WESTERN AUSTRALIA

# FORTIETH ANNUAL REPORT

# OF

# THE CHIEF COMMISSIONER

# OF THE

# WESTERN AUSTRALIAN

# INDUSTRIAL RELATIONS COMMISSION

FOR THE PERIOD

1 JULY 2002 TO 30 JUNE 2003

PURSUANT TO SECTION 16, SUBSECTION (2)(b) OF

THE INDUSTRIAL RELATIONS ACT, 1979

2003

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 2002 to 30 June 2003

Minister Responsible For the Administration of the Act

The Hon. J Kobelke MLA

in his capacity as Minister for Consumer and Employment Protection

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# MEMBERSHIP OF TRIBUNALS AND PRINCIPAL OFFICERS

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

During the year to 30th June 2003, the Commission was constituted by the following members:

| | |
|---|---|
| **President** | The Honourable P J Sharkey |
| **Chief Commissioner** | W S Coleman |
| **Senior Commissioner** | A R Beech |
| **Commissioners** | J F Gregor |
| | P E Scott |
| | S J Kenner |
| | J H Smith |
| | S Wood |
| | J L Harrison |

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

### Public Service Arbitrators

Commissioner P E Scott was appointed as the Public Service Arbitrator for two years from 19 June 2003.

Senior Commissioner A R Beech was appointed as an additional Public Service Arbitrator for one year from 20 June 2003.

Commissioner S J Kenner was appointed as an additional Public Service Arbitrator for one year from 20 June 2003.

Commissioner J L Harrison continued as an additional Public Service Arbitrator following the appointment for two years from 26 April 2002.

### Coal Industry Tribunal of Western Australia

Commissioner S J Kenner was appointed Chairperson on 24 December 2002 for a term expiring 31 December 2004.

### Railways Classification Board

Commissioner J H Smith continued as Chairperson of the Railways Classification Board following the appointment for two years from 11 June 2002.

Commissioner J L Harrison continued as Deputy Chairperson of the Railways Classification Board following the appointment for two years from 11 June 2002.

### Registry

During the period the Principal Officers of the Registry were: Mr J Spurling (Registrar), Ms S Bastian (Registrar Designate), Deputy Registrars Mr K McCann, Ms S Tuna, Ms D MacTiernan, Mrs J Wickham, Mr D McLane and Ms A Mullins, Director Operations Mr J Rossi and Clerk to the Industrial Magistrate Mr A Wilson.

## THE WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

The Western Australian Industrial Appeal Court was constituted of the following members from 1 July 2002 to 30 June 2003:

| | |
|---|---|
| The Honourable Justice Anderson | Presiding Judge |
| The Honourable Justice Scott | Deputy Presiding Judge |
| The Honourable Justice Parker | Ordinary Member |
| The Honourable Justice Hasluck | Ordinary Member |

Acting Ordinary Members:

| | |
|---|---|
| The Honourable Justice McKechnie | 1 - 30 September 2002 |
| The Honourable Justice Heenan | 1 - 31 October 2002 |
| The Honourable Justice McLure | 4 - 29 November 2002 |
| The Honourable Justice McLure | 1 - 30 April 2003 |
| The Honourable Justice Pullin | 3 - 30 June 2003 |

## INDUSTRIAL MAGISTRATES

During the reporting period, Industrial Magistrates Mr G Cicchini SM, Mr WG Tarr SM, Mr G Calder SM and Mr IG Brown SM exercised jurisdiction as Industrial Magistrates.

# MATTERS BEFORE THE COMMISSION

## 1. FULL BENCH MATTERS

The Full Bench has been constituted on each occasion by the President, The Honourable P J Sharkey, and by two Commissioners.

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

| | |
|---|---|
| Chief Commissioner W S Coleman | 28 |
| Senior Commissioner A R Beech | 23 |
| Commissioner J F Gregor | 16 |
| Commissioner P E Scott | 17 |
| Commissioner S J Kenner | 7 |
| Commissioner J H Smith | 3 |
| Commissioner S Wood | 21 |
| Commissioner J L Harrison | 9 |

NB. The above statistics include 2 Full Bench matters where the Full Bench was reconstituted, in order to reflect the work of all Full Bench members allocated to the matters.

The following summarises Full Bench matters:-

### APPEALS

Heard and determined from decisions of the:-

| | |
|---|---|
| Commission | 41 |
| * Includes one appeal instituted and part heard but not finalised | |
| Industrial Magistrate | 8 |
| Coal Industry Tribunal | 0 |
| Public Service Arbitrator | 3 |
| Railways Classification Board | 0 |

### ORGANISATIONS – APPLICATIONS BY OR PERTAINING TO

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

### OTHER

| | |
|---|---|
| Proceedings for enforcement pursuant to s 84A brought by the Minister, or another person or organisation | 3 |
| * NB – This statistic includes 2 matters instituted and part heard but not finalised | |
| Questions of law referred to the Full Bench | 0 |
| Matters remitted by the Industrial Appeal Court | 1 |
| Applications for extension of time to file Notice of Appeal | 1 |

### ORDERS

| | |
|---|---|
| Orders issued by the Full Bench | 66 |

## 2. PRESIDENT

Matters before the 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)** | 9 |
| **Applications for an order, declaration or direction pursuant to s 66** | 10 |

The following summarises s 66 applications:-

| | |
|---|---|
| Applications finalised in 2002/2003 | 17 |
| Directions hearings | 12 |
| Applications part-heard | 0 |
| Applications withdrawn by order | 0 |
| Applications discontinued by order | 1 |

## ORDERS

Orders issued by the President from 1 July 2002 to 30 June 2003 inclusive:-

| | |
|---|---|
| S.49(11) | 8 |
| S.66 | 32 |
| S.72A(6) | 0 |
| S.92 | 0 |
| S.97Q | 0 |
| Remitted from the Industrial Appeal Court | 0 |

## CONSULTATIONS

| | |
|---|---|
| Consultations with the Registrar pursuant to s 62 of the Act | 2 |

## 3. COMMISSION IN COURT SESSION

During the period under review the Commission in Court Session has been constituted 11 times, each time by three Commissioners and the extent to which each Commissioner has been a member of the Commission in Court Session is indicated by the following figures:

| | |
|---|---|
| Chief Commissioner W S Coleman | 5 |
| Senior Commissioner A R Beech | 6 |
| Commissioner J F Gregor | 1 |
| Commissioner P E Scott | 3 |
| Commissioner S J Kenner | 3 |
| Commissioner J H Smith | 4 |
| Commissioner S Wood | 5 |
| Commissioner J Harrison | 7 |

The matters dealt with by the Commission in Court Session were as follows:

| | |
|---|---|
| State Wage Case – s 51 | 1 |
| Review of Adult Minimum Weekly Rates of Pay | 1 |
| General Order – s 50 | 1 |
| New Award | 3 |
| New Agreement | 0 |
| Variation of an Award | 4 |
| Conference pursuant to s 44 | 2 |

## 4. FEDERAL MATTERS

| | |
|---|---|
| Federal matters dealt with by (WAIRC) Commissioners | 9 |
| State Matters Completed By A Federal (AIRC) Commissioner | 0 |

## 5. RULE VARIATIONS BY REGISTRAR

| | |
|---|---|
| Variation of Organisation Rules by the Deputy Registrar (Designate) | 4 |

## 6. BOARDS OF REFERENCE

| | |
|---|---|
| Construction Industry Portable Paid Long Service Leave Act 1985 | 1 |

## 7. INDUSTRIAL AGENTS REGISTERED BY REGISTRAR

| | |
|---|---|
| Number of Agents registered in this period | 7 |
| Total number of agents registered as corporate body | 39 |
| Total number of agents registered as individuals | 28 |
| Total number registered as at 30 June 2003 | 67 |

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

| Year | Number at 30 June |
|---|---|
| 1997 | 1661 |
| 1998 | 1899 |
| 1999 | 2071 |
| 2000 | 2166 |
| 2001 | 2316 |
| 2002 | 2359 |
| 2003 | 2499 |

# INDUSTRIAL ORGANISATIONS REGISTERED AS AT 30 JUNE 2003

| | Employee Organisations | Employer organisations |
|---|---|---|
| Number of organisations | 51 | 17 |
| Aggregate membership | 148,441 | 3346 |

# SUMMARY OF MAIN STATISTICS

## WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

| | MATTERS DEALT WITH | | | |
|---|---|---|---|---|
| | **1999-2000** | **2000-2001** | **2001-2002** | **2002-2003** |
| **Full Bench** | | | | |
| Appeals | 54 | 56 | 53 | 52 |
| Other matters | 11 | 7 | 7 | 6 |
| **President sitting alone** | | | | |
| S.66 matters (finalised) | 10 | 4 | 19 | 17 |
| S.66 Orders issued | 10 | 4 | 24 | 32 |
| S.49 (11) Matters | 15 | 12 | 8 | 9 |
| Other Matters | 2 | 1 | 0 | 0 |
| S.97Q | 0 | 0 | 0 | 0 |
| S.72(A)(6) | 0 | 2 | 0 | 0 |
| Consultations under s.62 | 6 | 5 | 8 | 2 |
| **Commission in Court Session** | | | | |
| General Orders | 2 | 2 | 2 | 1 |
| Other Matters | 17 | 15 | 15 | 1 |
| **Public Service Appeal Board** | | | | |
| Appeals To Public Service Appeal Board | 7 | 29 | 10 | 15 |
| **Commissioners sitting alone** | | | | |
| Conferences [1] | 477 | 434 | 368 | 370 |
| New Agreements | 418 | 346 | 287 | 203 |
| New Awards | 4 | 7 | 4 | 5 |
| Variation of Agreements | 0 | 19 | 0 | 0 |
| Variation of Awards | 219 | 298 | 271 | 231 |
| Other Matters [2] | 51 | 50 | 53 | 71 |
| Federal matters | 40 | 4 | 5 | 9 |
| Board Of Reference - Other Awards (Chaired by a Commissioner) | 2 | 7 | 4 | 0 |
| **Unfair Dismissal Matters Concluded** | | | | |
| Unfair Dismissal claims | 938 | 1064 | 1137 | 856 |
| Contractual Benefits | 312 | 322 | 297 | 233 |
| Unfair Dismissal & Contractual Benefits | 499 | 605 | 534 | 539 |
| **Public Service Arbitrator:** | | | | |
| Award/Agreement Variations | 28 | 33 | 20 | 32 |
| New Agreements | 73 | 37 | 44 | 56 |
| Orders Pursuant to S 80E | 11 | 21 | 28 | 30 |
| Reclassification Appeals | 137 | 18 | 19 | 85 |
| **Railways Classification Board** | | | | |
| Variation of Awards | 0 | 0 | 0 | 0 |
| Variation of Agreement | 0 | 0 | 0 | 0 |
| Appeals | 0 | 0 | 0 | 0 |
| **TOTALS** | **3316** | **3403** | **3214** | **2855** |

***Notes***

| [1] CONFERENCES | 1999-2000 | 2000-2001 | 2001-2002 | 2002-2003 |
|---|---|---|---|---|
| Conferences (S 44) | 337 | 298 | 274 | 263 |
| Conferences Referred For Arbitration | 74 | 58 | 58 | 39 |
| PSA conferences | 50 | 19 | 33 | 57 |
| PSA conferences referred | 11 | 4 | 2 | 11 |
| Conferences divided | 2 | 0 | 0 | 0 |
| Conferences referred and divided | 2 | 0 | 0 | 0 |
| PSA conference divided | 1 | 0 | 1 | 0 |
| Railways Classification Board | 0 | 0 | 0 | 0 |
| **TOTALS** | **477** | **379** | **368** | **370** |

| [2] OTHER MATTERS | 1999-2000 | 2000-2001 | 2001-2002 | 2001-2002 |
|---|---|---|---|---|
| Applications | 45 | 30 | 40 | 48 |
| Apprenticeship Appeals | 0 | 0 | 1 | 2 |
| Occupational Health Safety & Welfare | 0 | 0 | 0 | 0 |
| Public Service Applications | 0 | 0 | 5 | 12 |
| Teacher Applications | 0 | 0 | 0 | 0 |
| Workplace Agreements | 11 | 5 | 7 | 9 |
| **TOTALS** | **51** | **35** | **53** | **71** |

## THE WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

| | |
|---|---|
| Decisions issued by the Court during this period | 10 |

## INDUSTRIAL MAGISTRATE'S COURT

The following summarises the Court for the period under review.

| | |
|---|---|
| Lodged Claims 02/03 | 234 |
| Complaints Lodged 02/03 | 14 |
| Resolved | 259 |
| Resolved but lodged in another financial period | 121 |
| Pending | 155 |
| Total number of penalties 02 | 21 |
| Total value of penalties | $42 941 |
| Total number of claims/complaints resulting in disbursements | 39 |
| Total value of disbursements awarded | $44 575.02 |
| Claims/Complaints resulting in awarding wages | 32 |
| Total value of wages | $360 316.37 |
| Interest | $18 163.98 |

The matters dealt with related to alleged breaches of federal awards and agreements, state awards and agreements and the Minimum Conditions of Employment Act, together with claims pursuant to the Long Service Leave Act and enforcement of orders of the Western Australian Industrial Relations Commission.

# COMMENTARY

## 1. LEGISLATION

The Industrial Relations Act 1979 was extensively amended by the Labour Relations Reform Act 2002 which was assented to on 8 July 2002. Other than for Parts 2 and 3 this legislation came into operation on 1 August 2002. Except for Part 3 Division 3 and ss 108, 111(6) and 113, Parts 2 and 3 came into operation on 15 September 2002. Section 111(6) came into operation on 8 July 2002. Sections 108 and 113 came into force on 15 September 2003, which is the date the Workplace Agreements Act 1993 ceased to have effect. The Labour Relations Reform Act made the following substantial amendments to the Industrial Relations Act 1979 and other industrial legislation in Western Australia.

