
2008
WESTERN AUSTRALIA



Forty Fifth Annual Report
of
The Chief Commissioner of the
Western Australian Industrial Relations Commission
for the period
1 July 2007 to 30 June 2008

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

2008
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 2007 to 30 June 2008

Minister Responsible for the Administration of the Act
The Hon. Jon R Ford JP MLC
In his capacity as Minister for Employment Protection

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Membership and Principal Officers

Western Australian Industrial Relations Commission

During the year to 30 June 2008, the Western Australian Industrial Relations Commission (WAIRC) was constituted by the following members:

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

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

Public Service Arbitrators

Commissioner P E Scott continued her appointment as a Public Service Arbitrator throughout the period. This appointment is due to expire on 21 June 2009.

Senior Commissioner J H Smith continued her appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 13 January 2009.

Commissioner S J Kenner continued his appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 26 June 2009.

Commissioner S Wood was appointed on 9 November 2007 as an additional Public Service Arbitrator. This appointment is due to expire on 9 November 2008.

Commissioner J L Harrison continued her appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 1 May 2009.

Commissioner S M Mayman was appointed on 9 November 2007 as an additional Public Service Arbitrator. This appointment is due to expire on 9 November 2008.

Coal Industry Tribunal of Western Australia

Commissioner S J Kenner continued his appointment as Chairperson of the Coal Industry Tribunal.

Railways Classification Board

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

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

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

Occupational Safety and Health Tribunal

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

Registry

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

Mr J Spurling	Registrar
Ms S Bastian	Registrar Designate
Ms S Hutchinson (<i>formerly S. Tuna</i>)	Deputy Registrar
Mr A Wilson	Deputy Registrar

The Western Australian Industrial Appeal Court

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

The Honourable Justice Steytler	Presiding Judge
The Honourable Justice Wheeler	Deputy Presiding Judge
The Honourable Justice Pullin	Ordinary Member
The Honourable Justice Le Miere	Ordinary Member

Industrial Magistrates Court

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

Mr G Cicchini
Mr GN Calder
Ms PM Hogan

Matters Before the Commission

1. Full Bench Matters

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

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

The Honourable M T Ritter (Acting President)..... 34

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

Chief Commissioner A R Beech 17
 Senior Commissioner J H Smith 17
 Commissioner P E Scott 11
 Commissioner S J Kenner 3
 Commissioner S Wood 14
 Commissioner J L Harrison..... 6
 Commissioner S M Mayman 5

The following summarises Full Bench matters:

Appeals

Heard and determined from decisions of the:

Commission - s.49 9
 Industrial Magistrate - s.84..... 7
 Coal Industry Tribunal 0
 Public Service Arbitrator..... 3
 Railways Classification Board..... 0
 Occupational Safety and Health Tribunal 1

Organisations – Applications by or Pertaining to

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

Other

Proceedings for enforcement pursuant to s.84A brought by the Minister; the Registrar or a deputy registrar; an industrial inspector; or any organisation, association or employer	2
Questions of law referred to the Full Bench	0
Matters remitted by the Industrial Appeal Court	0
Number of Full Bench matters heard but not determined in 2007/2008	4

Orders

Orders issued by the Full Bench	55
---------------------------------------	----

2. Acting President

Matters before the Acting President sitting alone were as follows:

Applications for an order that the operation of a decision appealed against be stayed pursuant to s.49 (11)	2
Applications for an order, declaration or direction pursuant to s.66.....	3

The following summarises s.66 applications:

Applications finalised in 2007/2008.....	3
Directions hearings	5
Applications part heard	0
Applications withdrawn by order	0
Applications discontinued by order	1

Orders

Orders issued by the Acting President from 1 July 2007 to 30 June 2008 inclusive:

Order pursuant to s.49 (11)	2
Order pursuant to s.66.....	4
Reference of rules by Full Bench under s.72A(6)	0
Application pursuant to s.92	0
Remitted from the Industrial Appeal Court	0
Rules brought to President pursuant to s.97Q	0

Consultations

Consultations with the Registrar pursuant to s.62 of the Act.....	3
---	---

3. Commission in Court Session

The Commission in Court Session is constituted each time by three Commissioners with the exception of the 2008 State Wage order which was constituted by five Commissioners. The extent to which each Commissioner has been a member of the Commission in Court Session is indicated by the following figures:

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

These Commission in Court Session matters comprised of the following:

State Wage Order Case – s.50A Determine rates of pay for purposes of <i>Minimum Conditions of Employment Act 1993 and Awards</i>	1
General Order – s.50	2
New Award.....	0
New Agreement	0
Variation of an Award – s.40B	0
Cancellation of an Award – s.47	0
Conference pursuant to s.44.....	0
Joinder to an Award	0
Police Appeal – s.33P of <i>Police Act 1892</i>	1

4. Federal Matters

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

Variation of Organisation Rules by the Deputy Registrar.....	2
--	---

6. Boards of Reference

Long Service Leave - Standard Provisions	0
Long Service Leave - <i>Construction Industry Portable Paid Long Service Leave Act 1985</i>	2

7. Industrial Agents Registered by Registrar

Number of new agents registered during the period.....	1
Total number of agents registered as corporate body.....	29
Total number of agents registered as individuals.....	22
Total number of agents registered as at 30 June 2008.....	51

Awards and Agreements in Force under the Industrial Relations Act 1979

Year	Number at 30 June
2005	2759
2006	2737
2007	2804
2008	2810

Industrial Organisations Registered as at 30 June 2008

	Employee Organisations	Employer Organisations
No. of organisations	49	15
Aggregate membership	164,339	3662

Summary of Main Statistics

Western Australian Industrial Relations Commission

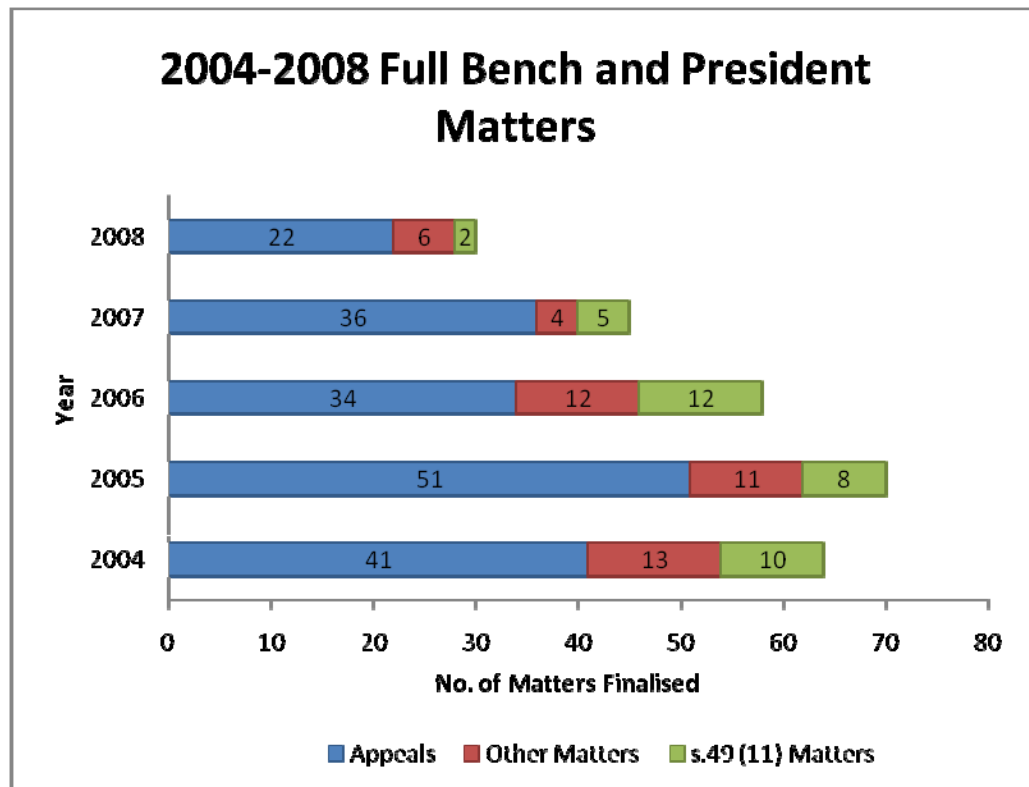
	MATTERS DEALT WITH			
	2004-2005	2005-2006	2006-2007	2007-2008
Full Bench:				
Appeals	51	34	36	22
Other Matters	11	12	4	6
Acting President sitting alone:				
S.66 Matters (finalised)	3	0	1	0
S.66 Orders issued	11	0	6	1
S.49(11) Matters	8	12	5	2
Other Matters	10	12	0	0
S.72A(6)	0	0	0	0
Consultations under s.62	0	2	6	3
Commission in Court Session:				
General Orders	2	2	4	2
Other Matters	7	9	9	4
Public Service Appeal Board:				
Appeals to Public Service Appeal Board	17	9	13	6
Commissioners sitting alone:				
Conferences ¹	332	259	138	62
New Agreements	444	264	76	54
New Awards	9	14	5	1
Variation of Agreements	3	1	2	0
Variation of Awards	261	157	132	63
Other Matters ²	109	93	46	54
Federal Matters	5	18	0	0
Board Of Reference - Other Awards (Chaired by a Commissioner)	1	0	1	0
Boards of Reference – Long Service Leave	3	2	3	3
Unfair Dismissal Matters Concluded:				
Unfair Dismissal claims	742	746	324	123
Contractual Benefits claims	261	259	191	86
Unfair Dismissal & Contractual Benefits claims together	436	207	16	1
Public Service Arbitrator (PSA):				
Award/Agreement Variations	40	39	25	25
New Agreements	26	19	24	13
Orders Pursuant to s.80E	0	0	1	2
Reclassification Appeals	88	143	84	37
TOTALS:	2877	2311	1147	567

