(1).....	1
Applications to amend the rules of a registered organisation pursuant to s 62 .....	8
Applications relating to State branches of federal organisations pursuant to s 71 .....	2
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

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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 .....	0
Matters remitted by the Industrial Appeal Court .....	0
Number of Full Bench matters heard but not determined in 2010/2011 .....	8

## Orders

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Orders issued by the Full Bench.....	43
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## 2. Acting President

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Matters before the Acting Presidents sitting alone were as follows:

Applications for an order that the operation of a decision appealed against be stayed pursuant to s 49(11) .....	2
Applications for an order, declaration or direction pursuant to s 66.....	6

The following summarises s 66 applications:

Applications finalised in 2010/2011 .....	5
Directions hearings .....	5
Applications part heard .....	0
Applications withdrawn by order .....	0
Applications discontinued by order .....	2

## Orders

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Orders issued by the Acting Presidents from 1 July 2010 to 30 June 2011 inclusive:

Order pursuant to s 49 (11) .....	2
Order pursuant to s 66 .....	11
Reference of rules by Full Bench under s 72A(6) .....	0
Application pursuant to s 92.....	0
Remitted from the Industrial Appeal Court.....	0

## Consultations

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Consultations with the Registrar pursuant to s 62 of the Act .....	9
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### 3. Commission in Court Session

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The Commission in Court Session is constituted each time by three Commissioners with the exception of the 2011 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 .....	2
Acting Senior Commissioner P E Scott.....	4
Commissioner S J Kenner .....	1
Commissioner J L Harrison.....	2
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</i> and Awards .....	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

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Federal matters dealt with by WAIRC Commissioners ..... 0

(This is a reference to matters in the jurisdiction of the Commonwealth industrial relations system dealt with by WAIRC Commissioners who hold dual appointments in the Commonwealth tribunal. There are no dual appointments in the period of this Report).

### 5. Rule Variations by Registrar

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Variation of Organisation Rules by the Deputy Registrar..... 7

### 6. Boards of Reference

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

## 7. Industrial Agents Registered by Registrar

Number of new agents registered during the period.....	2
Total number of agents registered as corporate body .....	27
Total number of agents registered as individuals .....	18
Total number of agents registered as at 30 June 2011 .....	45

## Awards and Agreements in Force under the Industrial Relations Act 1979

Year	Number at 30 June
2007	2804
2008	2810
2009	2791
2010	2666
<b>2011</b>	<b>2613</b>

## Industrial Organisations Registered as at 30 June 2011

	Employee Organisations	Employer Organisations
No. of organisations	45	17
<b>Aggregate membership</b>	<b>155,276</b>	<b>4,483</b>

## Summary of Main Statistics

### Western Australian Industrial Relations Commission

	MATTERS DEALT WITH			
	2007-2008	2008-2009	2009-2010	2010-2011
<b>Full Bench:</b>				
Appeals	22	11	19	21
Other Matters	6	6	12	12
<b>Acting President sitting alone:</b>				
S 66 Matters (finalised)	0	9	6	5
S 66 Orders issued	1	29	25	11
S 49(11) Matters	2	1	2	2
Other Matters	0	0	0	4
S 72A(6)	0	0	0	0
Consultations under s 62	3	5	8	9
<b>Commission in Court Session:</b>				
General Orders	2	2	1	1
Other Matters	4	1	7	4
<b>Public Service Appeal Board:</b>				
Appeals to Public Service Appeal Board	6	19	17	26
<b>Commissioners sitting alone:</b>				
Conferences <sup>1</sup>	62	105	92	95
New Agreements	54	44	78	59
New Awards	1	0	0	5
Variation of Agreements	0	0	0	1
Variation of Awards	63	139	57	78
Other Matters <sup>2</sup>	54	62	191	209
Federal Matters	0	0	0	0
Boards Of Reference - Other Awards (Chaired by a Commissioner)	0	0	0	0
Boards of Reference – Long Service Leave	<b>3</b>	<b>0</b>	<b>1</b>	<b>0</b>
<b>Unfair Dismissal Matters Concluded:</b>				
Unfair Dismissal claims	123	163	176	135
Contractual Benefits claims	86	72	53	80
Unfair Dismissal & Contractual Benefits claims together	1	2	4	0
<b>Public Service Arbitrator (PSA):</b>				
Award/Agreement Variations	25	35	22	39
New Agreements	13	19	11	18
Orders Pursuant to s 80E	2	1	0	0
Reclassification Appeals	37	60	50	70
<b>TOTALS:</b>	<b>567</b>	<b>785</b>	<b>832</b>	<b>884</b>