(a) Objects and General Jurisdiction Matters

The objects of the Industrial Relations Act were amended by the Labour Relations Reform Act to provide the principal objects of the Industrial Relations Act (among others are) to promote freedom of association, equal remuneration for men and women for work of equal value, to promote collective bargaining and to establish primacy of collective agreements over individual agreements. Further objects have been inserted to ensure all agreements registered under the Act provide for rights and obligations in relation to good faith bargaining, to provide for fair terms and conditions of employment, to encourage employers and employees to reach agreements appropriate to the needs of enterprises, to facilitate the efficient organisation and performance of work according to the needs of an industry balanced with fairness to the employees and to provide for a system of fair wages and conditions of employment.

The emphasis on the Commission's power to conciliate and arbitrate has been amended to provide the power to conciliate and arbitrate is unlimited by any other provisions in the Industrial Relations Act. Further it is now expressly stated that conciliation functions may be performed when arbitration functions are being or have been performed.

Whilst the Commission has always had the power to act on its own motion under s 44 to call a compulsory conference under s 44 which provides the Commission an expeditious means of dealing with industrial disputes the Commission is now directed to act with due speed in relation to all of its functions.

The definition of "industrial matter" has been extended to include "any matter affecting or relating or pertaining to" employment issues, a number of matters including the relationship between employers and employees and union dues.

(b) Repeal of Workplace Agreements legislative provisions and enactment of scheme of employer-employee agreements

Consistent with the amendments to the principal objects, workplace agreements registered under the Workplace Agreements Act prior to 22 March 2001 remained in operation for up to 12 months after the commencement of Part 3 (23 July 2002). Workplace agreements that took effect after 21 March 2001 remained in operation for only six months after 23 July 2002.

The provisions of the Workplace Agreements Act relating to unfair dismissal have been also amended. All employees who worked under a workplace agreement will have their claims heard, not in the Industrial Magistrate's Court, but by the Commission.

Workplace agreements have been replaced by employer-employee agreements (EEA's) which are individual agreements between employers and employees that may deal with any industrial matter. While in operation, EEA's operate to the exclusion of any award or industrial agreement, unless the parties provide otherwise in the EEA. EEA's are required to state the nature of the employment relationship between the parties and contain dispute resolution provisions.

Consistent with the objects of the Industrial Relations Act which provides for the primacy of collective bargaining, EEA's are unable to be made during the term of an industrial agreement. There is a limited exception with respect to people with disabilities.

In relation to the role of the Commission in respect of EEA's, the Registrar of the Commission is required to oversee the registration of EEA's. Employers must provide both prospective and existing employees with detailed information before making an EEA, including an information statement that has been prepared by the Registrar of the Commission in accordance with the requirements of the Labour Relations Reform Act. EEA's must be lodged with the Registrar within 21 days of signing by the parties. EEA's that are not lodged within the 21-day period will be refused. EEA's made with new employees will cease immediately at the end of this period. The Registrar is prevented from registering EEA's for a period of 14 days after lodgement. This provides a cooling-off period, during which time the Registrar must be satisfied that the EEA is in order for registration. The Registrar has broad information-gathering powers to assist in this function.

Parties have appeal rights to the Commission when an EEA is refused registration.

A key feature of the EEA system is the requirement that an EEA cannot be registered by the Registrar unless it meets an award-based, no disadvantage test. EEA's cannot overall disadvantage employees in comparison with a relevant State award or, when no such award applies, a comparable State or Commonwealth award. In accordance with the requirements of the Labour Relations Reform Act, on 14 August 2002 the Commission in Court Session issued Guidelines and Principles under s 97VX of the Industrial Relations Act for the Registrar to follow in determining whether an EEA passes the no disadvantage test.

The Labour Relations Reform Act also establishes civil penalty provisions to deal with unlawful conduct that may affect employees, prospective employees and employers. The civil penalty provisions cover a wide range of scenarios, including employees being dismissed or disadvantaged in employment because they choose not to make an EEA. Any alleged contravention of civil penalty provisions can be commenced in the Industrial Magistrate's Court. Further, EEA's are enforceable in the same way as awards and industrial agreements are under s 83 of the Industrial Relations Act. Employees under EEA's have the same right to access the Commission for unfair dismissal as any other employee in Western Australia.

(c) Good Faith Bargaining

For the first time in the history of Western Australian Industrial Relations Commission the bargaining process for an industrial agreement can now be regulated by a formal statutory process. The formal process is commenced by serving written notice of particular matters under s 42 of the Industrial Relations Act. In the case of unions, they are able to commence bargaining with several employers who are proposed to be bound by a similar industrial agreement. An employer may also commence bargaining with several unions to cover their entire workforce in an industrial agreement.

A notice initiating bargaining can be issued up to 90 days prior to the expiry of a current industrial agreement to allow the parties time to reach agreement prior to the nominal expiry date of the current agreement. Where there is no industrial agreement, good faith bargaining may commence at any time.

When a party receives a notice proposing to initiate bargaining, they have 21 days in which to respond. If they respond in the affirmative, then bargaining commences and the obligations pertaining to good faith bargaining apply.

The amendments provide that "good faith bargaining" includes such obligations as stating and explaining the parties' position, meeting at reasonable times and places, disclosing relevant and necessary information, acting honestly, bargaining genuinely and adhering to outcomes and commitments made. Bargaining genuinely will require a party not to hold on steadfastly to an inflexible and unreasonable bargaining position.

The amendments recognise that a party who takes industrial action during bargaining does not necessarily mean that they are not bargaining in good faith. However, the Commission is able to examine the conduct of the parties and may determine that the act of taking industrial action was in breach of the duty to bargain in good faith. Significantly, good faith bargaining does not require parties to reach an agreement or to agree on particular terms of an agreement. The Commission is empowered to compel parties to comply with the requirements of good faith bargaining. However, it does not have the power to require a party to make an agreement or agree to any particular term of a proposed

agreement. The obligations associated with good faith bargaining continue until either an industrial agreement is made or the Commission ends bargaining. Once the Commission declares that bargaining has ended it may exercise conciliation and arbitral powers. Where parties have reached agreement on some but not all terms of a proposed industrial agreement the Commission can determine those outstanding issues.

While the purpose of the good faith bargaining provisions is to provide all possible assistance to the parties to reach agreement without third party intervention, the Commission is empowered on application to arbitrate an outcome in the form of an enterprise order where it ends bargaining. The Commission is also empowered to arbitrate an outcome where a party has refused to bargain as prescribed, in which case the aggrieved party may apply to the Commission for an enterprise order.

An enterprise order can include all matters which were the subject of negotiation or that would normally appear in an industrial agreement, subject to the usual constraints on the Commission's jurisdiction. Enterprise orders are limited to a maximum nominal term of two years. Only a single employer can be a party to an enterprise order. Organisations of associations of employers cannot be a party to an enterprise order.

An enterprise order may only be varied during its term by agreement between the parties. It may be replaced during its term, but only by the registration of an industrial agreement. After the nominal expiry of an enterprise order, the order continues in effect until it is replaced by either an industrial agreement, award or another enterprise order. Section 42C provides the Commission in Court Session with the power to provide guidance on good faith bargaining by a Code of Good Faith. The Commission to date has not made such a Code.

(d) Minimum Conditions of Employment and General Orders

The Labour Relations Reform Act made four changes to the Minimum Conditions of Employment Act 1993, three of which affect the jurisdiction of the Commission.

Prior to the amendments, the minimum weekly rates of pay were determined by the Minister responsible for the administration of the Minimum Conditions of Employment Act following a recommendation from the Commission each year. The Labour Relations Reform Act repealed the Minister's power to set the minimum weekly rates of pay and restored this power to the Commission. Under s 51F of the Industrial Relations Act the Commission is required to review the minimum weekly rates of pay annually at the time of the State Wage Decision and to determine the appropriate level of the minimum weekly rates of pay. Prior to making an order, industrial parties are able to make submissions on the appropriate level of the minimum weekly rates of pay. There is also a separately prescribed ability for the key industry parties to make an application for review of the level of the minimum rates of pay if 12 months has elapsed since the previous increase.

The Commission is also required to determine and issue a minimum wage for employees 21 years of age and over. Junior minimum rates of pay are set as a percentage of the adult minimum wage rate, under the Minimum Conditions of Employment Act. The Commission is also required to determine and issue a separate set of minimum wage provisions for trainees and apprentices.

The casual loading under the Minimum Conditions of Employment Act has been increased from 15 per cent to 20 per cent. The Commission, however, is empowered to increase the loading on application by the key industry parties or the Minister.

The Commission is also empowered to make a general order in relation to a matter that is the subject of a minimum condition of employment in the Minimum Conditions of Employment Act if the general order is more favourable to employees than that contained in the Minimum Conditions of Employment Act.

In 1995, in his Review of Western Australian Labour Relations Legislation, Senior Commissioner Fielding recommended that the Commission be provided with a discretion to either apply or not to apply the National Wage Decision. In accordance with his recommendations, the Commission has now been provided with greater flexibility in the flowing on of National Wage Decision increases to the State award system. Prior to amendment, s 51 had been interpreted as providing power to flow on the

National Wage Decision in its entirety or reject the National Wage Decision. The Commission has now been empowered with the discretion to either apply or not apply part or in whole the National Wage Decision as it sees fit. However, the actual dollar amount determined in the National Wage Decision cannot be modified by the Commission should it determine to flow on the decision. The Commission is now required to give effect to the National Wage Decision increase in State awards no later than 30 days after the effective date of the National Wage Decision. Section 51 also now explicitly requires the Commission to ensure there is consistency and equity in the variation of awards.

(e) Making of Awards and Award Reviews

The Commission has now been empowered to make interim awards to cover employees pending the making a new award extending to employees to whom no award applies. When making a new award (to extend to employees to whom no award applies) the onus is on any party opposing the making of a new award to show that it would not be in the public interest.

The scope of a common rule award can now be extended to include a new industry by the addition of a named party to an existing award where the new party is in an industry to which an award did not apply. Prior to the amendment an award could only extend to a named employer who is added as a party to an existing award.

The Commission has now been directed by legislation to ensure that it reviews and varies its awards on its own motion by order at any time to ensure awards do not contain wages less than the minimum award wage as ordered by the Commission under s 51, to ensure conditions of employment are not less favourable than those provided by the Minimum Conditions of Employment Act, or contain obsolete provisions or require to be updated. Further the Commission is expressly directed to ensure an award does not contain provisions that discriminate against an employee on any ground which discrimination in work is unlawful under the Equal Opportunity Act 1984. Further the amendments also enable the Commission to vary an award to ensure it facilitates the efficient performance of work according to the needs of industry and enterprises within the industry, balanced with fairness to the employees in the industry and enterprises. Before making an order the Commission must give notice to the Minister and key industry parties and afford them an opportunity to be heard.

(f) Right of Entry, Record Keeping and Inspection of Records

The right of entry to authorised representatives of unions to enter premises of an employer has been extended under the amendments to enable authorised representatives of a union to hold discussions (which are not limited to industrial matters) with employees. However, authorised representatives will only be duly authorised if they hold an instrument of authority (permit) issued by the Registrar of the Commission The Commission has been empowered to revoke or suspend such permits if an authorised representative has acted improperly in the exercise of the powers conferred on them by the Industrial Relations Act or if they have intentionally and unduly hindered an employer or employees during their working time. Civil penalty provisions have been inserted as sanctions against those who obstruct or hinder others in relation to this section or who purport to be authorised to exercise right of entry powers without such authority. In addition to, or instead of ordering such penalties, the Industrial Magistrate's Court may issue an order for the purpose of preventing any further contravention of the relevant provision. The amendments retain the restriction on the Commission's jurisdiction in that it is prohibited from making an award or order or an agreement conferring or making powers of entry and inspection that are additional to or inconsistent with the powers of entry and inspection of records under the Industrial Relations Act.

The procedure and information to be kept in employment records in relation to employees covered by awards, orders, industrial agreements and EEA's is now prescribed under the Industrial Relations Act rather than the Minimum Conditions of Employment Act.

(g) Other Significant Repeals

Part VIB – Pre-strike Ballots has been repealed in its entirety. Although enacted in 1997 no applications ever proceeded under this Part. Section 44(5b), (5c) and (6b) – Compulsory Conferences have been repealed. Prior to the repeal where it appeared to the Commission that a strike was occurring which constituted a breach of an award, order, agreement, understanding, undertaking or

procedure by a union the Commission was required to order the union and its affected members to resume work immediately. Similar repeals have been made to s 32.

Part IIIA – Federal Award Coverage has also been repealed. Part IIIA enabled the Commission on application to strike out a union party to an award or an industrial agreement where a union's Federal counterpart body had notified an alleged industrial dispute under the Workplace Relations Act 1996 (Cth). No formal notifications were ever filed in the Commission under this Part.

Part VIC – Political Expenditure by Organizations has also been repealed. The provisions under this Part prohibited unions from making payments for political expenditure from union funds and enabled the Registrar on application to the Industrial Magistrate's Court to recover any unauthorised payments as a debt due to the Crown. Whilst no prosecution action has been undertaken, in 1998 a review of all union rules was undertaken by the Registrar of the Commission which resulted in the removal of any provisions in union rules which enabled payments for political expenditure.

(h) Unfair Dismissal

The amendments to the unfair dismissal jurisdiction of the Commission have in some aspects restricted the jurisdiction of the Commission to hear claims and provide remedies of unfair dismissal and contractual benefit claims and in other matters its jurisdiction and powers have been enlarged. As to restrictions, the Commission is prohibited from hearing unfair dismissal claims by employees who have commenced and continued proceedings in the Australian Industrial Relations Commission, whose employment is regulated by a Federal Award or Federal instrument and whose remuneration is more than a prescribed amount (presently $90,000 per annum) or whose employment is not covered by an award, order, industrial agreement, EEA or workplace agreement and their remuneration is more than $90,000 per annum. Similar restrictions apply to contractual benefit claims. The Commission's jurisdiction to hear and determine unfair dismissal claims has been extended in that the Commission may accept a claim by an employee out of time if the Commission considers that it would be unfair not to do so. As to remedies, s 23A has been repealed and re-enacted. Under the amended section the Commission can now make re-employment orders. Further, where a re-instatement order or re-employment order is made the Commission may make an order it considers necessary to maintain the continuity of the employee's employment and order payment of lost remuneration between the date of dismissal and the re-instatement or re-employment. This enactment is intended to overcome the Industrial Appeal Court decision in *City of Geraldton v Cooling* (2000) 80 WAIG 5341. In addition in making re-instatement or re-employment orders the Commission may now make orders of an injunctive nature against third parties to prevent external interference with employment issues. Where an unfair dismissal application is made under s 44 – Compulsory Conference, the Commission can in certain circumstances make interim orders (which may include re-instatement or re-employment orders pending resolution of the claim).