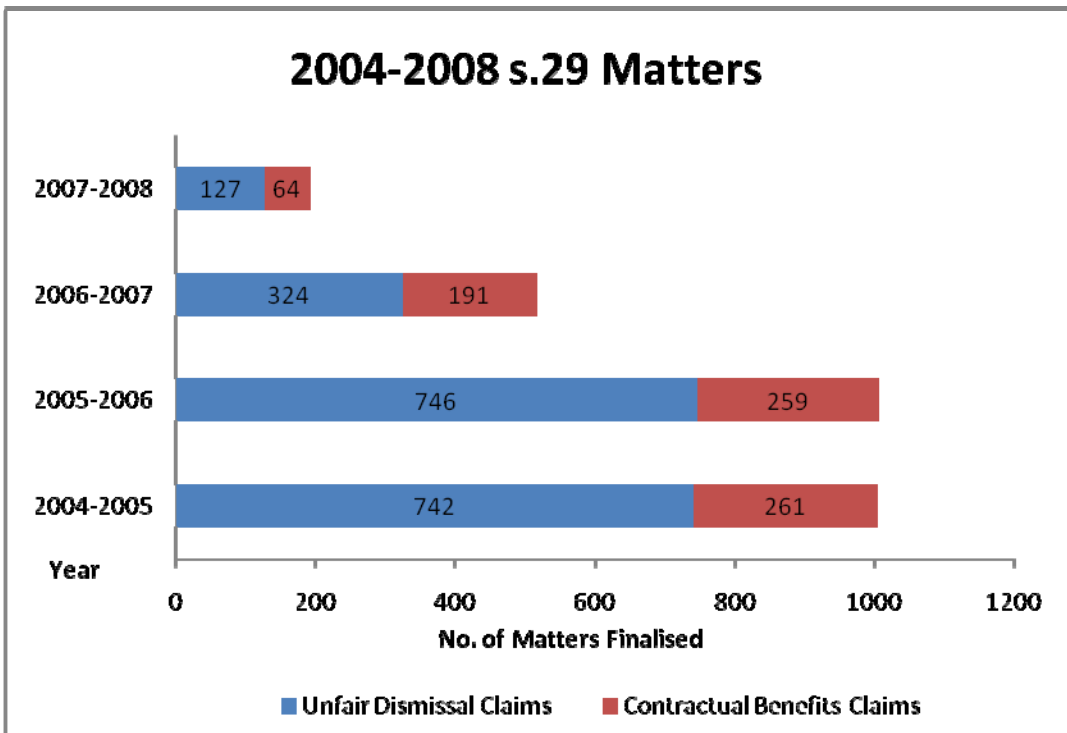
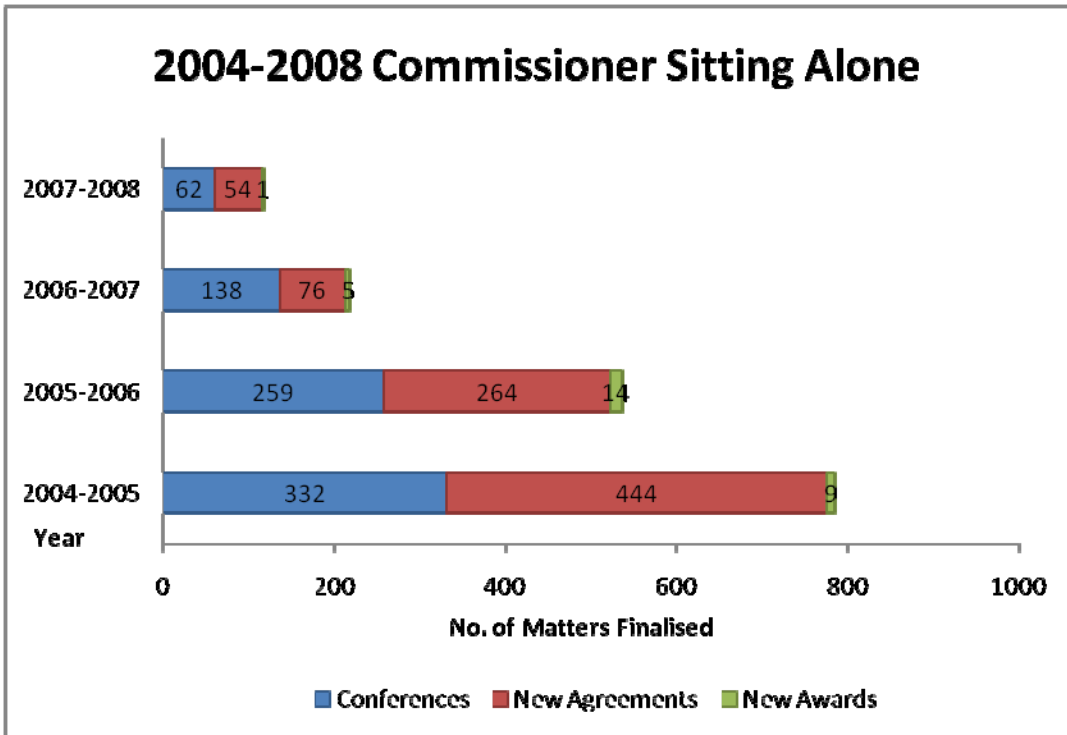
Notes