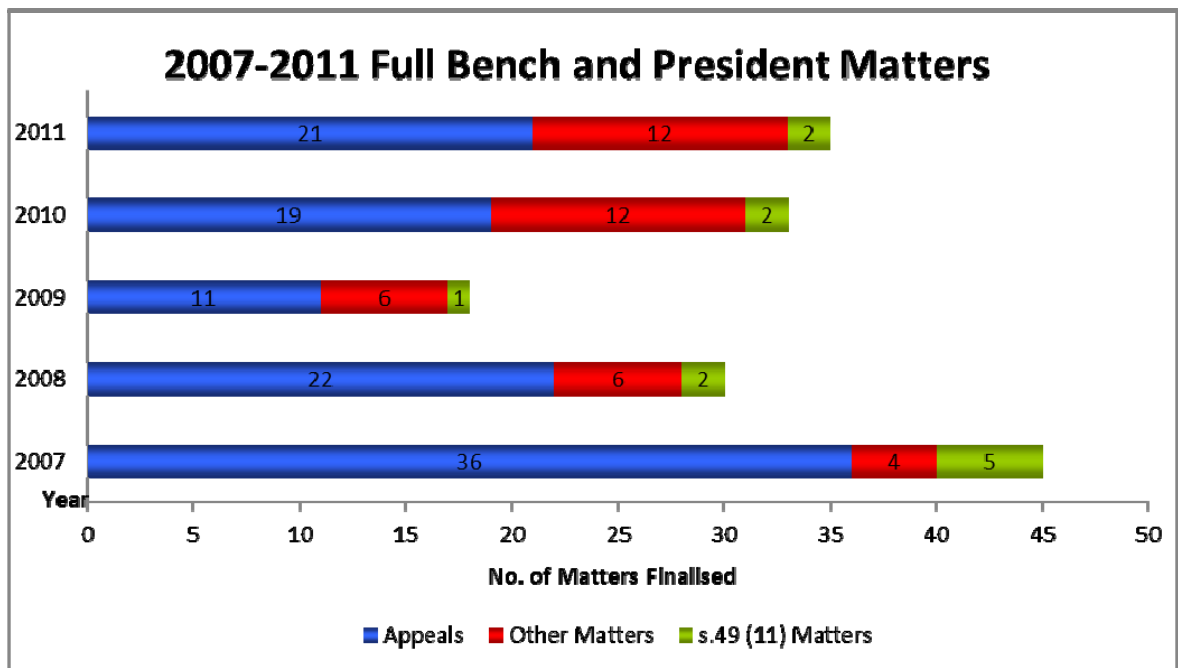
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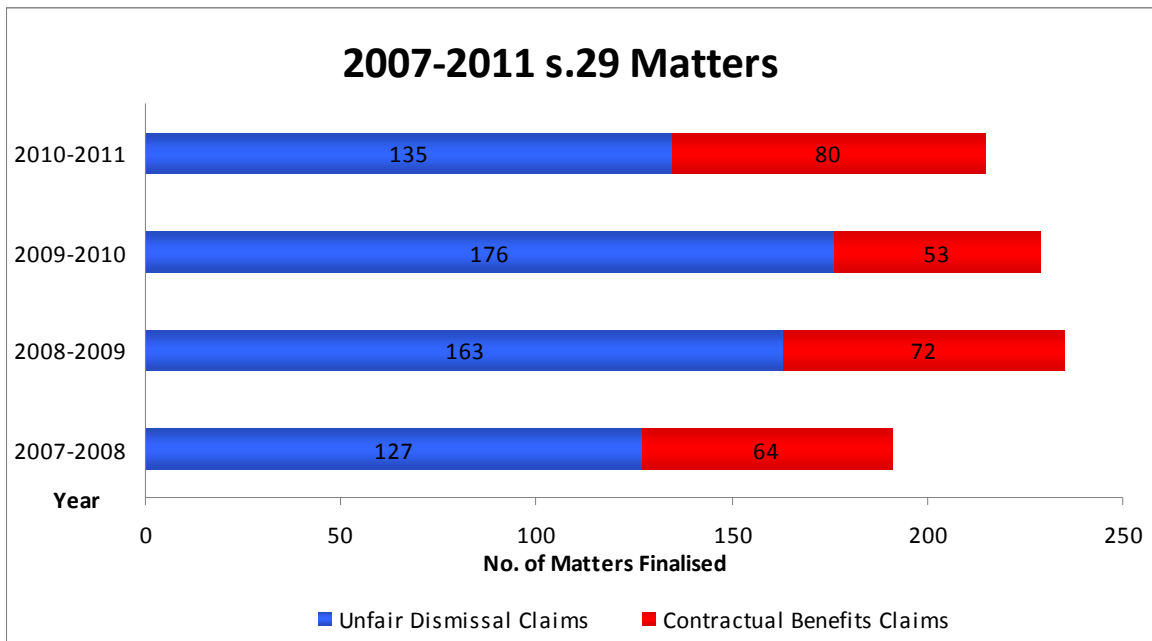
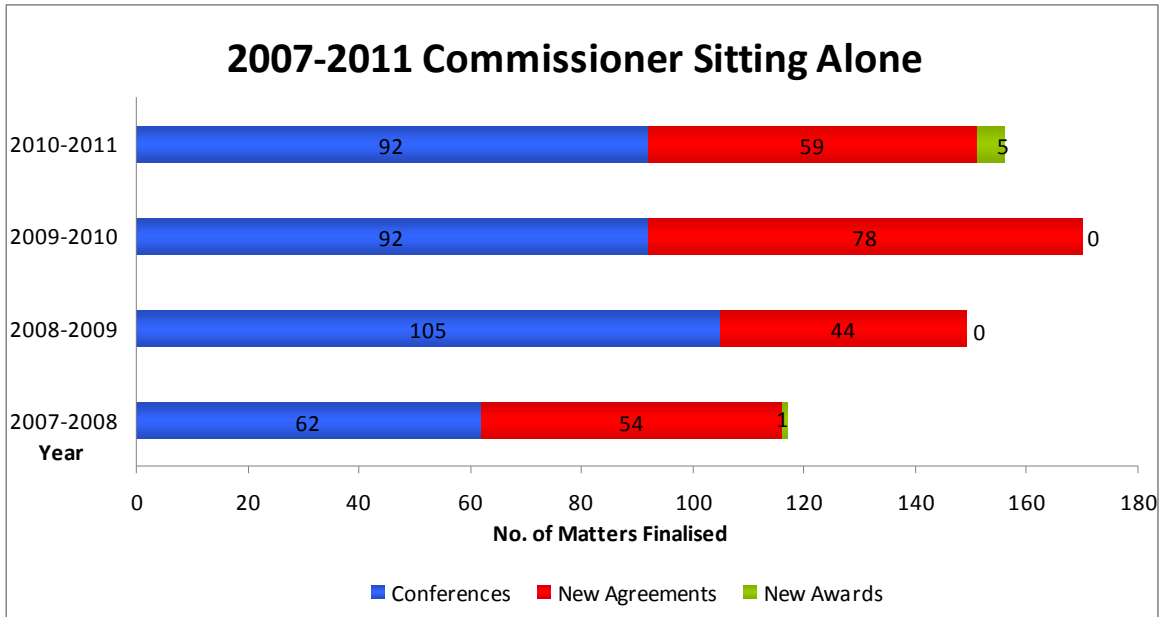
<sup>1</sup> CONFERENCES include the following:				
Conferences (s 44)	75	51	45	56
Conferences referred for arbitration (s 44(9))	22	8	7	8
Conferences divided	0	0	0	1
Conferences referred and divided	0	0	0	0
PSA conferences	35	39	39	27
PSA conferences referred	6	7	1	3
PSA conferences divided	0	0	0	0
<b>TOTALS</b>	<b>138</b>	<b>105</b>	<b>92</b>	<b>95</b>

<sup>2</sup> OTHER MATTERS include the following:				
Applications	12	0	0	0
Apprenticeship Appeals	0	0	0	0
Occupational Safety & Health Tribunal #	7	0	0	0
Public Service Applications	27	39	29	41
<b>TOTALS</b>	<b>46</b>	<b>39</b>	<b>29</b>	<b>41</b>

#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. A further note on the operation of the Tribunal is at Part 14 of this Report.

From this Report on, reference "Workplace Agreements" has been discontinued as it is no longer valid.





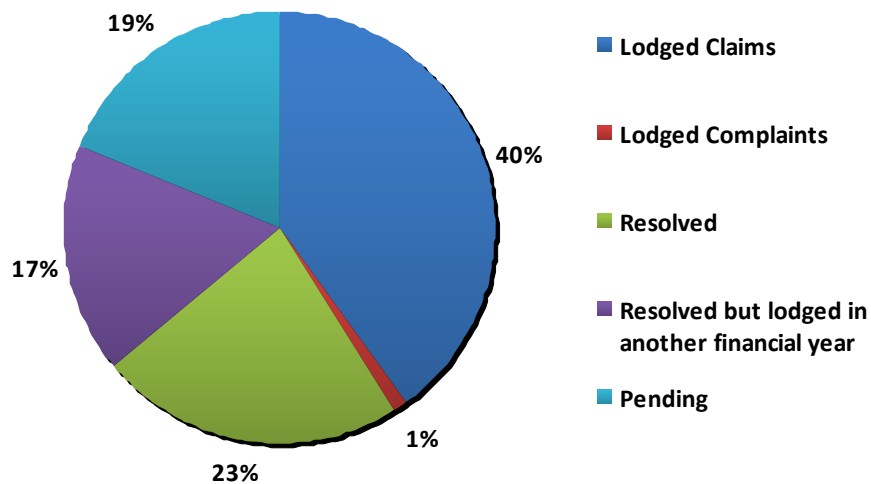
## The Western Australian Industrial Appeal Court

Decisions issued by the Industrial Appeal Court during this period.....	3
Orders issued by the Industrial Appeal Court during this period .....	2

## Industrial Magistrates Court

The following summarises the Court for the period under review:

Lodged Claims .....	130
Lodged Complaints.....	0
Resolved (total).....	49
Resolved (lodged in the period under review) .....	28
Resolved but lodged in another financial period.....	21
Pending.....	178
Total number of resolved applications with penalties imposed .....	0
Total value of penalties imposed .....	0
Total number of claims/complaints resulting in disbursements .....	1
Total value of disbursements awarded.....	\$40
Claims/Complaints resulting in awarding wages .....	1
Total value of wages of Magistrate matters resolved during the period.....	\$1,756



The Industrial Magistrates Court dealt with a number of claims alleging breaches of industrial instruments, namely Acts, awards and agreements. The alleged breaches occurred within both the State and federal industrial relations systems, and were heard and determined in accordance with the general jurisdiction of the Court. Similarly, the Court dealt with those claims which sought to enforce Orders of the Commission, within its general jurisdiction.