In determining a claim for unfair dismissal the Commission is now expressly required to have regard to whether the employee was employed for an agreed period of probation and had been employed for a period of less than 3 months at the time of dismissal.

In deciding an amount of compensation after making a decision that an employee has been harshly, oppressively or unfairly dismissed, the Commission is to have regard to any redress the employee has obtained under another enactment (where the evidence necessary to establish the claim for that redress is also the evidence necessary to establish a claim before the Commission). Further, in assessing compensation the Commission is required to not only have regard to an employee's efforts (if any) to mitigate loss but also the employer's efforts.

The Industrial Relations (General) Regulations 1997 have been amended by the Governor at the same time the Labour Relations Reform Act came into force to increase the filing fee for unfair dismissal claims from $5 to $50. As to other procedural matters, the prior process of referral for investigation by individual Commissioners has been replaced by an express power conferred upon the Commission to delegate to a Registrar by Regulations functions of the Commission in relation to unfair dismissal and contractual benefit claims. The power does not extend to the making of orders determining a claim. On 17 December 2002 Regulations were published in the Government Gazette which provide that claims for unfair dismissal and contractual benefits may be referred by the Chief Commissioner or by the Commissioner to whom the claim has been allocated to the Registrar for conciliation under s 32 of

the Industrial Relations Act by the Registrar or a Deputy Registrar. Where a Registrar or Deputy Registrar has performed a delegated function, a party to the proceedings may apply to the Commission to review a direction, determination or order made by a Registrar.

The remedies available for breach of an unfair dismissal order of the Commission have been enlarged through the Industrial Magistrate's Court. The reforms provide for specific performance of the original order for re-instatement, re-employment or compensation made by the Commission. In addition to any order for specific performance of the original order or compensation in lieu, a penalty may be imposed of up to $5,000 for an employer who fails to comply with an order of the Commission. In the case of an order for re-instatement or re-employment, the Industrial Magistrate may also order an employer to pay remuneration lost as a result of the failure to comply with the order. A failure to comply with an injunctive order made by the Industrial Magistrate attracts a maximum penalty of $5,000 and a daily penalty (on a failure to comply has been proved) of $500.

In the event an employer refuses to obey an order of the Industrial Magistrate's Court for specific performance of the original order or compensation in lieu of re-instatement or re-employment, such conduct will constitute an offence. Breach of compliance orders and orders for specific performance in respect to unfair dismissal constitutes an offence. The penalty able to be imposed for offences is up to $25,000 and $2,500 per day in respect of a body corporate and $5,000 and $500 per day in the case of an individual.

Of note is that the definition of "employer" has been amended. Firstly, "labour hire agencies" and "group training organisations" are now expressly deemed to be employers. Secondly, in relation to claims for contractual benefits only, the principal engaging a person under a contract to personally give a performance is deemed to be an employer and the person so engaged, is deemed to be an employee.

(i) Enforcement of Awards and Orders of the Commission and the Industrial Magistrate

The Labour Relations Reform Act has doubled the penalties applicable to a breach of an industrial instrument. The amendments also allow an Industrial Magistrate to make compliance orders for the purpose of preventing further contravention of an industrial instrument. The legislation anticipates such orders may be made in conjunction with penalties awarded for breach of an industrial instrument.

Breach of a compliance order will constitute an offence and significant penalties can be incurred. The Labour Relations Reform Act introduced a new enforcement regime in the form of civil penalty provisions. Provisions attracting civil penalties include time and wages record keeping and access requirements, obstruction of industrial inspectors and authorised representatives carrying out duties prescribed by the Labour Relations Reform Act, and prohibited conduct in relation to EEA's.

Civil penalty provisions attract a fine of up to $5,000 in the case of an employer, organisation or association and $1,000 in any other case, alternatively, a compliance order may be made. For example, an employer may incur a fine when prosecuted for failure to maintain time and wages records. Under the amendments, the Industrial Magistrate's Court may also issue a compliance order compelling the employer to commence the keeping of time and wages records.

(j) Review of decisions of the Commission

The amendments prohibit any decisions of the Commission being challenged by any court except as provided for in the Industrial Relations Act. Appeals from decisions of the Full Bench and the Commission in Court Session now only lie to the Industrial Appeal Court on grounds that the decision is in excess of jurisdiction on grounds the matter is not on an "industrial matter", or erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order; or on the ground that the appellant has been denied the right to be heard.

(k) Industrial Agreements

Industrial agreements can now be incorporated by consent into awards. In the 2003 State Wage Decision – Statement of Principles [2003] WAIRC 8452; (2003) 83 WAIG 1906, the Commission in Court Session determined that an award may be varied without the application being regarded as a claim for wages and/or conditions above or below the award safety net.

(l) Electronic Publication

Publication can be made of applications for coverage of employees by a union on an internet site maintained by the Commission. Further all awards, orders and decisions of the Commission can now be published on the Commission's internet site or in a newspaper. The Commission is still, however, required to publish all awards, orders and decisions of the Commission in the Industrial Gazette. The requirement to publish industrial agreements has been removed.

(m) Restriction on length and mode of hearing

The Commission is now expressly empowered to determine the periods that are reasonably necessary for the fair and adequate presentation of each case and require that the cases be presented within the respective periods. The amendments also expressly recognise the Commission's power to require evidence to be presented in writing and to decide the matters on which it will hear oral evidence or argument.

## 2. DECISIONS OF INTEREST

Redundancy Obligations

In the period under review the Industrial Appeal Court ("IAC") considered the relevant provisions of the Minimum Conditions of Employment Act 1993 ("MCE Act") and obligations on employers when making an employee redundant in *Garbett v Midland Brick Company Ltd* (2003) 83 WAIG 893. In this case, the appellant was employed by the respondent as a purchasing officer. He had been employed since April 1994. As a consequence of restructuring of operations in the stores and purchasing department of the respondent, in May 2000 the appellant was made redundant. The appellant's redundancy was affected on the same day he was informed of it, and he was provided with a letter of termination of employment from the respondent, outlining that there was no suitable alternative employment for him. The applicant's claim alleging unfair dismissal was dismissed at first instance by the Commission, with this decision being confirmed on appeal by the Full Bench. The appellant appealed to the IAC.

In its judgement, the IAC examined the requirements of Part 5 of the MCE Act, in particular s 41. Both Hasluck J and Heenan J considered these provisions of the MCE Act and concluded that in so far as there is a requirement for an employer to discuss the likely effects of a redundancy and measures to avoid or minimise it, these matters impose a duty on an employer to raise and discuss these issues with the affected employee. It is not enough, according to the judgement of the IAC, for nearly the opportunity for such discussions to be provided. It was held on the facts of the case under appeal that the employer had not complied with its statutory duty under the MCE Act, to hold the required discussions, therefore the dismissal was harsh, oppressive and unfair, and the appeal upheld.

In another case also in relation to redundancy, the IAC in *Dellys v Elderslie Finance Corporation* (2002) 82 WAIG 1193 considered whether the obligation to provide a redundancy payment was an implied term of the employee's contract of employment. The facts of the matter were that the appellant was dismissed on 14 July 2000 from his position as national agency manager for the respondent company. The appellant's dismissal on the grounds of redundancy was effected on the same day that he was advised of it. On the termination of his employment, the appellant was paid a sum equal to ten weeks base salary. This payment was calculated on the basis that four weeks of it was salary in lieu of notice, with the remainder as a severance payment. The appellant was successful in his unfair dismissal claim at first instance, and was awarded a sum of compensation for loss. An appeal to the Full Bench of the Commission was, by majority, dismissed.

On the appeal to the IAC, Anderson J considered whether an implied term for redundancy payments arose in the case. It was Anderson J's view, (Scott and Hasluck JJ agreeing), that applying the tests for the implication of terms into a contract, that it was neither necessary nor obvious, to imply such a term into a contract of employment, as a matter of law. The IAC held that its earlier decision in *Coles Myer Ltd v Coppin and Ors* (1993) 73 WAIG 1754 is not authority for the proposition that a redundancy entitlement is implied into employment contracts.

The decision of the IAC in *Dellys*, was considered by the Full Bench *Epath Pty Ltd v Adriansz* (2003) 83 WAIG 454. In that case, the appellant claimed he had been unfairly dismissed and denied contractual entitlements. One of the appellant's grounds supporting his unfair dismissal claim was that he was not afforded a reasonable severance payment, on the termination of his employment. The appellant's employment was terminated on the grounds of redundancy. At first instance, the Commission found that the appellant's dismissal was unfair, in part by reason of him not receiving a redundancy payment on termination of his employment, contrary to the position with other employees.

On appeal to the Full Bench, the Commission dismissed the respondent employers appeal, and held that an entitlement to a redundancy payment, as an implied term of a contract of employment, as considered in *Dellys*, is a different question to the fairness of a dismissal, by reason of the absence or inadequacy of a redundancy payment. (Post script - The decision of the Full Bench was upheld on appeal to the IAC on 8 August 2003 on the basis that applying *Dellys*, if a redundancy payment cannot be implied into a contract of employment, it is not a formal entitlement and therefore, cannot be the subject of compensation for "loss" under s 23A of the Act: *Epath Pty Ltd v Adriansz* unreported IAC 8 August 2003).

Dismissal for Want of Prosecution

The Full Bench of the Commission in *Burch v Oretek Ltd* (2002) 82 WAIG 2853 considered relevant principles in relation to dismissal of proceedings for want of prosecution. In this case the appellant filed an application alleging unfair dismissal in October 2001. The appellant resided outside of the state in Victoria. The Commission listed the matter for hearing and the appellant was notified by notice of hearing, sent to his last address for service in Victoria. The Commission at first instance dismissed the appellant's claim as he failed to appear at the proceedings and additionally, because the appellant had taken no steps in relation to his claim for an inordinately long period.

The Full Bench affirmed the decision of the Commission at first instance. It concluded that the Commission was correct to proceed to hear and determine the claim in the absence of the appellant, citing and applying *McConkey v M and A's of Denmark* (2001) 81 WAIG 1561. Furthermore, in applying *AWU v Barminco Pty Ltd* (2000) 80 WAIG 3162, that given the length of the delay, the explanation for the delay and other relevant factors, the Commission was correct in dismissing the applicant's claim.

Nature of Contractual Benefits Claims

The IAC in *Hot Copper Australia Ltd v Saab* (2002) 82 WAIG 2020 considered the Commission's Contractual Benefits jurisdiction under s 29(1)(b)(ii) of the Act. In this case, the employee's claims at first instance included a claim for specific performance of a term in the employee's contract of employment that the employer provide him with shares and share options, as a contractual benefit. The Commission at first instance and the Full Bench on appeal concluded that the subject matter of the applicant's claim in this regard, was an industrial matter for the purposes of the Commissions contractual benefits jurisdiction.

On appeal to the IAC, Anderson J (Parker and Hasluck JJ agreeing), held that the subject matter of the employees claimed was not an industrial matter, because it lacked the character and complexion of industrial relations. The Court concluded that at its essence, the claim for the shares or value of the shares, was a "private claim of a commercial nature which lacks any ingredient or complexion of industrial relations" (at para 29). The appeal was therefore upheld and the matter determined accordingly.

Extension of Time for Unfair Dismissal

As a result of amendments to the Act coming into effect on 1 August 2002, the Commission now has the statutory power under s 29(3) of the Act, to accept an unfair dismissal application outside of the 28 day time limit prescribed by the Act, if it considers that it would be unfair not to do so. In *Azzalini v Perth In-flight Catering* (2002) 82 WAIG 2992 the Commission considered these provisions of the Act. In this case, it was held by the Commission that the terms of ss 29(2) and (3) were provisions that affected substantive rights and obligations and therefore had prospective and not retrospective operation and effect. In this case also, the Commission set out relevant principles in terms of the

factors to consider in determining an application for an extension of time. In another decision of the Commission, similar principles were dealt with: *Andrew v Metway Property Consultants and Auctioneers* (2002) 82 WAIG 3260.

(Post script - The principles dealt with in *Azzalini* were referred to and affirmed by the Full Bench in *Director General of the Department for Education v Malik* unreported 20 August 2003).

Registration of Employee - Employer Agreements

In *City of Melville v Registrar* (2003) 83 WAIG 1018, the Commission determined appeals pursuant to s 97VM of the Act from the refusal by the Registrar of the Commission to register a number of Employer employee agreements ("EEA's"). The first issue the Commission determined was a preliminary issue of the status of an applicant to intervene, as bargaining agent for the parties to the EEA's. The Commission held that the language of s 97UJ(1)(b) of the Act, when reference is made to "in connection with" the registration of an EEA, encompassed the refusal of registration of an EEA and incidentally, any appeal from such refusal by the Registrar. Accordingly, the bargaining agent for the employees was granted leave to intervene in the appeal on their behalf. The substance of the appeal was to the effect that the Registrar had erroneously refused to register the EEA'S, on the grounds that the EEA's did not contain dates of execution, and therefore it could not be determined whether the application's for the EEA's had been lodged within time under s 97UY(1) of the Act. The Commission upheld the appeals on the basis that there is no requirement in the Act, for EEA's to contain a date of execution and moreover, requirements in the accompanying Regulations, were met in this case, enabling the date of execution of the EEA's to be determined. Other matters were also dealt with in the appeal, in relation to the powers of the Registrar, concerning steps taken to satisfy himself that EEA's are in order for registration under the Act.