¹ CONFERENCES include the following:				
Conferences (s.44)	228	177	75	27
Conferences referred for arbitration (s.44(9))	54	23	22	4
Conferences divided	0	4	0	0
Conferences referred and divided	0	2	0	0
PSA conferences	40	44	35	29
PSA conferences referred	10	9	6	2
PSA conference divided	0	0	0	0
TOTALS	332	259	138	62

² OTHER MATTERS include the following:				
Applications	64	32	12	17
Apprenticeship Appeals	0	0	0	0
Occupational Safety & Health Tribunal #	3	13	7	9
Public Service Applications	42	42	27	28
Workplace Agreements	0	0	0	0
TOTALS	109	93	46	54

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





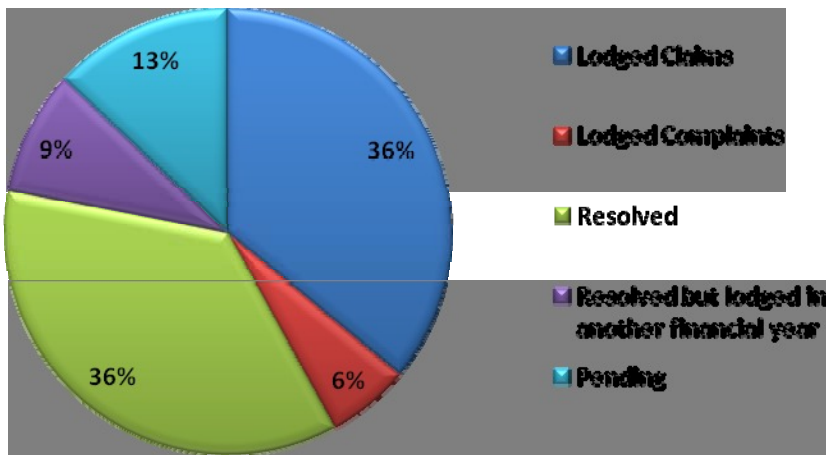
The Western Australian Industrial Appeal Court

Decisions issued by the Industrial Appeal Court during this period.....	4
Orders issued by the Industrial Appeal Court during this period	7

Industrial Magistrates Court

The following summarises the Court for the period under review:

Lodged Claims	82
Complaints Lodged	15
Resolved (total)	84
Resolved (lodged in the period under review)	64
Resolved but lodged in another financial period	20
Pending	29
Total number of resolved applications with penalties imposed.....	12
Total value of penalties imposed	\$118,400.00
Total number of claims/complaints resulting in disbursements	0
Total value of disbursements awarded	\$8,940.00
Claims/Complaints resulting in awarding wages.....	1
Total value of wages of Magistrate matters resolved during the period	\$3273.58



The matters dealt with by the Industrial Magistrates Court related to alleged breaches of federal awards and agreements, State awards and agreements and the *Minimum Conditions of Employment Act 1993*, together with claims pursuant to the *Long Service Leave Act 1958* and enforcement of orders of the WAIRC.