A small proportion of small claims, filed pursuant to the *Workplace Relations Act 1996* and the *Fair Work Act 2009*, were heard and determined by the Industrial Magistrate, also under the Court's general jurisdiction.

## 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
<b>Reprint 13: The <i>Industrial Relations Act 1979</i> as at 9 Apr 2010</b>			
<i>Standardisation of Formatting Act 2010</i> s. 4	19 of 2010	28 June 2010	11 Sept 2010 (see s 2(b) and <i>Gazette</i> 10 Sept 2010 p. 4341)
<i>Health Practitioner Regulation National Law (WA) Act 2010</i> Pt. 5 Div. 29	35 of 2010	30 Aug 2010	18 Oct 2010 (see s 2(b) and <i>Gazette</i> 1 Oct 2010 p. 5075-6)
<i>Public Sector Reform Act 2010</i> s. 109	39 of 2010	1 Oct 2010	28 Mar 2011 (see s 2(b) and <i>Gazette</i> 5 Nov 2010 p. 5563)

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

On 11 September 2010, the Act was amended by the *Standardisation of Formatting Act 2010*, No. 19 of 2010 to change the format of the title of Schedule 1 – Matters to be published in the “*Western Australian Industrial Gazette*”.

On 18 October 2010, the Act was amended by the *Health Practitioner Regulations National Law (WA) Act 2010* (No. 35 of 2010) which amended ss 72B(1) and 97WR in relation to the definition of the term “medical practitioner”.

On 28 March 2011, the *Public Sector Reform Act 2010*, No. 39 of 2010 amended s 80I(1)(b) and (d) in Part IIA – Constituent authorities Division 2 – Public service arbitrator and appeal boards of the *Industrial Relations Act 1979*. Specifically, it added “findings”, against which an appeal can also be made.



## INDUSTRIAL RELATIONS COMMISSION REGULATIONS 2005

Citation	Gazettal	Commencement
<i>Industrial Relations Commission Amendment Regulations 2010</i>	9 Jul 2010 p. 3239-40	r 1 and 2: 9 Jul 2010 (see r 2(a)); Regulations other than r. 1 and 2: 14 July 2010 (see r. 2(b) and <i>Gazette</i> 13 Jul 2010 p 3291)
<i>Industrial Relations Commission Amendment Regulations (No. 2) 2010</i>	12 Oct 2010 p. 5153-5	r 1 and 2: 12 Oct 2010 (see r 2(a)); Regulations other than r. 1 and 2: 13 Oct 2010 (see r 2(b))

## INDUSTRIAL RELATIONS (GENERAL) REGULATIONS 1997

There were no amendments for these Regulations during the reporting period.

### 2. State Wage Order Case

On 10 June 2011 the Commission in Court Session delivered its decision in the 2011 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 2011 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 Australian Hotels Association Western Australia and The Employment Law Centre. The Minister, TLCWA and CCIWA appeared in the proceedings and also made oral submissions.

After hearing submissions and considering the evidence, the Commission issued a General Order that adjusted the current minimum wage and rates of wages paid under awards by an increase of \$19.90 per week from the first pay period on or after 1 July 2011.

The Commission considered the balance of the evidence and submissions before it in the context of the considerations under s 50A(3) of the Act. It said that an increase was permitted which tends more towards addressing in a modest way the decline in the value of the WA minimum wage relative to average earnings than an increase based principally upon the notions of maintaining purchasing power. The Commission set the WA minimum wage at \$607.10 per week.

Apart from the necessary resulting changes to Principle 9 of the Statement of Principles, there were no other changes to the Principles.

The computerised system for updating and maintaining awards used in 2010 was again successfully utilised in 2011. The automated process applied the wage increases from the 2011 State Wage order that was effective on and from the commencement of the first pay period on or after 1 July 2011. Further enhancements to this system are being developed as the automated process adjusted all pay rates in only 80% of the 245 awards affected by the 2011 State Wage order.

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

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On 10 June 2011, the Commission in Court Session, on its own motion, issued a State Wage order pursuant to s 50A of the Act increasing the minimum weekly rate of pay prescribed for the purpose of the MCE Act to \$607.10 on and from the commencement of the first pay period on or after 1 July 2011.

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

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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 \$525.70 per week on and from the commencement of the first pay period on or after 1 July 2011.

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

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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 date of operation is the commencement of the first pay period on or after 1 July 2011.

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 date of operation is the commencement of the first pay period on or after 1 July 2011.

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## 6. Public Service Arbitrator and Public Service Appeal Board

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### Public Sector – General

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The Public Service Arbitrator continued to deal with a wide range of matters applicable to the public sector generally.

### Reclassification Issues

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#### Health Professional - Specified Callings

The review of the work value and levels of classification of health professional positions in the public health sector has concluded with the Public Service Arbitrator determining the last of the positions in this lengthy, detailed and time consuming review. The Arbitrator acknowledges the work of the representatives of the Health Services Union of Western Australia (Union of Workers) including Mr Dan Hill and Mr Richard Barlow, and the representatives of the Director General of Health, Mr John Ross in particular, and the cooperative and productive manner in which the process was conducted.

The review of the work value and levels of classification of professional positions in the broader public sector is in the final stages of being resolved by conciliation between The Civil Service Association of Western Australia Incorporated, the Department of Commerce and the Public Sector Commission. Only a small number of positions and issues remain to be resolved.

#### WorkCover Arbitrators

Last year's Annual Report noted that claims by WorkCover Arbitrators for a reclassification of their positions had been dismissed and that they had appealed to the Full Bench of the Commission, however the appellants sought and were granted leave to discontinue the appeals.

A number of WorkCover Arbitrators who were not qualified legal practitioners applied to the Public Service Arbitrator to have their position classifications recognised as specified callings and their salary levels increased to bring them to the same salary level applicable to the arbitrators who were qualified legal practitioners. The Public Service Arbitrator determined that as they did not meet the criteria for the specified calling of 'legal officer', the positions could not be so recognised. However, due to the nature of the work, and other considerations, they were granted temporary special allowances to take their salaries to the same level.

A number of WorkCover Arbitrators who had been appointed on fixed term contracts appealed to the Public Service Appeal Board claiming that their employer's decision to appoint them under fixed term contracts was wrong, and seeking that they be appointed permanently. The Board found that the appointments on fixed terms were invalid, however this did not mean that the consequence was that the appointments were permanent. The Board found that the employer could not simply be directed to permanently appoint as it was required to comply with statutory procedures in making appointments and could not be directed to ignore those procedures. Further, the Board noted that the appellants had entered into the fixed term contracts without question and had not challenged the nature of the contracts until nearly four years after entering into the contracts. The Board also noted that at the time of the decision of the Board, the contracts had less than two months to run and the respondent had already commenced the process of advertising the positions. However the Board also decided that even though the fixed term appointments had not been validly made, it was not appropriate to formally invalidate the appointments.

## Public Health Frontline Clerical Officers

In July 2010, frontline clerical officers in the public health sector, members of the Health Services Union of Western Australia (Union of Workers), threatened industrial action due to their employer refusing their claims for recognition of increased work value in their level of classification.

The Public Service Arbitrator conciliated between the parties and issued a recommendation for the establishment of a process to have the Arbitrator review approximately 320 full time equivalent positions.

The parties have been in the process of gathering information and identifying an appropriate sample of positions to be examined. Hearings and inspections by the Public Service Arbitrator are currently being scheduled.

## Decisions of Interest of the Public Service Arbitrator

### Public Health Sector Dismissals – Salary Packaging

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The Public Service Appeal Board and the Commission in its general jurisdiction have now dealt with a number of claims by officers and employees who were dismissed after making claims for salary packaging benefits where they had not themselves incurred the expenditure claimed, in some cases having submitted copies of receipts where someone else incurred the expenditure. Allegations had been made in respect of 253 employees, with 17 employees being dismissed.