Interim Awards

The Commission's new power to make an interim award under s 36A of the Act was considered and exercised in *Dampier Salt Ltd v The Australia Workers' Union, Western Australian Branch, Industrial Union of Workers and Others* (2002) 82 WAIG 2879 and 3223. In this case the Commission in Court Session heard and determined applications by both the union and the employer parties to substantially vary terms and conditions of employment contained in the relevant award to accommodate the acquisition by the employer of another company operating in the salt industry.

In determining the claims, the Commission in Court Session concluded that the evidence before it was insufficient to enable the union of employer applications to succeed, in light of the requirements of the Act in ss 6(af) and 26(1)(vi) that the efficient performance of work according to industry and enterprise needs to be facilitated. The Commission in Court Session did however, in light of its conclusion that the existing Dampier Salt Award did not extend to the Port Hedland operations newly acquired by the employer order that the existing terms and conditions be preserved by way of the making of an interim award under s 36A of the Act. The Commission in Court Session concluded that this would protect the existing wages and conditions of the relevant employees until a final award was made and it was in the public interest to do so.

Right of Entry

The Commission has also considered the new provisions of the Act in relation to right of entry. In *AFMEPKIU v Transfield Services (Australia) Pty Ltd and Anor* (2002) 82 WAIG 376, the Commission considered the terms of the new Divisions 2F and 2G of the Act in relation to right of entry and inspection by authorised representatives. At issue in this case was whether the employer could require a union official, in possession of the requisite authority under the Act, to undergo a random drug and alcohol test, as a condition of his entry to the respondent's site in the Pilbara of the State.

The Commission concluded that the provisions of the Act in relation to right of entry were a code and that the orders sought by the employer were inconsistent with that code and thus could not be made. Given the conclusion that the provisions of the Act are such a code, the Commission held that the terms of awards, orders and industrial agreements inconsistent with these provisions of the Act were of no effect.

Further, in *Silent Vector Pty Ltd t/a Sizer Builders v CFMEUW* (2002) 82 WAIG 565 the Commission considered applications to revoke the right of entry permits of a union official under s 49J(5) of the Act. In this case, the employer commenced proceedings alleging the official had "acted improperly" for the purposes of s 49J(5)(a) of the Act, in procuring industrial action. The Commission rejected the employer's application. In doing so, it concluded that given this provision of the Act involved the cancellation of a statutory right similar to the imposition of a penalty, then the higher civil standard of proof in *Briginshaw v Briginshaw* (1938) 60 CLR 336 should apply.

## 3. STATE WAGE CASE

On 6th May 2003 the Australian Industrial Relations Commission (the "AIRC") handed down its decision in the Safety Net Review – Wages Case (also referred to as the 2003 Living Wage Claim by the Australian Council of Trade Unions (the "ACTU") [Print PR002003].

The 2003 'Safety Net Review – Wages' is a National Wage Decision for the purpose of the Industrial Relations Act, 1979 as amended ("the Act"). Pursuant to s 51 of the Act, the Commission on its own motion, is to consider the National Wage Decision and, subject to the requirements of s 50(10) of the Act, unless it is satisfied that there are good reasons not to do so, shall make a General Order to adjust, by the amount of any change in the rate of wages under that decision, rates of wages paid under awards in this State (s 51(2)(a)).

The Commission received submissions from all parties afforded the opportunity to be heard under s 50(10) of the Act as well as the representative of the Australian Hotels Association.

However the scheme of s 51 of the Act as amended by the Labour Relations Reform Act No. 20 of 2002 has significantly changed the basis upon which a General Order is now made compared with that which issued when the June 2002 State Wage Decision was handed down ((2002) 82 WAIG 1369). Once satisfied that a General Order should issue, s 51(2)(a) and (b) of the Act combines the imperative for awards of this Commission to be increased by the same amount as that determined in the National Wage Decision with the prerogative for the Commission to adopt in whole or in part and with or without modification any principle, guideline, condition or other matter having effect under the National Wage Decision.

Section 51(3) of the Act requires the Commission to ensure that a General Order under s 51(2) has effect no more than 30 days after the day on which the relevant National Wage Decision was made. (The AIRC handed down the 2003 Safety Net Review – Wages (op cit) on 6th May 2003).

Section 51(5) of the Act provides that:

> "Without limiting the generality of section 26(1), in the exercise of its jurisdiction under this section the Commission shall ensure, to the extent possible, that there is consistency and equity –
>
> (a) in relation to the variation of awards; and
> (b) in relation to when such variations have effect."

The scheme of s 51 of the Act gives rise to some fundamental issues when a General Order is made. As a general proposition do the terms of s 51(3) impose a requirement which prevents the Commission from adopting in whole or in part and with or without modification any principle, guideline, condition or other matter having effect under the National Wage Decision which could cause the wage increase in awards in this State to operate from a date later than 30 days after the day on which the National Wage Decision was made? This issue had poignancy within the context of the May 2003 National Wage Decision and policy considerations followed by this Commission in the operation of the Wage Fixing System in Western Australia for a number of years.

With the availability of issuing General Orders to vary all awards from a common date, the Commission has in the past established "the beginning of the first pay period commencing on or after 1st August….." as the operative date for the application of the arbitrated safety net adjustment to award wages in this State. Adoption of the condition to require the expiry of a twelve month period since the last increase arising from the application of the 2002 National Wage Decision would see awards of this Commission move with effect from the beginning of the first pay period on or after 1st August 2003; a

significant period after the expiry of no more than 30 days after the date on which the May 2003 National Wage Decision was made.

Consistent with the dictates of s 51(3) as to the requirements to give effect to the increase in wages under the arbitrated safety net and the terms of s 51(5) of the Act, awards were varied by General Order to provide for:

(a) a $17.00 per week increase in award rates up to and including $731.80 per week; and
(b) a $15.00 per week increase in award rates above $731.80 per week;
(c) the Minimum Adult Award Wage be increased by $17.00 per week to $448.40 per week; and
(d) by majority the above increases will have effect on and from 5th June 2003.

By majority the Commission decided that these arbitrated safety net adjustments and the adjustment to the Minimum Adult Award Wage were to have effect on and from 5th June 2003.

Further the Commission decided that:

- Arbitrated Safety Net Adjustments (and the increase to the Minimum Adult Award Wage) were to be absorbed under the same terms as previous Arbitrated Safety Net Adjustments.

- The Statement of Principles – June 2002 was varied to provide as the Statement of Principles – June 2003 in terms to reflect the application of statutory amendments to the Act under ss 36A(2), 36A(3), 40A, 40B and 42I. Furthermore the Principles were varied to accommodate the adjustment to the Arbitrated Safety Net and the Minimum Adult Award Wage. The Principle regulating applications under "Economic Incapacity" was varied for clarification.

In making a General Order under s 51(2) and (3) the Commission, to the extent possible ensured consistency and equity in relation to the variations of awards and in relation to when such variations have effect pursuant to s 51(5) of the Act.

## 4. ADULT MINIMUM WEEKLY WAGE

Each time the Commission considers a National Wage Decision it is required to review minimum weekly rates of pay under the Minimum Conditions of Employment Act, 1993 (see s 51E(1) of the Act).

By s 51D(a) of the Act the Commission is to review the minimum weekly rate of pay applicable under s 12 of the Minimum Conditions of Employment Act, 1993 to employees who have reached 21 years of age and who are not apprentices or trainees. An order which issues under s 51F(1) of the Act has effect at the same time as the General Order that was made following the Commission's consideration of the National Wage Decision.

On 5th June 2003, the Commission issued its decision in the State Wage Case which was consequential upon its consideration of the "Safety Net Review – Wages, May 2003" (op cit), a National Wage Decision for the purposes of s 51(1) of the Act. The increase in wage rates and the Minimum Adult Award Wage had effect on and from 5th June 2003.

Prior to the June 2003 State Wage Case the minimum weekly rate of pay for employees aged 21 or more under s 12 of the Minimum Conditions of Employment Act, 1993 was $431.40 per week. This was established with effect from 1st August 2002 by operation of the Labour Relations Reform Act No 20 of 2002 (see Labour Relations Reform Act, 2002, section 168 – Transitional provisions for minimum weekly rates of pay and Schedule 1 to that Act).

The rate of $431.40 per week was the same as the Minimum Adult Award Wage determined by the Commission in the June 2002 State Wage Case ((2002) 82 WAIG 1375). The Minimum Adult Award Wage had been increased with effect on and from 5th June 2003 to $448.40 per week in the June 2003 State Wage Case.

In proceedings held in conjunction with the Commission's consideration of the 2003 National Wage Decision parties made submissions on the level of the new rate to be determined pursuant to s 51F of the Act.

Given the intent of Parliament to provide "an equitable level of remuneration consistent with principles of fairness and justice", the Commission sought to align the Statutory Minimum Wage with that determined in awards of this State and with the Federal Minimum Wage. (See recommendations pursuant to s 14 of the Minimum Conditions of Employment Act, 1993 in the period from 1993 to 2002).

It is noted that at $431.40 per week the level of the Statutory Minimum Wage was the same as the Minimum Adult Award Wage in Western Australian and the Federal Minimum Adult Wage prior to the arbitrated safety net adjustment resulting from the May 2003 National Wage Case (op cit).

Indeed an alignment with the Minimum Adult Award Wage was established in March 2001; then with movement in the award rate from August 2001 the differential persisted until April 2002 when parity was again re-established.

The recent history of wage movements in this State has been characterised by the alignment of the Statutory Wage and the award rate. This was achieved without any identifiable increase in the wage cost index for Western Australia nor in any identifiable adverse impact on employment.

The Commission was assisted by Professor David Plowman in its analysis an Australian Bureau of Statistics document "Employee Earnings and Hours" (unpublished data). Professor Plowman provided up to date data on the Western Australian population (>15 years) and the labour force:

| **WA Population and Labour Statistics, March 2003** | | | |
|---|---|---|---|
| | Males | Females | Persons |
| Population* | 777.3 | 778.5 | 1555.8 |
| Total Labour Force | 584.7 (75.5%) | 442.5 (57.8%) | 1027.3 (66.6%) |
| Unemployed | 32.3 (6.1%) | 23.5 (5.7%) | 558 (5.7%) |
| Employed | 552.4 | 419.0 | 971.4 |
| Full-time | 475.5 | 205.9 | 681.3 |
| Part-time | 76.9 | 213. | 290.1 |
| Wage and Salaried employees: | | | 708.8 (73%) |
| Source: ABS Cat. No. 6202.0. *Note: Aged 15 and over | | | |

The Commission in its decision on the Adult Minium Weekly Wage noted:

> "Whilst acknowledging the general limitations of the EEH survey Professor Plowman points out that it does not collect data on casual employees and that full time employment for the purpose of the survey is taken to be those working 35 hours a week or more. This is a different definition to that used under the Minimum Conditions of Employment Act, 1993. A further caveat is that the survey records a finite period – a particular pay period. The assumption is that other pay periods are not dissimilar. With respect to casual employment in the absence of a direct measure, Professor Plowman estimates the number on the basis of whether or not employees enjoy leave benefits as an employment condition. Those that do not are considered to be casual employees. On this method of estimation some 23% of males, 32% of females and 28% of persons are considered to be in casual employment. Other groups not directly measured are juniors (estimated to be 5% of the Western Australian workforce) and apprentices and trainees (estimated to be about 21,000 or 3.9% of the workforce). Though these last two categories are not measured as separate categories they are included in the aggregated data.
>
> In determining the proportion of the workforce in March 2002 that would be affected by a $20.00 per week increase in the minimum wage the ABS data suggests that 4% of the full-time employed workforce would be affected.

Professor Plowman notes that in March 2002 the total number of salary and wage earners was 690,500. The percentage of full-time wage and salary earners was 64.2%. Thus, the number of full-time employees affected by a $20.00 per week wage increase is 17,732. The same percentage applied to the March 2003 data would see 18,200 employees affected by a $20.00 increase in the minimum wage.

The ABS data suggests that 5.4% of part-time employees would potentially be affected by an increase of $20.00 per week or the hourly equivalent. In March 2002, this translates to about 11,210 employees. If the assumptions hold true for March 2003, the number of employees affected would be in the order of 11,400.

Applying the national percentage of the 15 – 19 years group in receipt of wages above the $400.00 per week band and adjusting this for the threshold of the existing minimum wage and the ABS definition of an 18 years old as an adult, it is estimated that 50% of 15 – 19 year old employees come within the cohort which would be affected by an increase of $20.00 per week or the hourly equivalent.

On the basis of the March 2003 population and labour statistics, Professor Plowman estimates that in total 32,400 (4.6%) of the Western Australian workforce will be affected by an increase in the minimum wage of up to $20.00 per week.

The Commission acknowledges the qualifications pointed out by Professor Plowman which must be taken into account in accepting this estimate. We are appreciative of the work done by him in assisting in the development of the EEH survey conducted by the ABS to address the particular requirements for assessing the impact of the Statutory Minimum Wage in Western Australia and for his analysis of the data.

On what is before us and on our assessment of economic trends there is nothing which deters us from the course of maintaining the alignment between the Statutory Minimum Wage for employees 21 years of age and over and Adult Minimum Adult Award Wage. The rate of $448.40 per week is an equitable level of remuneration and accords with principles of fairness and justice."

((2003) 83 WAIG 1917)

The General Order under s 51F following the review under s 51E(1) replaced the minimum weekly rate of $431.40 per week payable under s 12 of the Minimum Conditions of Employment Act, 1993 to employees who have reached 21 years of age and who are not apprentices or trainees and established the rate at $448.40 per week. This rate had effect on and from 5th June 2003.