Commentary

1. Legislation

INDUSTRIAL RELATIONS ACT 1979

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

Short title	Number and year	Assent	Commencement
Reprint 11: The <i>Industrial Relations Act 1979</i> as at 3 Nov 2006 (includes amendments listed above except those in the <i>Petroleum Legislation Amendment and Repeal Act 2005</i>)			
<i>Criminal Investigation (Consequential Provisions) Act 2006</i> s.73	59 of 2006	16 Nov 2006	1 Jul 2007 (see s.2 and <i>Gazette</i> 22 Jun 2007 p. 2838)
<i>Financial Legislation Amendment and Repeal Act 2006</i> s.4	77 of 2006	21 Dec 2006	1 Feb 2007 (see s.2 and <i>Gazette</i> 19 Jan 2007 p. 137)
<i>Petroleum Amendment Act 2007</i> s.97	35 of 2007	21 Dec 2007	19 Jan 2008 (see s.2(b) and <i>Gazette</i> 18 Jan 2008 p. 147)
<i>Police Amendment Act 2008</i> s.13 and 23(3)	8 of 2008	31 Mar 2008	s.13: 1 Apr 2008 (see s.2(1)) s.23(3): 21 Jun 2008 (see s.2(2) and <i>Gazette</i> 20 Jun 2008 p. 2706)

During the period under review, the following consequential amendments were made to the Act:

On 1 July 2007, the Act was amended by the *Criminal Investigation (Consequential Provisions) Act 2006* which amended clause 2(3) of Schedule 3 Police Officers to include reference to special constables.

On 21 December 2007, the Act was amended by the *Petroleum Amendment Act 2007* which changed references to the *Petroleum Act 1967* in ss.7(3)(c), 8(2a)(b) and 113(1)(d)(ii)(III) to *Petroleum and Geothermal Energy Resources Act 1967*.

On 31 March 2008, the Act was amended by the *Police Amendment Act 2008*. The change amended the definition of “police officer” in paragraph (d) of Schedule 3 clause 1 as a consequential amendment to amendments to the *Police Act 1892* and changed terminology from an “aboriginal police aide” to an “Aboriginal police liaison officer”. This amendment took effect from 1 April 2008. A further amendment was made to Schedule 3 clause 1 by s.23 of the *Police Amendment Act 2008* whereby the definition of “police officer” in paragraph (d) of Schedule 3 clause 1 was deleted with effect from 21 June 2008.

The *Owner-Drivers (Contracts and Disputes) Act 2007* was assented to on 6 June 2007 and established the Road Freight Transport Industry Tribunal under s.38 of that Act. The Tribunal is to be constituted by a Commissioner of the WAIRC and comes into operation on 1 August 2008.

INDUSTRIAL RELATIONS COMMISSION REGULATIONS 2005

Citation	Gazettal	Commencement
<i>Industrial Relations Commission Amendment Regulations 2008</i>	22 Jan 2008 p. 192-4	r.1 and 2: 22 Jan 2008 (see r.2(a)); Regulations other than r.1 and 2: 23 Jan 2008 (see r.2(b))
Reprint 1: The <i>Industrial Relations Commission Regulations 2005</i> as at 16 May 2008 (includes amendments listed above)		
<i>Industrial Relations Commission Amendment Regulations (No. 2) 2008</i>	10 Jun 2008 p. 2491-4	r.1 and 2: 10 Jun 2008 (see r.2(a)) Regulations other than r.1 and 2: 1 Jul 2008 (see r.2(b))

2. State Wage Order Case

On 9 June 2008 the Commission in Court Session delivered its decision in the 2008 State Wage order case pursuant to s.50A of the Act. Section 50A requires the Commission before 1 July in each year, to make a General Order setting the minimum weekly rate of pay applicable under the *Minimum Conditions of Employment Act 1993* (MCE Act) to adults, apprentices and trainees and, to adjust rates of wages paid under awards.