Each of the cases before the Public Service Appeal Board and the Commission has been dealt with on its merits; some have been determined and others are still in the conciliation and arbitration process.

## Public Service Appeal Board

### Membership of the Public Service Appeal Board

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The following persons have been members of the Public Service Appeal Board during the year.

Mr K Chinnery	Mr K Trent	Mr M Madden
Mr B Dodds	Ms M McHugh	Ms D Baker
Mr D Solosy	Ms D van Hamersveld	Ms B Conway
Mr S Jenkins	Mr J Wrightson	Mr A Mayor
Mr G Brown	Mr J Travers	Ms N Ireland
Mr M Celenza	Ms B Kasten	Mr S Seeds

### Constituting the Public Service Appeal Board

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A new Public Service Appeal Board (“Board”) must be constituted on each occasion that an appeal is made. The chairman is a member of the Commission however the two Board members have to be nominated on each occasion by the employer and the union. Delays in constituting the Board continue to occur as previously reported, in some cases the nominating parties have taken a number of weeks to nominate a suitable person and notify the Commission.

This year there have been a number of complicating factors. In one case the Board had been formed and the hearing of the appeal scheduled. A member of the Board did not attend and was unable to be contacted resulting in the hearing being unable to commence until the nominating party was able to find a replacement, which they did with speed.

On another occasion, a member of the Board became unwell and stood down. The nominating party was unable to provide a replacement for some weeks.

If these circumstances arose in respect of members of the Commission becoming unavailable at short notice, matters would be able to be reallocated and very little, if any, inconvenience would result.

## **7. Award Review Process**

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The Public Service Arbitrator continued to review public sector awards pursuant to s 40B of the Act to ensure that they reflect current statutory requirements, are up to date and promote efficiency.

The Commission discontinued the reviews of 12 private sector awards as these awards were cancelled on the Commission's own motion under s 47 of the Act in May and June 2010 on the ground that there was no employee to whom the award applied.

Following the delivery of the 2011 State Wage General Order, the new pay rates, where applicable, were available to the public and published on the Commission's website two weeks prior to the effective date of the pay increases on 1 July 2011.

The speed and accuracy of the publication of the pay rates continues to be invaluable to employers and employees to minimise underpayments which also assist in the prevention of industrial disputes. This standard is only able to be maintained while there are officers with detailed knowledge and expertise working closely with efficient information technology staff.

## 8. Right of Entry Permits Issued

Organisation	2007/08	2008/09	2009/10	2010/11
Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees, The			1	1
Australian Institute of Marine and Power Engineers, Western Australian Union of Workers				1
Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch	6	2	0	16
Australian Nursing Federation, Industrial Union of Workers Perth, The			19	4
Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch, The	6	0	0	0
Australian Workers' Union, West Australian Branch, Industrial Union of Workers, The	1	3	4	4
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch, The	6	1	6	5
Civil Service Association of Western Australia Incorporated, The	20	14	35	16
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	1	0	3	0
Construction, Forestry, Mining and Energy Union of Workers, The	7	6	7	5
Food Preservers' Union of Western Australia, Union of Workers, The	1	0	0	0
Forest Products, Furnishing & Allied Industries Industrial Union of Workers, WA, The	1	0	0	1
Health Services Union of Western Australia (Union of Workers)	3	0	0	0
Independent Education Union of Western Australia, Union of Employees, The	3	1	2	1
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	13	38	31	60
Media, Entertainment and Arts Alliance of Western Australia (Union of Employees)	4	0	0	0
Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, The	1	0	0	0
Shop, Distributive and Allied Employees' Association of Western Australia, The	5	6	3	5
State School Teachers' Union of W.A. (Incorporated), The	3	4	7	5
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	1	2	1	4
United Firefighters Union of Australia, West Australian Branch	1	1	0	0
Western Australian Branch of the Australian Medical Association, The	0	0	2	0
Western Australian Prison Officers' Union of Workers	19	9	0	0
Western Australian Railway Officers' Union	2	2	0	0
<b>TOTAL</b>	<b>98</b>	<b>89</b>	121	<b>128</b>

Number of permits that have been issued since 8 July 2002 (gross total)..... 1147

Number of permits issued during the 2010/11 financial year ..... 128

Number of people who presently hold a permit..... 348

Number of permits that are current ..... 371

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 Act.

- ❖ 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 of the Act.

	2007-2008	2008-2009	2009-2010	2010-2011
Unfair Dismissal	127	184	193	127
Denial of Contractual Benefits	64	64	86	81
<b>TOTAL</b>	<b>191</b>	<b>248</b>	<b>279</b>	<b>208</b>

### Section 29 Applications Finalised

	2007-2008	2008-2009	2009-2010	2010-2011
Unfair Dismissal	123	163	176	135
Denial of Contractual Benefits	86	72	53	80
Both in same application	1	2	4	0
<b>TOTAL</b>	<b>210</b>	<b>257</b>	<b>233</b>	<b>215</b>

### Section 29 Applications Lodged Compared with All Matters<sup>1</sup> Lodged

Section 29 applications represent 27.3% of all the matters lodged in the Commission.

	2007-2008	2008-2009	2009-2010	2010-2011
All Matters Lodged	849	839	1056	762
Section 29 Applications Lodged	191	248	279	208
<b>Section 29 as (%) of All Matters Lodged</b>	<b>22.5%</b>	<b>29.5%</b>	<b>26.4%</b>	<b>27.3%</b>

<sup>1</sup> 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

	2007-2008	2008-2009	2009-2010	2010-2011
All Matters Finalised	593	804	836	869
Section 29 Applications Finalised	210	237	233	215
<b>Section 29 as Percentage (%) of All Matters Finalised</b>	<b>35%</b>	<b>29.5%</b>	<b>27.9%</b>	<b>24.7%</b>

## Section 29 Matters – Method of Settlement

The following table shows that 87% of s 29 matters were settled without recourse to formal arbitration.

	Unfair Dismissal	Contractual Benefits	Both	Total	%
Arbitrated claims in which order issued	21	7	0	28	13
Settled after proceedings before the Commission	70	53	0	123	57.2
Matters referred for investigation resulting in settlement	1	1	0	2	0.9
Matters discontinued/dismissed before proceedings commenced in the Commission	28	13	0	41	19.1
Matters withdrawn/discontinued in Registry	15	6	0	21	9.8
<b>Total Finalised in 2010 - 2011 Reporting Year</b>	<b>135</b>	<b>80</b>	<b>0</b>	<b>215</b>	<b>100</b>

## 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	3	23	2	<b>28</b>	3.4	20.5	25	<b>13.5</b>
Legal Representation	11	10	1	<b>22</b>	12.5	8.9	12.5	<b>10.6</b>
Personal	69	67	0	<b>136</b>	78.4	59.8	0	<b>65.4</b>
Other	3	10	0	<b>13</b>	3.4	8.9	0	<b>6.2</b>
No Data Provided	2	2	5	<b>9</b>	2.3	1.8	62.5	<b>4.3</b>
<b>TOTAL</b>	<b>88</b>	<b>112</b>	<b>8</b>	<b>208</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

## 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	1	1	0	<b>2</b>	1.1	0.9	0	1
17 to 20	5	6	0	<b>11</b>	5.7	5.4	0	5.3
21 to 25	3	13	0	<b>16</b>	3.4	11.6	0	7.7
26 to 40	23	24	0	<b>47</b>	26.1	21.4	0	22.6
41 to 50	33	24	0	<b>57</b>	37.5	21.4	0	27.4
51 to 60	11	25	0	<b>36</b>	12.5	22.3	0	17.3
Over 60	7	8	0	<b>15</b>	8	7.1	0	7.2
No Data Provided	5	11	8	<b>24</b>	5.7	9.8	100	11.5
<b>TOTAL</b>	<b>88</b>	<b>112</b>	<b>8</b>	<b>208</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