## 5. MINIMUM WEEKLY RATES OF PAY FOR APPRENTICES AND TRAINEES UNDER SECTIONS 14 AND 15 RESPECTIVELY OF THE MINIMUM CONDITIONS OF EMPLOYMENT ACT, 1993

By s 51D(b) and (c) of the Industrial Relations Act, 1979 the Commission is required to review the minimum weekly rate or rates of pay applicable under section 14 of the Minimum Conditions of Employment Act, 1993 to apprentices and the minimum rate or rates of pay applicable under section 15 of the Minimum Conditions of Employment Act, 1993 to trainees. In accordance with s 51E of the Act the review is to be undertaken when the National Wage Decision is considered under s 51(2) of the Act. Following the review the Commission is required to make an order under s 51F setting the new minimum weekly rates for these employees. However under s 51G the Commission may –

"(1) For the purposes of section 51F as it relates to rates for apprentices or trainees, the Commission may -

(a) set a minimum weekly rate of pay in relation to apprentices and trainees generally;

(b) subject to subsections (2) and (3) set a minimum weekly rate of pay in relation to apprentices or trainees who belong to particular classes of apprentice or trainee; or

(c) do a combination of (a) and (b).

(2) The Commission may set a minimum weekly rate of pay in relation to apprentices or trainees who have reached 21 years of age that is different from a rate or rates for apprentices or trainees who are under 21 years of age.

(3) In setting a minimum weekly rate of pay in relation to apprentices and trainees who have reached 21 years of age the Commission shall not set different minimum weekly rates of pay for those apprentices or trainees on the sole basis of age.

(4) The Commission shall ensure that at any particular time there is applicable in relation to each class of apprentice and each class of trainee -

(a) a minimum weekly rate of pay set in respect of that class; or

(b) the minimum weekly rate of pay in relation to apprentices or trainees, as is relevant to the case, generally.

(5) In setting a minium weekly rate of pay in relation to apprentices or trainees generally or in relation to apprentices or trainees who belong to a particular class of apprentice or trainee, the Commission may use such means as in its opinion are appropriate including, but not limited to -

(a) setting the rate in figures;

(b) setting the rate as a proportion of -

(i) the minimum weekly rate of pay referred to in section 51D(a);

(ii) the minium rate of pay set by a General Order under section 51(2); or

(iii) any award or other wages instrument;

(c) adopting some or all of the provision of any award or other wages instrument; or

(d) setting out any other method for the calculation or assessment of the rate."

Under s 51H an order made under s 51F(1) following the review of minimum weekly rates of pay for these employees has effect at the same time as the General Order made pursuant to consideration of the National Wage Case has effect. In this case that was on and from 5th June 2003.

In the decision handed down on 27 June 2003 the Commission stated:

"In summary from the scheme of the Act it is mandatory for the Commission to review the minimum weekly rates of pay of apprentices under section 14 of the Minimum Conditions of Employment Act, 1993 and trainees under section 15 of the Minimum Conditions of Employment Act, 1993 each time a National Wage Case is considered. It is also mandatory for the Commission to make an order setting minimum weekly rates. In so doing the order which must be made rescinds the order setting existing minimum weekly rates for apprentices and trainees and sets new minimum weekly rates for these employees. There is however some discretion in setting the minimum weekly rates for apprentices and trainees generally or with respect to particular classes of apprentices and trainees. The date from which the order has effect is prescribed by reference to the date of effect of the General Order made pursuant to consideration of the National Wage Decision.

Current minimum weekly rates of pay for apprentices under section 14 and trainees under section 15 of the Minimum Conditions of Employment Act, 1993 are those established by operation of section 168 and Schedule 1 – Transitional Provisions for minimum weekly rates of pay under the Labour Relations Reform Act, 2002. Schedule 1 provides:

"4. Minimum weekly rate of pay for apprentices and trainees

(1) The minimum weekly rate of pay for an apprentice or trainee in relation to whom a workplace agreement or an employer-employee agreement is not in force is the rate of pay that is provided for under an award that applies to that apprentice or trainee.

(2) The minimum weekly rate of pay for an apprentice or trainee in relation to whom a workplace agreement or an employer-employee agreement is in force is the rate of pay that is provided for under an award that would, if the workplace agreement or employer-employee agreement were not in force, apply to that apprentice or trainee."

At present the minimum weekly rates of pay for an apprentice as defined by reference to the Industrial Training Act, 1975 and for a trainee being in that class of persons prescribed by regulations made by the Governor as a person to be treated as a trainee for the purpose of the Industrial Relations Act, 1979, are the rates set out in awards that apply to apprentices and trainees as defined. As has already been noted the current rates were established by operation of section 168 of the Labour Relations Reform Act, 2002.

However no minimum weekly rate has been established by operation of that legislation for apprentices or trainees who are "award free". Section 51E(4) of the Act makes it clear that the Commission is required to ensure that at any particular time there is applicable to each class of apprentice and each class of trainee a minimum weekly rate of pay set in respect of that class or a minimum weekly rate of pay that is relevant to the respective class generally.

Based on the position put to the Commission the minimum weekly rate for apprentices pursuant to section 14 of the Minimum Conditions of Employment Act, 1993 shall be apprentices' rates set out in the Metal Trades (General) Award, 1966 as varied by the General Order under section 51(2) of the Act. The rates so determined will be applied under section 14 of the Minimum Conditions of Employment Act, 1993 to that class of apprentice not covered by an award. In other respects the minium weekly wage rate for apprentices covered by awards or relevant awards in the case of apprentices under employer-employee agreements shall be the rate under the award or relevant award that applies to the apprentice.

There is insufficient before the Commission at this time to set a rate under the Minimum Conditions of Employment Act, 1993 for apprentices who have reached 21 years of age that is different from rates for apprentices who are under 21 years of age."

((2003) 83 WAIG 1919)

The Order given effect by the Commission provides:

"1. THAT pursuant to section 51F(1)(a) of the Act the order that established minimum weekly rates of pay under section 14 and 15 of the Minimum Conditions of Employment Act, 1993 to apprentices and to trainees respectively by operation of the Labour Relations Reform Act, 2002 (section 168, Schedule 1 – Transitional minimum weekly rates of pay (clause 4)) is rescinded.

Apprentices

2. THAT pursuant to section 51F(1)(b) of the Act the minimum weekly rate of pay applicable under section 14 of the Minimum Conditions of Employment Act, 1993 to apprentices shall be:

(a) in relation to that class of apprentice to whom an award or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of apprentice under the award where the award applies or the relevant award where an employer-employee agreement is in force.

(b) in relation to that 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, 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, 1966 which operate on and from 5th June 2003 namely:

| | *Total Rate per Week* |
|---|---|
| *Four Year Term* | |
| First year | $227.72 |
| Second year | $298.21 |
| Three year | $406.65 |
| Fourth year | $477.14 |

| | |
|---|---|
| *Three and a Half Year Term* | |
| First six months | $227.72 |
| Next year | $298.21 |
| Next year | $406.65 |
| Final year | $477.14 |
| | |
| *Three Year Term* | |
| First year | $298.21 |
| Second year | $406.65 |
| Third year | $477.14 |

Trainees

3. THAT pursuant to section 51F(1)(b) of the Act the minimum weekly rate of pay applicable under section 15 of the Minimum Conditions of Employment Act, 1993 to trainees shall be:

(a) in relation to that class of trainee to whom an award applies or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of trainee under the award where an award applies or the relevant award where an employer-employee agreement is in force.

(b) in relation to that 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 minimum weekly rate of pay at the relevant Industry/Skill level as determined by reference to Attachment A hereunder, shall be the rate of pay contained in the following table. These rates of pay are based on the Metal Trades (General) Award, 1966 which operated as at 4th June 2003:

Table 1.

| **Industry/Skill Level A** | | | |
|---|---|---|---|
| **School Leaver** | **Year 10 $** | **Year 11 $** | **Year 12 $** |
| | 146.00 | 175.00 | 215.00 |
| | | | |
| Plus 1 year our of school | 175.00 | 215.00 | 250.00 |
| Plus 2 years | 215.00 | 250.00 | 290.00 |
| Plus 3 years | 250.00 | 290.00 | 333.00 |
| Plus 4 years | 290.00 | 333.00 | |
| Plus 5 years or more | 333.00 | | |
| | | | |
| **Industry/Skill Level B** | | | |
| **School Leaver** | **Year 10 $** | **Year 11 $** | **Year 12 $** |
| | 146.00 | 175.00 | 205.00 |
| | | | |
| Plus 1 year our of school | 175.00 | 205.00 | 235.00 |
| Plus 2 years | 205.00 | 235.00 | 275.00 |
| Plus 3 years | 235.00 | 275.00 | 315.00 |
| Plus 4 years | 275.00 | 315.00 | |
| Plus 5 years or more | 315.00 | | |
| | | | |
| **Industry/Skill Level C** | | | |
| **School Leaver** | **Year 10** | **Year 11** | **Year 12** |

| | $ | $ | $ |
|---|---|---|---|
| | 146.00 | 175.00 | 190.00 |
| | | | |
| Plus 1 year our of school | 175.00 | 190.00 | 215.00 |
| Plus 2 years | 190.00 | 215.00 | 240.00 |
| Plus 3 years | 215.00 | 240.00 | 270.00 |
| Plus 4 years | 240.00 | 270.00 | |
| Plus 5 years or more | 270.00 | | |
| | | | |

For any class of trainees under this subclause undertaking a traineeship that is not provided for in Attachment A, the minimum weekly rate of pay shall be the rate of pay in Industry/Skill Level C.

Australian Qualification Framework (AQF)

For a trainee in this class undertaking a AQF4 traineeship the minimum weekly rate of pay shall be the weekly wage rate for an AQF3 trainee at Industry/Skill Levels A, B or C as applicable with the addition of 3.8 per cent of that wage rate.

Part time and School Based Trainees

This provision shall apply to trainees who undertake a traineeship on a part time basis, or as a School Based trainee, by working less than full time hours and by undertaking the approved training at the same or lesser training time than a full time trainee.

School Based trainees will receive the relevant wage rate at Skill/Industry Levels A, B and C as applicable, as for School Leavers.

The minimum weekly rate of pay for part time and School Based trainees shall be calculated by taking full time rates expressed above multiplied by 1.25. This minimum weekly rate of pay for part time School Based trainees is then divided by 38 in accordance with section 10 of the Minimum Conditions of Employment Act, 1993 to produce a minimum hourly rate of pay.

(c) in relation to that class of trainee to whom an award applies or a relevant award applies where an employer-employee agreement is in force and who has reached 21 years of age, the minimum weekly rate of pay is the rate of pay that applies to that class of trainee determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship under the award or under the relevant award where an employer-employee agreement is in force.

(d) in relation to that 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 entered in to and who has reached 21 years of age, the minimum weekly rate of pay shall be that determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship set out hereunder:

| | |
|---|---|
| Industry/Skill Level A | $333.00 per week |
| Industry/Skill Level B | $315.00 per week |
| Industry/Skill Level C | $270.00 per week |

4. THAT the minimum weekly rates of pay pursuant to this Order for the purposes of section 14 and 15 of the Minimum Conditions of Employment Act, 1993 shall have effect on and from 5th June 2003."

((2003) 83 WAIG 1922)

## 6. PUBLIC SERVICE ARBITRATOR AND PUBLIC SERVICE APPEAL BOARD

The Commission in Court Session dealt with a claim of work value change by the Hospital Salaried Officers Association on behalf of clinical psychologists employed in the public health system. On 23 December 2002, the Commission in Court Session granted increased rates of pay and revised the classification structure for clinical psychologists following some 10 days of hearings where more than 25 witnesses gave evidence of the changes which had taken place in clinical psychologist services and practice in Western Australia and elsewhere. (*Hospital Salaried Officers of Western Australia Union of Workers v Royal Perth Hospital and Others* (2002) 83 WAIG 23).

The last year has seen the registration of a large number of enterprise bargaining agreements which supplement the General Agreements reached in 2002 for public servants and government officers. Those General Agreements brought some consistency to the conditions of employment of public servants and government officers employed across all government departments and agencies. The enterprise bargaining agreements deal only with matters which are unique to the particular department or agency due to its specific needs, which go beyond the standard arrangements.

The Public Service Arbitrator has continued to deal with issues related to the conversion to permanency of officers engaged on fixed term contracts. These issues of principle appear to have largely been resolved, however, a small number of individual matters are in the process of being concluded.

The Public Service Arbitrators have been involved in lengthy conciliation dealing with police officers and prison officers in respect of staffing levels. The Public Service Arbitrator involved in the prisons matter has spent a considerable time meeting with the parties in the prisons with a view to resolving those matters. In respect of police, the union is seeking a registered agreement with the Commissioner of Police to set out particular staffing ratios and formulae. A trial of the staffing arrangement has been implemented and is in the process of assessment and review.

Once again, conflict has arisen regarding the jurisdiction and powers of the Public Service Arbitrator due to the complexities of the Public Sector Management Act 1994, the Regulations arising from the Public Sector Management Act 1994, and the Public Sector Standards. The Full Bench and the Industrial Appeal Court have confirmed the Public Service Arbitrator's authority to deal with industrial matters according to equity, good conscience and substantial merits, i.e. the fairness of certain decisions of government employers. The Public Service Arbitrator's role is not to enforce the Public Sector Management Act 1994 and Regulations, or deal with non compliance with Public Sector Standards. (*The Commissioner of Police v Civil Service Association of Western Australia Incorporated* [2002] WASCA 19). However, the limitations and difficulties associated with the complexities continue to arise and cause difficulty for the parties. The processes for departments and agencies dealing with alleged breaches of discipline or substandard performance by employees continue to be of concern. The Public Service Arbitrator has received a number of applications for orders to require the employer to cease those processes on the basis of failures by the employers to properly and fairly apply the processes. The problems associated with complexity and repetition of some of the aspects of those processes set out in the Public Sector Management Act 1994, commented on in last year's annual report, continue to arise.

The Public Service Appeal Board has dealt with an increased number of appeals over the last year. For a time, some parties sought to apply rigidly legalistic approaches to the pursuit of claims before the Public Service Arbitrator and the Public Service Appeal Board. This significantly increased the amount of time taken by the parties, the Public Service Arbitrator and the Public Service Appeal Board

to deal with those matters. Further, this type of approach particularly in matters involving the Public Service Appeal Board has been problematic in that the members of the Public Service Appeal Board nominated by the parties to the appeal have been required to spend considerable periods of time away from their other duties to deal with interlocutory and other processes which have not been the norm within the Public Service Appeal Board's processes. The Public Service Arbitrator and the Public Service Appeal Board have made clear their strong preference for less formal processes, in keeping with the spirit of the Industrial Relations Act 1979, with its requirement that matters be dealt with according to equity, good conscience and the substantial merits without regard to technicalities and legal form. The trend noted above appears to be abating.