The application for the 2008 State Wage order was created on the Commission's own motion. The Commission placed public advertisements of the proceedings and received submissions from the Minister for Employment Protection (Minister), Trades and Labor Council of WA (TLCWA), Australian Mines and Metals Association, Inc (AMMA), Chamber of Commerce and Industry of WA (CCIWA), and Western Australian Council of Social Services. The Minister, TLCWA, AMMA and CCIWA appeared in the proceedings and also made oral submissions.

The evidence and material before the Commission showed that the trend for very strong economic activity in Western Australia was continuing, that WA's wages growth had been the highest in the nation, and that a real wage increase would be sustainable. After hearing submissions and considering the evidence the Commission issued a General Order that adjusted the minimum wage and rates of wages paid under awards by a \$29 per week increase, effective on and from the commencement of the first pay period on or after 1 July 2008.

As foreshadowed in the 2007 State Wage order decision, in late 2007, the Minister, TLCWA, AMMA and CCIWA were invited to meet with a single Commissioner for the purpose of reviewing the 2007 Statement of Principles. In the 2008 hearing, each party made a submission in relation to this. The Commission agreed with the majority view that the principles should remain in their current form and not be altered in any significant way. Apart from some minor modifications, more important changes included the deletion of Principle 2.1 as it merely restated the role of awards that is given to them under the Act; and the deletion of Principle 7.13 which made reference to equal remuneration for men and women for work of equal or comparable value. This language was added to Principle 10.

The computerised system for updating and maintaining awards used in 2007 was again successfully utilised in 2008. The automatic process was further enhanced and adjusted all pay rates in 81% of the 320 awards affected by the State Wage order. Some type of manual invention was necessary in the other 60 awards and the various types of manual adjustment required on these awards can be explained as follows:

Calculation of junior rates of pay in 24 awards, 6 of which do not prescribe a formula for calculation (10% of total manual);
 Calculation of trainee rates in 11 awards (18% of total manual); and
 Unconventional calculation of adult rates of pay could not be automated in 26 awards.

Draft schedules of the awards as amended by the State Wage order were provided on compact disc to the Minister, TLCWA, AMMA and CCIWA on 20 June 2008.

All awards were updated on the Commission's website (<http://www.wairc.wa.gov.au>) on the morning of 1 July 2008, the day that Commission's State Wage order took effect.

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

On 3 June 2008, the Commission in Court Session, on its own motion, issued a State Wage order pursuant to s.50A of the Act increasing the minimum weekly rate of pay prescribed for the purpose of the MCE Act to \$557.40 on and from the commencement of the first pay period on or after 1 July 2008.

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

The State Wage order referred to above ordered that the minimum weekly rate of pay applicable under s.14 of the MCE Act to an apprentice who has reached 21 years of age shall be \$488.40 per week on and from the commencement of the first pay period on or after 1 July 2008.

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

Minimum weekly rates of pay for apprentices pursuant to s.14 of the MCE Act and trainees pursuant to s.15 of the MCE Act were also dealt with in the State Wage order referred to above.

Apprentices under the MCE Act refer to the class of apprentice to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into. For this class of apprentice, it was ordered that the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award*. The date of operation is the commencement of the first pay period on or after 1 July 2008.

Trainees under the MCE Act refer to the class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into. The Commission ordered that for this class of trainee, the minimum weekly rate of pay at the relevant Industry/Skill level is based on the *Metal Trades (General) Award*. The date of operation is the commencement of the first pay period on or after 1 July 2008.

6. Public Service Arbitrator and Public Service Appeal Board

Public Sector - General

As noted in previous Annual Reports the interrelationship of various pieces of legislation dealing with public sector employees continues to be problematic. In last year's Annual Report it was noted that there were a number of applications made by employees to one jurisdiction when they ought to have been made in another jurisdiction and that by the time the error was discovered, the time limit for the filing of an application in the appropriate jurisdiction had elapsed. This required the Commission, the Arbitrator or the Public Service Appeal Board to consider an application for an extension of time in which the application could be received and involved costly and time consuming procedures and duplication. The problem has occurred again on a number of occasions in the last year. A number of employees have also filed applications in a number of jurisdictions for the purpose of preserving their position. This is again costly, time consuming and wasteful. It requires the Commission, the Arbitrator or the Public Service Appeal Board to sort out a matter which could be able to be resolved by a streamlined process.