### Employment Period

Period of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Under 3 months	11	17	0	<b>28</b>	12.5	15.2	0	<b>13.5</b>
4 to 6 months	16	14	0	<b>30</b>	18.2	12.5	0	<b>14.4</b>
7 to 12 months	11	22	1	<b>33</b>	12.5	19.6	2	<b>15.9</b>
1 to 2 years	12	19	0	<b>31</b>	13.6	17	0	<b>14.9</b>
2 to 4 years	18	14	0	<b>32</b>	20.5	12.5	0	<b>15.4</b>
4 to 6 years	7	3	2	<b>12</b>	8	2.7	25	<b>5.8</b>
Over 6 years	8	11	0	<b>19</b>	9.1	9.8	0	<b>9.1</b>
No Data Provided	5	12	6	<b>23</b>	5.7	10.7	75	<b>11.1</b>
<b>TOTAL</b>	<b>88</b>	<b>112</b>	<b>8</b>	<b>208</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

### Salary Range

	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under \$200 P/W	10	5	0	<b>15</b>	11.5	4.5	0	<b>7.2</b>
\$201 to \$600 P/W	10	31	1	<b>42</b>	11.5	27.7	12.5	<b>20.3</b>
\$601 to \$1000 P/W	19	41	2	<b>62</b>	21.8	36.6	25	<b>30</b>
\$1001 to \$1500 P/W	24	24	0	<b>48</b>	27.6	21.4	0	<b>23.2</b>
\$1501 to \$2000 P/W	9	6	1	<b>16</b>	10.3	5.4	12.5	<b>7.7</b>
Over \$2001 P/W	15	5	0	<b>20</b>	17.2	4.5	0	<b>9.7</b>
No Data Provided	0	0	4	<b>4</b>	0	0	50	<b>1.9</b>
<b>TOTAL</b>	<b>87</b>	<b>112</b>	<b>8</b>	<b>207</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

### Category of Employment

Over half 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	6	0	10	4.5	5.4	0	4.8
Casual F/Time	2	1	0	3	2.3	0.9	0	1.4
Casual P/Time	2	4	0	6	2.3	3.6	0	2.9
Fixed Term	5	5	0	10	5.7	4.5	0	4.8
Full Time	15	13	1	29	17	11.6	12.5	13.9
Permanent	8	6	0	14	9.1	5.4	0	6.7
Permanent F/Time	44	29	2	75	50	25.9	25	36.1
Permanent P/Time	4	37	1	42	4.5	33	12.5	20.2
Probation	0	3	0	3	0	2.7	0	1.4
Part Time	0	7	0	7	0	6.2	0	3.4
No Data Provided	4	1	4	9	4.5	0.9	50	4.3
<b>TOTAL</b>	<b>88</b>	<b>112</b>	<b>8</b>	<b>208</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

### Reinstatement Sought

This table shows whether applicants sought reinstatement as presented by gender. Consistent with the past four years, over half of the respondents did not seek reinstatement.

Reinstatement Sought	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Yes	16	22	2	40	18.2	19.6	25	19.2
No	48	69	0	117	54.5	61.6	0	56.2
No Data Provided	24	21	6	51	27.3	18.8	75	24.5
<b>TOTAL</b>	<b>88</b>	<b>112</b>	<b>8</b>	<b>208</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

### 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	1	1	<b>2</b>	0	0.9	2	<b>1</b>
17 to 20	1	10	0	<b>11</b>	2.5	8.5	0	<b>5.3</b>
21 to 25	1	14	1	<b>16</b>	2.5	12	2	<b>7.7</b>
26 to 40	8	26	13	<b>47</b>	20	22.2	25.5	<b>22.6</b>
41 to 50	10	40	7	<b>57</b>	25	34.7	13.7	<b>27.4</b>
51 to 60	11	18	7	<b>36</b>	27.5	15.4	13.7	<b>17.3</b>
Over 60	5	6	4	<b>15</b>	12.5	5.1	7.8	<b>7.2</b>
No Data Provided	4	2	18	<b>24</b>	10	1.7	35.3	<b>11.5</b>
<b>TOTAL</b>	<b>40</b>	<b>115</b>	<b>51</b>	<b>208</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

## 10. Employer-Employee Agreements (EEAs)

Employer Employee Agreements (“EEAs”) 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. Agreements that meet these checks are registered by the Registrar.

### INDUSTRIAL RELATIONS ACT 1979 PART VID

#### Applications to Lodge EEAs for Registration

Number of EEAs Lodged	2007-2008	2008-2009	2009-10	2010-11
Meeting Lodgement Requirements	54	9	6	2
Not Meeting Lodgement Requirements	2	0	0	0
<b>Total</b>	<b>56</b>	<b>9</b>	<b>6</b>	<b>2</b>

#### EEAs Lodged for Registration and Finalised

Outcome	2007-2008	%	2008-2009	%	2009-10	%	2010-11	%
Refused	6	16%	2	17%	1	20%	0	0%
Registered	29	78%	10	83%	4	80%	1	50%
Withdrawn	2	6%	0	0%	0	0%	1	50%
<b>Total</b>	<b>37</b>	<b>100</b>	<b>12</b>	<b>100</b>	<b>5</b>	<b>100</b>	<b>2</b>	<b>100</b>

#### Guidelines and Principles for No Disadvantage Test

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

### Demographic Data for Registered EEAs

Registered EEAs by Gender	2007-08	%	2008-09	%	2009-10	%	2010-11	%
Female	14	48%	6	60%	3	75%	1	100%
Male	15	52%	4	40%	1	25%	0	0%
<b>Total</b>	<b>29</b>	<b>100</b>	<b>10</b>	<b>100</b>	<b>4</b>	<b>100</b>	<b>1</b>	<b>100</b>

Registered EEAs by Age	2007-08	%	2008-09	%	2009-10	%	2010-11	%
Employees 18 years of age or over	29	100%	10	100%	4	100%	1	100%
Employees under 18 years of age	0	0	0	0%	0	0%	0	0%
<b>Total</b>	<b>29</b>	<b>100</b>	<b>10</b>	<b>100</b>	<b>4</b>	<b>100</b>	<b>1</b>	<b>100</b>

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

	2007-08	% of Total Registered EEAs	2008-09	% of Total Registered EEAs	2009-10	% of Total Registered EEAs	2010-11	% of Total Registered EEAs
Number of Registered EEAs where the employee had a disability	0	0%	2	20%	0	0%	0	0%

### EEAs Registered by Term of Agreement

Term of EEA	2007-08	%	2008-09	%	2009-10	%	2010-11	%
<1 year	13	45%	3	30	0	0	0	0
1 to 2 years	2	7%	2	20	1	25	0	0
2 to 3 years	14	48%	5	50	3	75	1	100
<b>Total</b>	<b>29</b>	<b>100</b>	<b>10</b>	<b>100</b>	<b>4</b>	<b>100</b>	<b>1</b>	<b>100</b>

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

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These are appeals pursuant to s 33P of the *Police Act 1892* and are filed by police officers who have been removed from the WA Police under s 8 of that Act. They are heard by three Commissioners, one of whom must be either the Chief or the Senior Commissioner.

During the reporting period, no such appeals were filed, however, the Commission continued to deal with five appeals that had been filed in previous reporting periods.