The case management approach to deal with Public Service Appeal Board matters referred to in last year's annual report has been successful in dealing with a small back log of appeals filed but not prosecuted within a reasonable period.

Two other matters of concern arise due to the different jurisdictions of the Public Service Arbitrator and the Public Service Appeal Board. The first is that applicants have felt the need to file a multiplicity of claims all dealing with the same issues to ensure that the claim will be able to be dealt with by one of the jurisdictions. This has been a strategic approach which, while aimed at ensuring that the complaint does not fall between the jurisdictions and be lost, causes a substantial duplication in proceedings, resulting in the expenditure of time, money and inconvenience to all concerned.

A second issue involves the inability of the Public Service Appeal Board to conciliate matters before it, as no conciliation power is prescribed. This has meant that matters which ought to be before the Public Service Appeal Board can be the subject of applications to the Public Service Arbitrator, so that conciliation can take place.

Any review of the Public Sector Management Act 1994 should take these concerns into account.

## 7. SECTION 80ZE - INQUIRIES

In August 1998, following discussions with the Western Australian Police Union of Workers, Cabinet approved for an interim protocol for review for police officers facing dismissal proceedings initiated by the Police Commissioner under s 8 of the Police Act 1892. The agreed arrangements brought the matter before the Commission under s 80ZE of the Industrial Relations Act which enables the Minister to refer matters (not being industrial matters) to the Commission for enquiry and report. The interim arrangements were agreed to on the basis that legislation would be enacted to establish a permanent review process.

The interim protocol has now been substantially enacted by the Police Amendment Act 2003 which was assented to on 27 March 2003 and came into operation by proclamation 25 July 2003.

Whilst the interim protocol was applied, the Commission received 12 applications for review by police officers, five of which were withdrawn. The remaining seven matters were heard in accordance with the terms of the interim protocol and in each case recommendations were made to the Minister under s 80ZE.

The Police Amendment Act enacts a comprehensive code for removal of a police officer under s 8 of the Police Act. The Code is contained in Part IIB of the Police Act. A police officer who is removed may appeal to the Commission on the ground that the decision of the Commissioner of Police to take removal action was harsh, oppressive or unfair. The Commission is to be constituted by not less than three Commissioners, one of whom shall be the Chief Commissioner or the Senior Commissioner.

On hearing the appeal the appellant has the burden of establishing that the decision to take removal action was harsh, oppressive or unfair. The Commission is expressly requested to have regard to the interests of the appellant and the public interest. The public interest is defined to include the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of the members of the Police Force and the special nature of the relationship between the Commissioner of Police and members of the Force.

Pursuant to the Police Amendment Act, s 113(1)(c) of the Industrial Relations Act has been amended to empower the Commission to make regulations regulating the practice and procedure to be followed in relation to appeals under s 33P of the Police Act.

## 8. AWARD REVIEW PROCESS

During the period covered by this report the Commission continued to update its awards. This was done following application by a party to the respective award. However, the award review process received a considerable boost in August 2002 when amendments to the *Industrial Relations Act 1979* empowered the Commission, of its own motion, to vary awards to reflect statutory and other requirements. The Commission is yet to exercise this power.

A number of parties to awards were active during the period and significant improvements were made in awards regulating both white-collar and blue-collar industries. The variations have resulted in these awards becoming clearer, more informative contemporary documents.

Staff of the Department of the Registrar are involved in assisting the parties on award updating by providing information on a range of matters including relevant statutory provisions.

The Commission estimates that work has commenced on the updating of about 100 awards and the process continues to gather momentum.

Analysis of award variation orders

During the period 157 Award variation Orders were issued by the Commission.

A comprehensive update and modernisation of eight Awards occurred. These processes saw, for example, the update of or inclusion of contemporary leave provisions, the updating of allowances, the removal of gender specific language and the inclusion of Statutory provisions in respect of Minimum Conditions of Employment, Superannuation Guarantee contributions, Right of Entry and notice periods.

Some awards had not been updated for several years and significant research was required by the parties to establish the original basis of award provisions. Typically several conferences were then required followed by hearings to give final effect to the variations.

The basis for Awards to be updated has therefore been set although some organisations do not appear to be sufficiently resourced for the task.

Aside from those Awards comprehensively updated, the instances of award variation by subject were :-

| | |
|---|---|
| Allowances | 103 |
| Adult wages | 21 |
| Superannuation | 15 |
| Organisation names | 12 |
| Junior wages | 9 |
| Respondents | 4 |
| Award parties | 3 |
| Definitions | 3 |
| Hours of work | 2 |
| Scope, callings | 2 |
| Part time employment | 2 |
| Study leave | 2 |
| Classifications | 1 |
| Dispute resolution procedure | 1 |
| | 180* |

* Some applications were concerned with more than one topic. Does not include the 8 awards which were comprehensively updated

## 9. RIGHT OF ENTRY

**RIGHT OF ENTRY PERMITS**
**Industrial Relations Act Part II, Division 2G**
**Section 49J**

**Financial Year 2002 - 2003**

| Organisation | Permits issued |
|---|---|
| Australian Collieries' Staff Assoc | 1 |
| Australian Liquor, Hospitality & Miscellaneous Workers Union | 78 |
| Australian Meat Industry Employees Union | 3 |
| Australian Municipal, Administrative, Clerical and Services Union of Employee - WA Clerical and Administrative Branch | 8 |
| Australian Rail Tram & Bus Industry Union of Employees WA Branch | 2 |
| Australian Workers Union WA Branch Industrial Union of Workers | 12 |
| Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union | 12 |
| Civil Service Association of WA Inc. | 30 |
| Communication. Electrical, Electronic, Energy, Inform. Postal, Plumbers, & Allied Workers Union of Aust. WA Branch | 8 |
| Construction, Forestry, Mining and Energy Union of Workers | 27 |
| Federated Brick Tile & Pottery Industrial Union of Australia | 1 |
| Hospital Salaried Officers Association | 9 |
| Independent Schools Salaried Officers' Assoc of WA I | 5 |
| Media Entertainment & Arts Alliance | 2 |
| Plumbers & Gasfitters Employees Union, Western Australian Branch | 2 |
| Sales Representatives & Commercial Travellers Guild of WA | 6 |
| State School Teachers Union of Western Australia | 19 |
| The Association of Professional Engineers, Australia | 1 |
| Australian Rail, Tram & Bus Industry Union of Employees WA Branch | 2 |
| Food Preservers Union of Western Australia Union of Workers | 7 |
| Forest Products, Furnishing & Allied Industries Union of Workers WA | 10 |
| Shop, Distributive & Allied Employees Association of WA | 19 |
| The WA Hairdressers & Wigmakers Employees Union of Workers | 12 |
| The WA Clothing & Allied Trades Industrial Union of Workers | 5 |
| Transport Workers Union, Industrial Union of Workers, WA Branch | 7 |
| United Firefighters Union of Western Australia | 2 |
| Western Australian Prison Officers Union of Workers | 5 |
| Western Australian Railway Officers' Union | 2 |
| WA Police Union of Workers | 1 |
| **Total** | **298** |

The Commission constituted by a Commissioner pursuant to s 49J considered twelve applications to revoke or suspend right of entry permits. As a result of these proceedings no permits were revoked or suspended.

## 10. DECLARATIONS THAT BARGAINING HAS ENDED AND ENTERPRISE ORDERS

Applications made under s 42H of the Industrial Relations Act 1979 are applications for an order stating that, subject to certain conditions, the bargaining period between the applicant and other negotiating party has ended.

Applications made under s 42I of the Act (simply put and subject to the conditions prescribed by the Act) are applications to the Commission to make an "enterprise order" if a declaration has already been made under s 42I.

During the period 6 applications under s 42H were received. At the end of the period 2 had been finalised and 4 were in progress.

There were 14 applications under s 42I of which 11 were finalised by the end of the period and 3 were in progress.

## 11. 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.

- Section 29(1)(b)(i) - Claims alleging unfair dismissal
- Section 29(1)(b)(ii), claims alleging a denied contractual benefit
- A combination of both in the same application

For the purposes of this analysis the three types of application are referred to in the following tables as "Section 29" applications.

Section 29 Applications Lodged

Applications alleging unfair dismissal continue to represent the most significant proportion of the types of applications that are lodged under Section 29.

| **Section 29 applications lodged** | **1998-1999** | **1999-2000** | **2000-2001** | **2001-2002** | **2002-2003** |
|---|---|---|---|---|---|
| Unfair Dismissal | 901 | 926 | 1127 | 1141 | 827 |
| Denial of Contractual Benefits | 299 | 277 | 352 | 289 | 198 |
| Both in same application | 502 | 515 | 627 | 593 | 537 |
| TOTAL | 1702 | 1718 | 2106 | 2023 | 1562 |

Interpolating the total of "both in same application" from the foregoing table to the two principal claims of unfair dismissal and contractual benefits shows the following;

| **Section 29 applications** | **1998-1999** | **%** | **1999-2000** | **%** | **2000-2001** | **%** | **2001-2002** | **%** | **2002-2003** | **%** |
|---|---|---|---|---|---|---|---|---|---|---|
| Unfair Dismissal | 1403 | 64% | 1441 | 65% | 1755 | 83% | 1438 | 71% | 827 | 53% |
| Denial of Contractual Benefits | 801 | 36% | 792 | 35% | 351 | 17% | 586 | 29% | 735 | 47% |

Section 29 Applications Finalised

| | **1998-1999** | **1999-2000** | **2000-2001** | **2001-2002** | **2002-2003** |
|---|---|---|---|---|---|
| Unfair Dismissal | 1249 | 939 | 1069 | 1137 | 856 |
| Denial of Contractual Benefits | 405 | 312 | 325 | 297 | 233 |
| Both in same application | 564 | 498 | 607 | 534 | 539 |
| TOTAL | 2218 | 1749 | 2001 | 1968 | 1628 |

Interpolating the total of "both in same application" from the foregoing table to the two principal claims of unfair dismissal and contractual benefits shows the following;

| | 1998-1999 | % | 1999-2000 | % | 2000-2001 | % | 2001-2002 | % | 2002-2003 | % |
|---|---|---|---|---|---|---|---|---|---|---|
| Unfair Dismissal | 1813 | 65% | 1437 | 64% | 1676 | 84% | 1404 | 71% | 856 | 53% |
| Denial of Contractual Benefits | 969 | 35% | 810 | 36% | 325 | 16% | 564 | 29% | 772 | 47% |

Compared with All Other Matters[1] Lodged

Section 29 Applications continue to represent over half of all the matters lodged in the Commission and this pattern has been evident over the last four reporting years.

| Section 29 compared with all other matters lodged | 1998-1999 | 1999-2000 | 2000-2001 | 2001-2002 | 2002-2003 |
|---|---|---|---|---|---|
| All Matters Lodged | 3487 | 3312 | 3671 | 3627 | 3276 |
| Section 29 Applications Lodged | 1702 | 1718 | 2106 | 2023 | 1562 |
| Section 29 as Percentage (%) of All Matters Lodged | 49% | 52% | 57% | 56% | 48% |

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

Section 29 Applications Compared with All Other Matters Finalised

A similar pattern emerges in that the section 29 applications represent just over half of all the matters dealt with over the last four reporting years.

| Section 29 compared with All other Matters | 1998-1999 | 1999-2000 | 2000-2001 | 2001-2002 | 2002-2003 |
|---|---|---|---|---|---|
| All Matters finalised | 4731 | 3524 | 3745 | 3558 | 3127 |
| Section 29 Applications finalised | 2218 | 1749 | 2001 | 1968 | 1628 |
| Section 29 as Percentage (%) of All Matters finalised | 47% | 50% | 53% | 55% | 52% |

Section 29 Matters – Method of Settlement

The following table shows the continuing very high percentage of section 29 matters that were settled without recourse to formal arbitration.

| Section 29 Matters Method of Settlement | Unfair Dismissal | Contractual Benefits | Both | Total | % |
|---|---|---|---|---|---|
| Arbitrated claims in which order issued | 96 | 40 | 69 | 205 | 13% |
| Settled after proceedings before the Commission | 419 | 84 | 262 | 765 | 47% |
| Matters referred for investigation resulting in settlement | 213 | 58 | 101 | 372 | 23% |
| Matters withdrawn before proceedings commenced in the Commission | 127 | 51 | 107 | 285 | 18% |
| Matters withdrawn without proceedings | 1 | 0 | 0 | 1 | 0% |
| Total Finalised in 2001-2002 financial year | 856 | 233 | 539 | 1628 | 100% |

Demographic Data for Section 29 Applications collected at the time of Lodgement

The Commission began a demographic data collection system during the 2000/2001 financial year to capture additional information on applications at the time of lodgement. The following tables serve to illustrate a variety of characteristics relating to applicants that have claimed redress under section 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 (63%) were prepared to conduct their own case in the Commission whilst the remainder were represented in some form, as set out in the table.

| | Female | % Female | Male | % Male | Total | % Total |
|---|---|---|---|---|---|---|
| Industrial Agent | 73 | 12% | 102 | 11% | 175 | 11% |
| Legal representation | 66 | 11% | 149 | 15% | 215 | 14% |
| Other | 81 | 14% | 110 | 11% | 191 | 12% |
| Personal | 373 | 63% | 608 | 63% | 981 | 63% |
| *Total* | 593 | 100% | 969 | 100% | 1562 | 100% |