Among the matters dealt with are the following:

- (i) The Commission convened several conferences to deal with disputes in respect of employees' rights and entitlements.
- (ii) The Commission convened two conferences to deal with an application which raised a reclassification dispute in respect of several public sector employees.
- (iii) The Commission registered four public sector industrial agreements.
- (iv) The Commission amended 10 public sector awards by consent.

The Commission arbitrated four applications involving two employees brought as a test case in respect of entitlements pursuant to expired workplace agreements which continue to have effect as statutory contracts of employment. The decision in respect of the two Public Service Arbitrator applications was set aside by the Full Bench in part on grounds the Commission did not have jurisdiction to hear the applications as the remedy sought was to enforce an award or agreement. A further appeal has been made to the Industrial Appeal Court.

Classification Issues

Last year's Annual Report noted the question of the appropriate test to be applied by the Arbitrator in dealing with classification issues (*Health Services Union of Western Australia (Union of Workers) v. the Director General of Health in Right of the Minister for Health as Metropolitan Health Service at Pathwest Laboratory Medicine WA* ((2008) 88 WAIG 475). The matter was the subject of an appeal to the Full Bench which determined that the Commission's Statement of Principles does not fetter the Arbitrator's jurisdiction to deal with issues of classification of government officers whose conditions are set by an industrial agreement. Last year's Report noted that it was yet to be determined what criteria would apply to the Arbitrator's consideration of claims that the classification attached to a position is wrong, or that a position has been wrongly downgraded, in the absence of change to the requirements of the position.

The Commission examined the history of the work value test and noted that the proper assessment of a level of classification requires consideration of the level of skill, responsibility and the circumstances under which the work is performed along with a comparison of like positions.

Procedural Fairness

The Full Bench of the Commission has also considered the issue of the employer failing to provide an employee with an opportunity to be heard prior to suspending the employee without pay when the employee had been charged with a breach of discipline, and was also the subject of criminal charges (*Health Services Union of Western Australia (Union of Workers) v. Director General of Health in Right of the Minister for Health as the Metropolitan Health Service, the South West Health Board and the WA Country Health Service* ((2008) 88 WAIG 543)). The Full Bench found that natural justice required that the employee be given the opportunity to be heard on the issue of suspension without pay. In this case, it was found that there had been a breach of procedural fairness and that the Arbitrator did not have the power to cure any procedural unfairness as the decision of the employer, being made without the employee receiving procedural fairness, was void.

Status of Officers of the Corruption and Crime Commission

The Arbitrator has also considered the situation of a public service officer appointed to the staff of the Corruption and Crime Commission whose position with the Corruption and Crime Commission had been abolished and the effect of that upon the employee's status as a public servant (*Civil Service Association of Western Australia (Incorporated) v. Commissioner, Corruption and Crime Commission and the Minister for Public Sector Management*, ((2008) 88 WAIG 265)). The Arbitrator found that the officer, upon being appointed to the staff of the Corruption and Crime Commission, did not retain his status as a permanent public service officer. While he had a right of return to the public service, it was at the level appropriate to his last public service appointment, not necessarily at the same level of office held by the officer in employment with the Corruption and Crime Commission. The Public Service Arbitrator's decision in respect of the status of public service officers who take up positions with the Corruption and Crime Commission other than on secondment and the level at which they return to the public service is contrary to the recommendation of the Archer Review into the Corruption and Crime Commission. An appeal was lodged against this decision which is due to be heard in September 2008.

Public Service Appeal Board

As with previous years, a number of appeals to the Public Service Appeal Board have raised issues regarding the disciplinary processes contained within the *Public Sector Management Act* 1994. In *Stephen Mann v. Employing Authority, Government Employees Superannuation Board* ((2008) 88 WAIG 131), the appellant challenged whether the person directed by an employing authority to conduct an investigation or inquiry into suspected breaches of discipline under that Act could be someone other than an employee of that employing authority. The Public Service Appeal Board found that there was no such limitation and that persons external to the organisation were able to undertake such investigations or inquiries.

This year has seen further difficulties in the formation of a Public Service Appeal Board. There is no standing Public Service Appeal Board but rather when each new appeal is lodged a new Board is formed by the Public Service Arbitrator together with nominees of each of the employing authority and the relevant union. On a number of occasions in the last year there have been quite significant delays in the Board being formed due to delays in either of the parties forwarding their nominations to the Commission. On one occasion the appellant sought urgent interim orders, however the Board was unable to be formed and undertake any proceedings for at least a month because of a delay in receiving the nomination of the employing authority (*Mann*, above). Informal discussions have been held with the Civil Service Association of Western Australia Incorporated (CSA) and the Department of Consumer and Employment Protection with a view to attempting to streamline the process for nominations. However, to date nothing has been resolved to overcome this issue. One option may require an amendment to the *Industrial Relations Act* 1979.