Two of these five appeals were discontinued in this reporting period, one being discontinued after three conciliation conferences. The third appeal, after a hearing, was struck out as incompetent as the police officer had not been the subject of removal action, but rather had resigned.

The fourth appeal was heard during this period and it was dismissed. The appellant filed an appeal in the Industrial Appeal Court and that appeal was also heard during this reporting period. The decision of that court to dismiss the appeal was delivered outside this reporting period.

In the fifth appeal, the Commission dismissed the appellant's application to tender new evidence and then heard the appeal. The decision to dismiss the appeal was delivered outside the reporting period.

Further, two appeals that had been filed in the Industrial Appeal Court and heard in the last reporting period, had decisions issue in this reporting period. Both appeals were dismissed.

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

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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 an "industrial matter" under the Act.

During the reporting period, 16 requests for mediation were lodged. Of these, two were discontinued, two were closed and seven are pending.

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

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During the course of 1 July 2010 to 30 June 2011 there were 35 applications to the Road Freight Transport Industry Tribunal under the *Owner-Drivers (Contracts and Disputes) Act 2007* ("the OD Act"). The nature of the applications made to the Tribunal have included in the main, disputes in relation to payment claims, industrial action by owner-drivers, and disputes in relation to the negotiation and re-negotiation of owner-driver contracts.

Some more notable matters to come before the Tribunal are as follows.

#### Application RFT 38 of 2010 - (2011) 91 WAIG 426

These proceedings involved a claim by the applicant for damages arising from an alleged unlawful termination of an owner-driver contract. The respondent is a company based in Victoria but with operations in Western Australia.

The relevant owner-driver contract contained a clause to the effect that the contract was governed by the laws of Victoria and the parties agreed to the exclusive jurisdiction of the courts and tribunals of that State. Counsel for the respondent therefore contended that the dispute properly should be litigated in the Victorian jurisdiction and not before the Tribunal. The applicant argued that the Tribunal had jurisdiction under the OD Act, notwithstanding the terms of the relevant provisions of the owner-driver contract.

In applying the relevant principles of private international law, and exclusive choice of jurisdiction clauses in contracts, the Tribunal held that the parties, as a part of their bargain, having agreed upon the Victorian jurisdiction for the purposes of dispute resolution, should be held to their bargain. This was so, notwithstanding the Tribunal's conclusion that it had jurisdiction under the OD Act to hear and determine the matter. The Tribunal declined to hear the application as a matter of discretion.

Although an appeal to the Full Bench of the Commission was instituted, the appeal was discontinued.

#### Application RFT 2 of 2011 - (2011) 91 WAIG 1154

These proceedings relate to an application by the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch in relation to a dispute concerning joint negotiations for owner-driver agreements. The parties were in dispute in relation to the appropriate rates of pay to apply to owner-driver contractors engaged by the respondent in its operations in Western Australia. The union was appointed as negotiating agent for the owner drivers under Part 5 of the OD Act.

The dispute raised for the first time the application of the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*. These Regulations incorporate, as Schedule 1, the Owner-Driver Contracts Code of Conduct 2010 including, at Division 3, Guideline Rates of Payment. The Guideline Rates of Payment are established by the Road Freight Transport Industry Council and are produced for the purposes of guidance to owner-drivers and hirers when negotiating owner-driver contracts. Additionally, under Division 3 of Schedule 1 of these Regulations, the guideline rates can provide guidance to the Tribunal when determining whether payments have been made at a safe and sustainable rate.



The dispute was the subject of a number of compulsory conciliation conferences under s 44 of the OD Act. Despite conciliation, no agreement could be reached between the parties.

By reason of s 47(2) the Tribunal does not have jurisdiction to refer for hearing and determination matters arising in relation to the conduct of joint negotiations for an owner-driver contract. Having conciliated the matter, the Tribunal was therefore unable to further assist the parties to resolve the dispute.

Whilst it would seem to be appropriate that matters of this kind referred to the Tribunal be, at least in the first instance, the subject of compulsory conciliation conferences before the Tribunal, the existence of s 47(2) of the OD Act would appear to create an impediment to the Tribunal further determining such disputes if they cannot be resolved through formal conciliation proceedings. I draw to your attention whether it is appropriate to maintain this exclusion to the Tribunal's jurisdiction.

### Application RFT 3 of 2011

This matter involved the referral by the applicant of a dispute to the Tribunal in relation to proposed industrial action being undertaken by owner-driver contractors of the applicant. The applicant alleged that the conduct of the owner-drivers concerned was unconscionable conduct for the purposes of Part 6 of the OD Act.

As a consequence of compulsory conciliation proceedings before the Tribunal under s 44 of the OD Act, orders were made under s 44(3) of the OD Act preventing the owner-drivers concerned from engaging in, or continuing any form of, industrial action involving refraining from offering their services in accordance with the relevant owner-driver contract.

Subsequently the parties resolved the issues between them on an interim basis.

### Application RFT 4 of 2011

This matter involved a dispute between owner-drivers engaged by the respondent in Western Australia. The initial dispute involved allegations that the respondent was declining to provide work to owner-drivers in accordance with their owner-driver contracts. Various matters were in dispute concerning the terms and conditions of the owner-driver contracts.

Urgent compulsory conciliation proceedings before the Tribunal, and Recommendations made by the Tribunal, allowed the parties to the owner-driver contracts to resolve the issues in an orderly way without resort to industrial action.

## 14. Occupational Safety and Health Tribunal

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During the year, three applications were filed before the Occupational Safety and Health Tribunal pursuant to the *Occupational Safety and Health Act 1984* ("OSH Act"). These resulted in conciliation and subsequently the applications were closed.

At the beginning of the year 139 applications were awaiting conclusion between the parties involved. Of those applications, 105 orders were issued dismissing applications and 19 orders were issued discontinuing applications. Fifteen applications are awaiting notices of discontinuance to be filed.

A difficulty in the practical operation of s 28 of the OSH Act was drawn to the attention of the Tribunal. A dispute on a construction site was referred to the Tribunal under s 28 and was successfully settled by conciliation. The Tribunal was advised that the fact that applications under s 28 must be made by individual employees, rather than by an organisation, meant that the agents involved were obliged throughout the process to locate each individual applicant to advise them of the process and to seek instructions in order for a settlement to be able to be agreed. This proved difficult given that the process extended beyond the completion of the site in question and employees had left the site.

## 15. Other Matters

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### Health

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The following disputes were the subject of conciliation conferences before the Commission:

- the use of casual and fixed term contract employees at several public hospitals;
- a Department of Health review of nurses' workloads;
- a replacement agreement for support workers sought by the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch. After the Commission issued recommendations, the parties agreed to an order containing new wage rates issuing by consent in settlement of this dispute;
- the terms of a new agreement for disability support workers. After conciliation conferences were held in the Commission an order containing new wage rates issued by consent in settlement of this dispute;
- staff providing relief coverage in the sterile services department of the King Edward Memorial Hospital;
- negotiations for a new agreement for enrolled nurses, nursing assistants and Aboriginal and ethnic health workers;
- the introduction of new business rules for mental health nurses; and
- privatisation of some hospital services.

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## Local Government and Social and Community Services

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At the time of the Commonwealth government's "Work Choices" legislation in 2006 which overrode the coverage of the State's industrial relations system with respect to constitutional corporations, the conditions of employment of employees in the local government and social and community sectors were largely prescribed by awards and agreements of the Australian Industrial Relations Commission. An unknown, but significant, number of employers in those industry sectors are not constitutional corporations and the Commonwealth's amendments provided a five-year transitional period at the end of which, in March 2011, those employers in WA would commence to be covered by the State industrial relations system.