Age Groups

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

| Age Group | Female | % Female | Male | % Male | Total | % Total |
|---|---|---|---|---|---|---|
| 1. Under 16 | 9 | 2% | 15 | 2% | 24 | 2% |
| 2. 17 to 20 | 47 | 8% | 51 | 5% | 98 | 6% |
| 3. 21 to 25 | 69 | 12% | 90 | 9% | 159 | 10% |
| 4. 26 to 40 | 209 | 35% | 376 | 39% | 585 | 37% |
| 5. 41 to 50 | 128 | 22% | 202 | 21% | 330 | 21% |
| 6. 51 to 60 | 76 | 13% | 128 | 13% | 204 | 13% |
| 7. Over 60 | 7 | 1% | 35 | 4% | 42 | 3% |
| 8. Data Not Provided | 48 | 8% | 72 | 7% | 120 | 8% |
| *Total* | 593 | 100% | 969 | 100% | 1562 | 100% |

Employment Period

It is significant to note that 21% of all applicants were employed for less than 3 months.

| Period of Employment | Female | % Female | Male | % Male | Total | % Total |
|---|---|---|---|---|---|---|
| 1. Under 3 months | 139 | 23% | 188 | 19% | 327 | 21% |
| 2. 4 to 6 months | 81 | 14% | 124 | 13% | 205 | 13% |
| 3. 7 to 12 months | 100 | 17% | 128 | 13% | 228 | 15% |
| 4. 1 to 2 years | 79 | 13% | 145 | 15% | 224 | 14% |
| 5. 2 to 4 years | 81 | 14% | 128 | 13% | 209 | 13% |
| 6. 4 to 6 years | 26 | 4% | 76 | 8% | 102 | 7% |
| 7. Over 6 years | 46 | 8% | 121 | 12% | 167 | 11% |
| 8. Data Not Provided | 41 | 7% | 59 | 6% | 100 | 6% |
| *Total* | 593 | 100% | 969 | 100% | 1562 | 100% |

Salary Range

| | Female | %Female | Male | % Male | Total | % Total |
|---|---|---|---|---|---|---|
| 1. Under $200 P/W | 100 | 17% | 141 | 15% | 241 | 15% |
| 2. $201 to $600 P/W | 279 | 47% | 280 | 29% | 559 | 36% |
| 3. $601 to $1000 P/W | 161 | 27% | 325 | 34% | 486 | 31% |
| 4. $1001 to $1500 P/W | 36 | 6% | 145 | 15% | 181 | 12% |
| 5. $1501 to $2000 P/W | 8 | 1% | 51 | 5% | 59 | 4% |
| 6. Over $2001 P/W | 9 | 2% | 27 | 3% | 36 | 2% |
| *Total* | 593 | 100% | 969 | 100% | 1562 | 100% |

Category of Employment

65% of all applicants were Full Time, Permanent or Permanent Full Time employees at the time of their termination.

| Period of Employment | Female | % Female | Male | % Male | Total | % Total |
|---|---|---|---|---|---|---|
| Casual | 54 | 9% | 46 | 5% | 100 | 6% |
| Casual Full Time | 3 | 1% | 8 | 1% | 11 | 1% |
| Casual Part Time | 5 | 1% | 2 | 0% | 7 | 0% |
| Fixed Term | 17 | 3% | 31 | 3% | 48 | 3% |
| Full Time | 107 | 18% | 191 | 20% | 298 | 19% |
| Permanent | 85 | 14% | 158 | 16% | 243 | 16% |
| Permanent Full Time | 151 | 25% | 323 | 33% | 474 | 30% |
| Permanent Part Time | 43 | 7% | 21 | 2% | 64 | 4% |
| Probation | 13 | 2% | 31 | 3% | 44 | 3% |
| Part Time | 28 | 5% | 12 | 1% | 40 | 3% |
| Data Not Provided | 87 | 15% | 146 | 15% | 233 | 15% |
| *Total* | 593 | 100% | 969 | 100% | 1562 | 100% |

Reinstatement Sought

57% of applicants did not seek reinstatement when they lodged their application.

| Reinstatement Sought | Female | % Female | Male | % Male | Total | % Total |
|---|---|---|---|---|---|---|
| No | 355 | 60% | 528 | 54% | 883 | 57% |
| Data Not Provided | 50 | 8% | 109 | 11% | 159 | 10% |
| Yes | 188 | 32% | 332 | 34% | 520 | 33% |
| *Total* | 593 | 100% | 969 | 100% | 1562 | 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 | No | % No | No Data | % No Data | Yes | % Yes | Total | % Total |
|---|---|---|---|---|---|---|---|---|
| 1. Under 16 | 12 | 1% | 1 | 1% | 11 | 2% | 24 | 2% |
| 2. 17 to 20 | 71 | 8% | 6 | 4% | 21 | 4% | 98 | 6% |
| 3. 21 to 25 | 111 | 13% | 10 | 6% | 38 | 7% | 159 | 10% |
| 4. 26 to 40 | 329 | 37% | 58 | 36% | 198 | 38% | 585 | 37% |
| 5. 41 to 50 | 198 | 22% | 26 | 16% | 106 | 20% | 330 | 21% |
| 6. 51 to 60 | 100 | 11% | 23 | 14% | 81 | 16% | 204 | 13% |
| 7. Over 60 | 24 | 3% | 5 | 3% | 13 | 3% | 42 | 3% |
| 8. Data Not Provided | 38 | 4% | 30 | 19% | 52 | 10% | 120 | 8% |
| *Total* | 883 | 100% | 159 | 100% | 520 | 100% | 1562 | 100% |

## 12. EMPLOYER EMPLOYEE AGREEMENTS

**INDUSTRIAL RELATIONS ACT PART VID**
**FINANCIAL YEAR 2002/2003**

Applications to Lodge EEA's for Registration

| **Number of EEA's Lodged** | |
|---|---|
| Not Meeting Lodgement Requirements | 103 |
| Meeting Lodgement Requirements | 398 |
| Total | 501 |

EEA's Lodged for Registration and Finalised

| **Outcomes** | **Number of EEA's** | **%** |
|---|---|---|
| Refused | 205 | 60.47% |
| Registered | 37 | 10.91% |
| Withdrawn | 97 | 28.61% |
| Total | 339 | 100.00% |

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

Guidelines and Principles for No Disadvantage Test

Pursuant to s 97VX the Commission prepared the following instrument to establish principles and guidelines to be followed by the Registrar in determining whether and EEA passes the no-disadvantage test:

**Guidelines and Principles for the Registrar to follow in determining whether an Employer Employee Agreement (EEA) passes the No Disadvantage Test (NDT)**

1. Subject to the other requirements for registration of an EEA being in order pursuant to the terms of s 97VB and Schedule 4 of the Act, in applying the NDT the Registrar must in the first instance examine the EEA to see if:

   (a) it confers on the employer a power to change any term or condition of the employment without the consent of the employee; and

   (b) the employer could exercise the power in a way that would result, on balance, in a reduction in the overall entitlements of the employee.

The EEA is taken to disadvantage the employee if (a) and (b) are the case and no further consideration is necessary (s 97VS(3)).

The provisions in (a) and (b) above cannot be offset or in any way overcome by a written undertaking given by the employer.

2. (a) In the absence of the impediment set out in Clause 1 the Registrar shall determine the award or relevant order that would otherwise extend to the employee.

(b) The award or relevant order in subclause 2(a) is that which but for the operation of the EEA would apply to the employee in his or her employment with the employer (s 97VS(4)).

(c) There may be an award which covers the employee's employment by operation of common rule. For the purpose of s 97VS (2) and (4) in ascertaining whether this is the case the Registrar shall have regard to the scope of an award which covers the kind of work performed by the employee, ascertained by reference to the major and substantial duties of the employee and the purpose of his or her employment.

(d) The provisions of subclause 2(c) also apply for the purpose of the determination of the Registrar pursuant to s 97VT of the Act.

(e) A determination by the Registrar under s 97VT(2) is binding on the Registrar for the purpose of applying the NDT when the EEA concerned is lodged for registration, unless the Registrar considers that the circumstances existing at the time the determination was made have changed in a material way (s 97VT(3)).

(f) For the purpose of s 97VS(2) and (4), there may be a relevant order as prescribed by the regulations which covers the employee's employment. This is to be determined by ascertaining whether the employer is a party to the order that covers the work performed by the employee.

(3) (a) If the Registrar is satisfied that there is no award that would otherwise extend to the employee in Clause 2 above, then any award, including an award under the Commonwealth Act, that the Registrar determines to be a comparable award and relevant order applies for the purpose of applying the NDT to see if the EEA disadvantages the employee.

(b) If in accordance with s 97VT(2) the Registrar has already determined that there is a comparable award or relevant order, that comparable award or relevant order will be relevant for the purposes of s 97VS.

A determination of a comparable award or relevant order by the Registrar for the purpose of applying the NDT when the EEA concerned is lodged, is binding on the Registrar for the purpose of applying the NDT unless the Registrar considers that the circumstances existing at the time when the determination was made have changed in a material way.

(c) In determining a comparable award the Registrar shall;

(i) look to awards of this Commission which cover the same kind of work being performed by the employee, ascertained by reference to the major and substantial duties of the employee and the purpose of his or her employment.

In this regard the Registrar shall look to awards with common rule application.

(ii) if a comparable award cannot be ascertained on the basis set out in (i) then there is recourse to enterprise awards. However, caution should be exercised in identifying an enterprise award which covers the kind of work performed by the employee, party to the proposed EEA.

In determining whether such an award should be a comparable award for the purpose of identifying the same kind of work, the Registrar shall take into account the industry and environment in which the work is undertaken and the context within which work is performed.

(iii) In determining an award or comparable award, including an award under the Commonwealth Act, the Registrar shall not have regard to whether or not the award or comparable award has been varied for all safety net wage adjustments or variations to allowances, available under the National Wage Case or State Wage Case decisions.

Likewise for the purposes of determining an award or comparable award under the Commonwealth Act the Registrar shall not have regard to whether or not the award or comparable award has undergone award simplification pursuant to s 89A of the Workplace Relations Act 1996 (Commonwealth).

(iv) However, if the Registrar considers that for the kind of work for which the employee is engaged, there is more than one award which may be determined to be a comparable award for the purposes of the NDT, the Registrar shall determine that award which has been varied for safety net adjustments and variations to allowances, in line with the State Wage Case decision or the National Wage Case decisions, as the case may be.

(4) If the Registrar is unable to determine an award which would otherwise apply or any award, including an award under the Commonwealth Act, as a comparable award or relevant order either under s 97VS or s 97VT, the EEA is to be taken not to disadvantage the employee in relation to the terms and conditions of his or her employment.

(5) (a) In comparing the entitlements of an employee under an EEA to the entitlements that would otherwise apply to the employee under an award, comparable award or a relevant order in the application of the NDT, the Registrar must take into account all relevant benefits, whether in the form of money or otherwise (s 97VU).

The relevant benefits may include:

(i) Wages, allowances, entitlements and protections under an award, comparable award or relevant order.

(ii) Training, promotional wage scales, wage or salary progression and competency based vocational training under an award, comparable award or relevant order.

(b) The relevant benefits under an award, comparable award or relevant order to be taken into account for the purpose of applying the NDT are those which apply under the award, comparable award or relevant order over the same period as the term of the proposed EEA.

(c) The relevant benefits are those which are ascertained by reference to the award, comparable award or relevant order and do not include any over award entitlements or benefits that accrue or may accrue to the employee under employment prior to the proposed EEA having effect.

6. (a) An EEA passes the NDT if it does not disadvantage the employee in relation to the terms and conditions of his/her employment. (s 97VS(1)).

For the Registrar to determine whether an EEA disadvantages an employee, the Registrar must ascertain "on balance" whether the overall entitlements have been reduced by referring to an award, comparable award or relevant order. (s 97VS(2)).

The Registrar is required to satisfy himself or herself that the EEA is no less favourable than the award, comparable award or relevant order to the employee when considered as a whole.

An EEA should not fail the test merely because a particular benefit, entitlement or protection is reduced, provided that on balance the overall package of terms and conditions is not reduced.

This will be a global rather than "line by line" approach. However, in considering whether the overall package of terms and conditions disadvantages the employee, a "line by line" assessment of terms and conditions may be necessary to form a judgement whether all increases and reductions, on balance, result in an overall disadvantage.

(b) In applying the NDT it may be necessary for the Registrar to compute payments the employee would otherwise be entitled to under the award, comparable award or relevant order and compare those payments with payments that employment under the EEA would attract, having regard to the pattern of work on which the employee is engaged or would be engaged.

In this regard the Registrar shall inform himself or herself as to the pattern of work for the purpose of applying the NDT and shall take into account such matters as the hours of duty, the frequency and duration of overtime and the nature and incidence of allowances.

(c) Any undertakings as to payments that are not a term of the EEA are not to be taken into account by the Registrar in the application of the NDT.

(d) In applying the NDT the Registrar shall not give separate consideration to matters of public interest but shall ensure that in balancing the overall package as a whole, the EEA has not sought to compensate for matters in a way which would derogate from the principal objects of the Act set out in section 6 and/or the rights of third parties.

Furthermore the Registrar shall satisfy himself or herself that particular terms and conditions of the award, comparable award or relevant order to apply for the purpose of the NDT are not less than particular terms and conditions set down in the Minimum Conditions of Employment Act. If this is the case, the term(s) and condition(s) under the Minimum Conditions of Employment Act shall operate in lieu of the particular term(s) and condition(s) in the award, comparable award or relevant order in applying the NDT.

(e) Where entitlements, benefits and protection of an employee under an award, comparable award or relevant order are being offset under the terms and conditions of employment of an EEA, the Registrar should satisfy himself or herself that if matters going to award standards, such as accrued sick leave or employment protection are involved, that in balancing the overall outcome the Registrar must take into account:

(i) the value of those benefits, entitlements and protections to the employee;

(ii) the costs of those benefits, entitlements and protections to the employer; and

(iii) community wage movements generally,

to establish the value of the benefit, entitlement or protection being forgone or reduced.

(f) In most instances it will be necessary for the Registrar to have completed work sheets setting out computations and calculations involved in comparing the value and the outcome of matters taken into account, for the purpose of applying the NDT.

(g) If the award, comparable award or relevant order does not make provision for part time or casual employment, the EEA that regulates employment on that basis shall not fail the NDT for that reason alone.