In December 2010 a number of applications for new awards to cover these industry sectors was made to the Commission in anticipation of the expiry of the transitional period. Those applications resulted in the Commission making five new awards to cover employers which are not trading corporations and their employees in:

- local government;
- social and community services;
- crisis assistance and supported housing;
- Aboriginal communities and organisations.

The issue, of course, is that many of those employers do not know whether they are, or are not, a trading corporation and thus whether they should be observing a State award or an existing national modernised award. This uncertainty is only able to be resolved on a case-by-case basis (for example *Shire of Ravensthorpe v. John Patrick Galea* (2009) 89 WAIG 2283 in relation to local government and *Aboriginal Legal Service of Western Australia Incorporated v. Mark James Lawrence* (No 2) (2008) 89 WAIG 243 in relation to social and community services).

In the case of these five new awards, the parties respectively agreed that the area and scope provisions of the awards should provide for common-rule of coverage of all employers in those respective industry sectors unless the employer is a constitutional corporation. This eminently sensible provision permitted the five new awards to issue without the Commission being asked to deal in advance with whether each employer to be covered by it is, or is not, a trading corporation.

The awards operated from the expiry of the transitional period. It is significant that this number of new awards has issued in a short period of time. What is possibly of greater significance is that they issued with the consent of all parties and without any industrial disruption. I see this as a demonstration that the Act, and within it the Commission, is operating efficiently. I refer subsequently for your consideration to possible further efficiencies which are desirable and which will require legislative change.

## Fire and Emergency Services

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The Commission has continued to assist the United Firefighters Union of Australia West Australian Branch and the Fire and Emergency Services Authority (FESA) to resolve a number of disputes and issues including the following:

- FESA's move to a new station at Wellington Street, Perth. Issues dealt with have included:
  - traffic management problems;
  - showers in the tunic room;
  - the layout and functioning of dormitories;
  - locker room doors; and
  - engine room procedures.
- a proposed restructure of FESA's south west regional office.
- the classification of instructors who train FESA's new recruits and existing employees.

## 16. Decisions of Interest

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### Jurisdiction – Contractual Entitlement Claims Against National System Employer (2011) 91 WAIG 67

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With the changes to the Commission's jurisdiction as a consequence of *Fair Work Act 2009 (Cth)* ("the FW Act") an issue has arisen whether the Commission retained jurisdiction to deal with claims for denied contractual benefits made by employees of national system employers. In this matter, the Commission determined that such claims are claims for enforcement of contracts of employment, and fall within those matters which are not excluded from the State's industrial laws by ss 26 and 27 of the FW Act. Therefore, although the Commission is unable to entertain claims of unfair dismissal made by employees of national system employers, it remains able to deal with claims by those employees that they have not been allowed a benefit to which they are entitled under their contract of employment.

### Western Australian Railway Officers' Union and Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch (2010) 90 WAIG 596

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The Full Bench made orders to amalgamate two employee organisations registered under the Act. The two organisations had for many years acted on a 'de facto' basis as one organisation. After being satisfied the provisions of the existing rules of the two organisations had been complied with and the rules of the proposed new organisation complied with the provisions of the Act, the Full Bench authorised the Registrar to register a new organisation known as the Western Australian Municipal, Administrative, Clerical and Services Union of Employees.

It is important for organisations which operate together as one organisation to ensure their formal structure under the Act does reflect that practice. This is a good example of two organisations doing so.

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### The Construction Forestry Mining and Energy Union of Workers (2011) 91 WAIG 1034

An application by The Construction, Forestry, Mining and Energy Union of Workers for a declaration relating to qualifications of persons for membership of a State Branch of a federal organisation and offices that exist within the Branch, was dismissed by the Full Bench. This application was made pursuant to s 71 of the Act which (following the completion of a number of steps) enables the offices in a State organisation to be held by persons who hold a corresponding office in the State organisation's counterpart federal body, without requiring an election to be held in the State organisation. However the application in this matter was unsuccessful. The Full Bench examined the function and powers of the offices of the State organisation and the offices in its counterpart federal body and formed the view that for each office in the State organisation there was not a corresponding office in the Western Australian Branch of the counterpart federal body.

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### Procedural Issues for the Conduct of a Fair Hearing Clarified (2011) 91 WAIG 129

In this matter the Full Bench considered and reviewed a number of procedural principles that apply to the conduct of a fair hearing of matters before the Commission. The first issue raised in this appeal was the procuring of evidence by a summons to witness and the setting aside of summonses. The Full Bench found that a wish to see documents if they assist a party's case was not a sufficient request for documents. The members of the Full Bench also found the imposition of time limits on the examination and cross-examination of witnesses in the matter before the Commission at first instance did not infringe the requirements of procedural fairness. After considering the general principles that should apply to all matters heard in the Commission, the Full Bench held the requirements of procedural fairness and the provision of a fair hearing established the following statutory case management regime:

- (a) Matters should be dealt with in a way that eliminates delay with a minimum of legal form and technicality but allows for a proper and just consideration of matters;
- (b) When managing a matter the Commission should have regard not only to the interests of each party but to interests of the public in the efficient use of resources of the Commission;
- (c) There should be a fair and reasonable opportunity to both parties to each present their case. A determination of what is fair and reasonable in the circumstances of a matter should have regard to the matters raised in (a) and (b) above and:
  - (i) The parameters of relevant matters set by the particulars given by each party in the application, notice of answer and any other particulars.
  - (ii) What is reasonably required for the efficient presentation by each party of their case.
  - (iii) The principle that each party should not be left in any doubt about what is alleged against them and the opposing case they are required to meet.

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### Whether an Order is an "Interim Order" (2011) 91 WAIG 166

The Full Bench upheld an appeal against an interim order made under s 44 of the Act requiring the continuation of the employment of a teacher for the purposes of the disposition of disciplinary proceedings under Part 5 of the *Public Sector Management Act 1994* ("the PSM Act") and any appeal pursuant to s 78 of the PSM Act.

One member of the Bench found that in making the order the Commission had failed to apply the pre-conditions for the exercise of power under s 44(6)(ba) of the Act. She also found the order was not an interim order as the terms of the order had the effect of finally determining a number of issues in dispute, thus rendering those issues incapable of arbitration. She observed that, when making an order under s 44(6)(ba) of the Act, it is not always necessary or appropriate to set the issues in dispute down for hearing and determination; an interim order contemplated by s 44(6)(ba)(i) or s 44(6)(ba)(ii) may be an appropriate means to prevent the deterioration of industrial matters until conciliation or arbitration has resolved the matter or matters, or to enable conciliation or arbitration to resolve the matter or matters, or be a means to encourage the parties to exchange or divulge attitudes or information which would in the opinion of the Commission assist the resolution of the matter or matters in question within the meaning of s 44(6)(ba)(iii). A second member also agreed that the effect of the order was that it was a final order.

The third member found separate reasons. He took a different view of the factual circumstances and found that the interim order was not a final order which finally determined the dispute between the parties about the employee's future employment. He did however find that one issue was rendered hypothetical. He also found that the order was not made for the purposes of three heads of power in s 44(6)(ba), namely:

- (a) to prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter;
- (b) to enable conciliation or arbitration to resolve the matter in question; or
- (c) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter in question.

For these reasons the Full Bench upheld the appeal and made an order to quash the interim order.

### **Western Australian Principals' Federation v. State School Teachers' Union of Western Australia (Inc) (2011) 91 WAIG 885**

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In 2009 the Western Australian Principals' Federation ("the Federation") made a second application under s 53(1) of the Act to register as a new organisation. An application made by the Federation in 2007 had been dismissed in 2008: (2008) 88 WAIG 1812. One material finding when the first application was heard by a Full Bench in 2008 was that the Federation could not establish on the balance of probability that the inaugural council and the officers of the Federation had been validly appointed.

Following the dismissal of the first application, the Federation took steps to attempt to regularise its constitution, to adopt a new set of rules and take steps to authorise an application to register the Federation as an organisation. The Full Bench, when hearing the second application in 2011, found that the Federation still had not made appointments that were effective in law of a president, council or other officers of the Federation. In particular, it found as there was no president, an annual general meeting of the Federation could not be convened and no valid business could be transacted to make a new constitution or new rules. Consequently, the Full Bench found there was no valid application before the Commission and made an order dismissing the application.

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### Liquor, Hospitality and Miscellaneous Union Western Australian Branch v. The Director General, Department of Education and Training (Application C 35 of 2010)

This matter concerns an application by the union challenging the status of fixed-term contracts for education assistants employed by the respondent throughout the State school system. The application potentially affected hundreds of education assistants employed on this basis.

Several compulsory conference proceedings were convened under s 44 of the Act. A process was put in place by the Commission requiring the parties to review systematically the engagement of fixed term contract employees throughout State government schools and this is continuing.

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### The Civil Service Association of Western Australia Incorporated v. Commissioner, Department of Corrective Services (2010) 91 WAIG 83

This matter involved a referral under s 44(9) of the Act of a dispute concerning a claim for a personal reclassification of senior officers of the respondent. At issue in the proceedings was the status of the respondent's policies and procedures regarding personal reclassifications, and importantly, whether they were consistent with the terms of the "Approved Procedure 1 – Approved Classification System and Procedures" as determined under the PSM Act.

The Arbitrator in its decision held that the respondent's policies were inconsistent with Approved Procedure 1 and were required to be read down consistent with the provisions of the PSM Act. That is, the Arbitrator held that it was not permissible for the respondent's policies to impose conditions on applicants for personal reclassifications that were inconsistent with Approved Procedure 1, given that the approved procedure was made under and had the force of the PSM Act.

Accordingly in this case, the officer concerned was held to be entitled to a personal reclassification.

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### The Civil Service Association of Western Australia Incorporated and Others (Application PSAAG 7 of 2011)

This application sought the registration of a new industrial agreement under s 41 of the Act for public servants and government officers. A number of related applications for industrial agreements and award variations to public sector awards were consequentially made reflecting agreement reached in enterprise bargaining negotiations across the public sector.

The Arbitrator listed all of the applications, largely conjointly, at short notice and made orders on 27 June 2011 registering the industrial agreements and making award variations in settlement of the enterprise negotiations across the state government sector.

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### Western Australian Prison Officers' Union of Workers v. The Minister for Corrective Services (Application C 24 of 2010)

This matter involved a dispute between the parties concerning staffing levels at the Woorloo Prison Farm in relation to an increase in the prison muster from 250 to 360 prisoners. The respondent employer proposed an increase of 44 full time equivalent staff members to cater for the

increase in prison muster with positions being allocated across administration, accommodation units, security, prosecutions, Vocational Support Officers ("VSO"(s)) and others.

The parties were in dispute as to the maintenance of an existing peak muster prison officer unit staffing level pending the recruitment of additional VSO positions and the establishment of new industries for the increase in muster.

As a result of compulsory conferences under s 44 of the Act, it was agreed, following recommendations from the Commission, that a trial period be implemented of new staffing arrangements at the Wooroloo Prison Farm for a period of six months or any further period as agreed between the parties.



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## 17. Conclusion

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There were no significant changes to the Act during this reporting period. Comprehensive data to accurately identify full coverage of the Act following the Commonwealth legislation remains unavailable. The Australian Bureau of Statistics Survey of Employee Earnings and Hours, May 2010 provides evidence to suggest that unincorporated businesses employ approximately 23.8%, and that the State government employs approximately 12.4%, of WA's workforce as measured by Type of Legal Organisation of the employer. Together, this suggests that the Act could regulate as many as 36.2% of WA employees plus an indeterminate number of WA employees whose employer is an incorporated body but which is not a constitutional corporation. The Act generally continues to operate efficiently for those employers and employees although there is, in my respectful view, need for legislative change to recognise the effect of the overriding coverage of the Commonwealth *Fair Work Act, 2009*.

In particular, sections 37 and 40B, which give power to the Commission to cancel an award which no longer applies, or to amend an award to ensure that the award does not contain provisions that are obsolete or need updating, do not permit the Commission on its own motion to readily cancel awards or industrial agreements or amend common rule awards to remove their purported application to employers which are constitutional corporations. The use of those sections of the Act will necessarily require the Registrar to contact the parties to each instrument and to make a report to the Commission, and the downsizing of the Registry staff following the Commonwealth legislation renders this impracticable. The process also has a number of inherently burdensome administrative processes. Although the parties to those awards or industrial agreements are able to make the necessary applications to achieve these objectives, the experience of the last five years shows that there is no inclination for parties to do so. I recommend that specific attention be given to prescribing in the Act a power for the Commission on its own motion to create a "modern" award to replace an existing State award or awards. This should apply to both the public and private sector awards to ensure a consistent award structure for the WA industrial relations system. In addition the Commission also should be given the power on its own motion to cancel an existing industrial agreement where it no longer has application, by giving public notice of an intention to do so and without the need for further administrative processes.

I have referred in a previous Annual Report to the problems for parties which have arisen due to the requirement of s 29A to publish a proposed new area and scope provision where it constitutes a change to the area and scope provision of an existing industrial agreement. Publication is still required even where the change in the area and scope of the agreement to be registered in substitution for an existing agreement is not substantive; this causes a delay in the Commission registering the agreement. I recommend that consideration be given to providing a discretion to the Chief Commissioner to direct that publication need not occur at all if it is not necessary.


During the course of the year, it became necessary to put in motion the procedure under s 80N of the Act for constituting the Railways Classification Board. This is a Board established within and as part of the Commission to enquire into and deal with any industrial matter relating to a railway officer, a group of railway officers or railway officers generally. The last application to the Board was made in 1998. In the absence of any applications since then, there has not been any requirement to constitute the Board and there have not been any appointments made to it in recent times. The procedure to constitute the Board has proved to be slow. In my view, consideration should be given to whether or not such a Board is the most efficient means of dealing with industrial matters relating to railway officers given the general jurisdiction, and availability, of the Commission itself to deal with such matters.

As noted in last year's Annual Report, and at page 6 of this Report, the position of Acting President was held by his Honour Justice Rene Le Miere for the purpose of dealing with one appeal due to the unavailability of her Honour Acting President Smith. The hearing of the appeal commenced during the time of last year's Annual Report and concluded during the time of this Report.

I record my sincere appreciation to the Registrar John Spurling who, in his dual capacity as CEO of the Department of the Registrar, provides excellent support to the Commission while necessarily reducing the size of the Registry as a consequence of the changed coverage of the Act. It is illustrative to record that both the Commission and the Department of the Registrar have taken positive steps to reduce costs where possible. Sound and efficient management, and the reduced number of members of the Commission, has seen the number of funded FTE positions in 2005, prior to the Commonwealth "Work Choices" legislation in 2006, reduced by one third from 80.3 to 52.

		2005	2011
Funded FTE	Department	53.3	34.27
	Commission	27	17.6
		<u>80.3</u>	<u>51.87</u>

The salary cost of the 80 positions in 2005 was \$5.9m; if there had not been this reduction in FTEs, the salary cost of those 80 positions in 2011 dollars would be \$7.5m. The actual cost of the present 52 FTEs in 2011 dollars is \$5.2m. The steps taken by both the Commission and the Department since 2006 to reduce salary costs, and the reduced number of members of the Commission, has saved \$2.3m, although operating costs, particularly rent, have necessarily increased since 2005.

 (Sgd.) A.R. BEECH

A.R. Beech  
Chief Commissioner  
30 August 2011