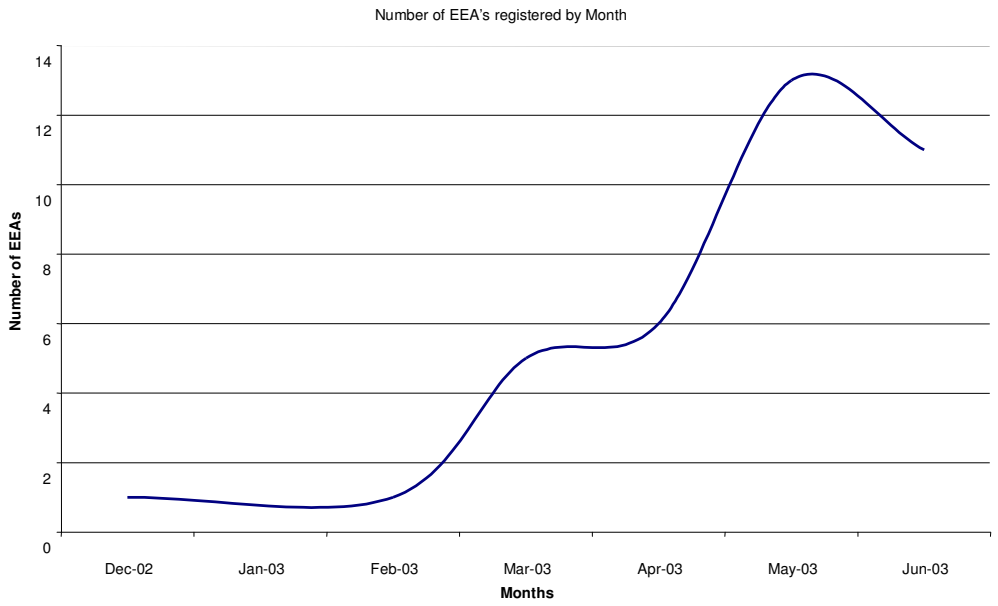
7. In accordance with the terms of s 97VV of the Act, an EEA does not disadvantage an employee in relation to his or her employment by reason only of a reduction of the employees wages if:

(i) the employee is eligible for the Commonwealth Supported Wage System; and

(ii) the EEA provides for the payment of wages to the employee at a rate that is not less than the rate set in accordance with that system for persons of a class that includes the employee.

During the year under review no applications were made under s 97VZ to the Commission by the Minister or a peak industrial body to have the instrument amended or replaced.

EEA's Registered by Month



Reasons for Refusing to Register EEA's Lodged

| **Reasons For Refusing EEA's*** | Number of Applications |
|---|---|
| Party/s Did Not Genuinely wish to have EEA Registered | 39 |
| Collective Not Individual EEA - Failed s 97UA | 3 |
| Documentation Not Provided to Employee Within Specified Time Frames (s 97UG) | 2 |
| Failed Employment Status & Subject to s 97VD Notice. | 6 |
| Failed Min Conditions and Subject to s 97VD Notice | 26 |
| Failed NDT and Subject to s 97VD Notice | 11 |
| Failed to Comply with s 97UU - Variation of EEA | 58 |
| Failed to Lodge Revised EEA within Time Specified in s 97VD Notice | 30 |
| Failed Witness Signature & Subject to s 97VD Notice. | 4 |
| Failure by Employer to Provide Copy of Relevant Award (s 97UG) | 75 |
| Inadequate DSP & Subject to s 97VD Notice | 21 |
| Inadequate Expiry/Commencement Date & Subject to s 97VD Notice | 7 |
| Not Lodged Within 21 Days of Execution | 1 |

*Note: As there may be multiple reasons for refusing to register one EEA, the figures are cannot be summated.

Demographic Data for Registered EEA's

| **Registered EEA's by gender** | Number of EEA's | % |
|---|---|---|
| Female | 6 | 16.22% |
| Male | 31 | 83.78% |
| Total | 37 | 100.00% |

| **Registered EEA's by Age Category** | Number of EEA's | % |
|---|---|---|
| Employees 18 years of age or over | 36 | 97.30% |
| Employees under 18 years of age | 1 | 2.70% |
| Total | 37 | 100.00% |

Reduced Wages payable for People with Disabilities (s 97VV)

Section 97VV prescribes that an employee is not disadvantaged in employment if the wages are reduced on the basis that the employee is eligible for the Supported Wage System (SWS) and the EEA provides for payment not less than the appropriate rate set by the SWS. Generally when an EEA is lodged with the Registrar, an application for access to the SWS is also lodged by the parties with the Supported Wage Management Unit (SWMU) at the Department of Family & Community Services. However, the Registrar may also approve EEA's where employers have used their own competency/productivity model as a method of assessment of the employee's relative productivity. The Registrar must still be satisfied that the SWS eligibility criteria and rates of pay have been met.

| | |
|---|---|
| Number of EEA's where employee has a disability | 17 |

Seventeen EEA's for employees with disabilities were registered. All of the EEA's registered also involved applications for access to the SWS. There were no EEA's for employees with a disability which involved the employer's own productivity/competency model.

Registered EEA's by Term of Agreement

| **Registered EEA's by Term** | | |
|---|---|---|
| Term | Number of EEA's | % |
| <1 year | 3 | 8.11% |
| 1 to 2 years | 3 | 8.11% |
| 2 to 3 years | 31 | 83.78% |
| Total | 37 | 100.00% |

Registered EEA's by Industry

| Registered EEA's by Industry | | | |
|---|---|---|---|
| **Classification** | **Number of EEA's** | **Division** | **Total** |
| Accommodation | 2 | Accommodation, Cafes and Restaurants | 4 |
| Pubs, Taverns and Bars | 2 | | |
| Plant Nurseries | 5 | Agriculture, Forestry and Fishing | 5 |
| Concreting Services | 4 | Construction | 6 |
| Electrical Services | 2 | | |
| Dental Services | 2 | Health and Community Services | 2 |
| Cement & Lime Manufacturing | 1 | Manufacturing | 3 |
| Structural Metal Product Manufacturing n.e.c. | 1 | | |
| Wooden Furniture and Upholstered Seat Manufacturing | 1 | | |
| Business and Professional Associations | 1 | Personal & Other Services | 4 |
| Hairdressing and Beauty Salons | 1 | | |
| Personal Services n.e.c. | 2 | | |
| Accounting Services | 6 | Property & Business Services | 6 |
| Automotive Repair and Services n.e.c. | 4 | Retail Trade | 7 |
| Car Retailing | 3 | | |
| Total | 37 | | 37 |

Dispute Resolution - Determinations of Private Arbitrator Lodged with the WAIRC (ss 97WN & 97WP)

Where an order or determination referred to in s 97WN(4)(b) & (c) is made by an arbitrator that is not a relevant industrial authority, the arbitrator must, at the request of the parties, lodge a copy of the order or determination with the Commission.

There have been no determinations of a private arbitrator lodged with the Commission.

Dispute Resolution – Determinations by the Commission (s 97UP)

EEA dispute provisions may provide for a party to refer to the relevant industrial authority, for arbitration in accordance with s 97WI, any question, dispute or difficulty that arises out of or in the course of the employment.

| | | |
|---|---|---|
| **Registered EEA's where WAIRC is Named as Arbitrator** | 33 | 89.19% |

The Commission has not been involved in the arbitration of any disputes in relation to EEA matters.

Referral to the Commission where delay alleged in dispute resolution (s 97WK)

If a party to an EEA alleges that the other party has failed to comply with the time limit included in the EEA dispute provisions, the allegation may be referred to the Commission.

No applications have been referred to the Commission where delays in dispute resolution were alleged.

Bargaining Agents

| | **Number of EEA's** | **%** |
|---|---|---|
| Number of EEA's lodged for registration where the employee was represented by a bargaining agent | 31 | 7.79 |
| Number of EEA's lodged for registration where the employer was represented by a bargaining agent | 151 | 37.94 |

Note: As both parties may be represented by bargaining agents the figures cannot be summated

Notices of Deficiency Issued (s 97VD)

| **Number of EEA's Finalised where Notices of Deficiency were Issued* (s 97VD)** | |
|---|---|
| **Decision** | Number of EEA's |
| Refused | 34 |
| Registered | 21 |
| Withdrawn | 11 |
| Total | 66 |

*Note - the figures only relate to EEA's that were finalised in the 2002/2003 financial year

Appeals Against Registrar's Decision to Refuse to Register EEA's (s 97VN)

| | |
|---|---|
| **Total Number of Appeals Against EEA Refusals** | 9 |
| Appeal upheld - Remitted back to Registrar | 6 |
| Appeal withdrawn or discontinued | 3 |

Approved Award Summaries

Section 97UG requires an employer to provide specific information to an employee prior to the signing of an EEA. This includes a copy of any relevant award that would ordinarily apply to the employee or a summary of the award which has been approved by the Registrar. The Registrar has approved 30 award summaries of the most commonly used awards:

- Animal Welfare Industry Award
- Bakers (Metropolitan) Award
- Building Trades Construction Award
- Children Services (Private) Award
- Cleaners and Caretakers Award
- Clerks (Commercial, Social and Professional Services) Award
- Clerks (Hotel, Motels and Clubs) Award
- Clerks (Wholesale and Retail Establishments) Award
- Contract Cleaners Award
- Dental Technicians' and Attendant/Receptionists' Award
- Electronics Industry Award Part 1 General
- Electrical Contracting Industry Award
- Enrolled Nurses and Nursing Assistants' (Private) Award
- Farm Employees
- Furniture Trades Industry Award
- Hairdressers Award
- Horticultural (Nursery) Industry Award
- Hotel and Tavern Workers Award
- Landscape Gardening Industry Award
- Metal Trades General Award Part 1
- Motel, Hostel, Service Flats and Boarding House Workers Award
- Motor Vehicle Industry Award
- Photographic Industry Award
- Printing Industry Award
- Restaurant, Tearoom and Catering Workers Award
- Security Officers Award
- Shop and Warehouse (Wholesale and Retail Establishments) Award
- Transport Workers (General) Award
- Vehicle Builders Award

Features of Registered EEA's

- Changes to hours of work which have generally been adapted to cater for the requirements of the business and clients.

- Variations in over time and penalty provisions with increases in ordinary rates of pay.

- Productivity based incentive or bonus schemes

- Payout of all or a proportion of accrued sick leave at the end of each year or on termination

- Non accumulation of sick leave from year to year

- Elimination of 17.5 % annual leave loading

- Agreement to cash out 50% of the annual leave entitlement into the hourly rate

- Elimination of various allowances applicable under the awards

- Inclusion of Supported Wage Model Clause for employees with disabilities to allow access to the Supported Wage System and the lawful payment of reduced wages

## 13. PUBLICATION OF THE WESTERN AUSTRALIAN INDUSTRIAL GAZETTE

The Commission, with support from the State Law Publisher, continues to reduce the cost of publishing the Western Australian Industrial Gazette as shown in the table below. In the last financial year the total cost of producing the Gazette has reduced by a further 42%.

In the past 4 years Gazette outlays have declined by 72% or $88451 per annum.

During the past year we have successfully produced two sub-parts entirely 'in house'.

We anticipate that the entire publication process will be brought in house in the ensuing period.

**Cost of Producing Western Australian Industrial Gazette**

| **Fin Year begin Cost per page 1 July** | Cost per page (inc GST) | Annual cost | Subparts | Cost per subpart |
|---|---|---|---|---|
| 1995 | $40.50 | $133,072 (not incl Jan edition) | 11 (excluding Jan Edition) | $12 097 |
| 1996 | $31.00 | $171,746 | 15 | $11 450 |
| 1997 | $31.00 | $123,381 | 15 | $8 225 |
| 1998 | $31.00 | $169,457 | 20 | $8 473 |
| 1999 | $31.00 | $123,354 | 13 | $9 489 |
| 2000 | $18.77 | $86,594 | 16 | $5 412 |
| 2001 | $18.02 | $60,260 | 16 (including 2 Appendices) | $3 766 |
| 2002 | $7.90 | $34,903 | 18 (including 1 Appendix) | $1939 |

## 14. INTERNET WEBSITE (www.wairc.wa.gov.au)

### Internet

The Commission has approved the development of web services that will allow for online facilities. Facilities will include the capacity for parties to submit applications electronically, subject to Commission approval, and for parties to view the progress of an application through simple web reporting.

### DREAMS framework

The Digital Registry Electronic Application Management System (DREAMS) is being developed to maintain a high level of compatibility between our current information technology systems and new developments. DREAMS translates multiple databases allowing for the synchronization of duplicated data.

### Garnet

The Garnet system has been developed within the DREAMS framework. It is a system that enables each chamber within the Commission to easily administer its current workload. It is a single easy to use system that automatically collects data on applications as they progress through the process.

Also enabled is an online version which will enable parties to matters to see the current file details, history, status and future court bookings in a secure environment, expected for launch in the second half of 2003.

### Digital transcript

A successful trial of digital transcript service was conducted during this year. The introduction of digital transcript into courts will enable Commission members to directly access an audio recording of proceedings and select any portion or all of the proceeding for transcription.

The effect will be to allow for all proceedings to be recorded no cost and then only those parts of proceedings that are required to be converted to written form. This will enable the Commission to maintain a complete digital library of all proceedings for future reference and alleviate the need to anticipate future transcript needs. Approval has been given for a permanent installation and 3 courts will be fitted with the equipment by the end of 2003.

## 15. OTHER MATTERS

In June 2003 flowing on from amendments to the Act, Deputy Registrars Mrs J Wickham, Ms A Mullins and Mr D McLane were appointed to undertake delegated functions pursuant to section 96 of the Act. Deputy Registrar Ms D MacTiernan has undertaken delegated functions pursuant to section 96 of the Act. The Commission welcomes these officers who have joined other officers of the Commission in undertaking conciliation and award review functions at the direction of the Commission.

I express my appreciation to my colleagues, chamber staff, the Registrar and all of his staff and to the court reporting personnel for their efforts and dedication throughout the year.

Chief Commissioner W.S. Coleman

22 September 2003