Public Service Award Review Process

The Public Service Arbitrator continues to work with the unions and employer parties to review public sector awards. Due to negotiations being undertaken for replacement Enterprise Bargaining Agreements, the parties' priorities have been in those negotiations and the drafting of agreements. The parties have undertaken that upon the finalisation of their agreements they will be in a position to devote time to upgrading and updating of their awards by reference to the negotiations for their Enterprise Bargaining Agreements.

7. Award Review Process

The Award Review section is responsible for providing information and award services to the Commission and for the maintenance of electronic records of all State awards and industrial agreements.

This information is available to the public via the Western Australian Industrial Gazette ("WAIG") and on the Commission's website.

Throughout 2007/2008 the Commission continued its program of reviewing all State awards through the efforts of Awards Review staff and with the assistance of the Minister, TLCWA and CCIWA.

The section also deals with State award back-rate-of-pay enquiries and provides copies of Commission orders to enquirers evidencing these amendments. During the year the section dealt with approximately 750 back-rate enquiries. Enquiries were received from the general public, employers, employees, organisations, practitioners, students and government departments. The reasons for enquiries ranged from checking for current and historical rates of pay, workers' compensation claims, claims for underpaid wages, child support calculations and disputed estate claims.

During the year, 54 new industrial agreements were processed, seven awards were cancelled and 63 award variations were effected. Where appropriate, relevant notices of matters were prepared and published on the Commission's website and in the WAIG. The majority of variations dealt with the updating of allowances pursuant to Wage Fixing Principles.

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

Throughout the year the section managed and mentored three Public Service Trainees employed under the School Based Traineeship Program. Educational talks and tours for various groups, including undergraduates, were conducted by Award Review staff and staff also assisted the Commission in conducting moot Commission hearings for undergraduates.

Major Achievement 2007/2008

Following the 2008 State Wage order, delivered on 9 June 2008, all State awards subject to the General Order were updated by Award Review staff in advance of the application of the General Order from the commencement of the first pay period on or after 1 July 2008.

This enabled all updated rates of pay to be published on the Commission's website on 1 July 2008. This achievement continues to place the WAIRC at the forefront of the application of wage increases to awards and the publication of the new pay rates. The speed and accuracy of the publication of the rates has proved to be invaluable to employers and employees and assists in the prevention of industrial disputes.

The level of efficiency is due to the detailed award knowledge, expertise and planning of staff of the Award Review section assisted by the Information Technology Branch. Considerable assistance was also provided by Registry staff and the Chief Commissioner's Associate.

8. Right of Entry Permits Issued

<i>Industrial Relations Act 1979 - Part II, Division 2G, s.49J</i>				
Organisation	2004/05	2005/06	2006/07	2007/08
Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch	10	4	3	6
Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch, The	-	0	1	6
Australian Workers' Union, West Australian Branch, Industrial Union of Workers, The	5	2	1	1
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch, The	2	3	2	6
Civil Service Association of Western Australia Incorporated, The	18	7	13	20
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch	7	1	0	1
Construction, Forestry, Mining and Energy Union of Workers, The	5	9	7	7
Food Preservers' Union of Western Australia, Union of Workers, The	2	3	1	1
Forest Products, Furnishing & Allied Industries Industrial Union of Workers, WA, The	3	0	1	1
Health Services Union of Western Australia (Union of Workers)	2	0	0	3
Independent Education Union of Western Australia, Union of Employees, The	2	8	5	3
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	20	26	33	13
Media, Entertainment and Arts Alliance of Western Australia (Union of Employees)	-	0	0	4
Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, The	-	0	0	1
Sales Representatives' and Commercial Travellers' Guild of W.A. Industrial Union of Workers	1	2	1	0
Shop, Distributive and Allied Employees' Association of Western Australia, The	9	8	2	5
State School Teachers' Union of W.A. (Incorporated), The	4	2	0	3
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	1	2	0	1
United Firefighters Union of Australia, West Australian Branch	-	1	0	1
Western Australian Branch of the Australian Medical Association, The	4	2	0	0
Western Australian Clothing and Allied Trades' Industrial Union of Workers, Perth, The	5	4	0	0
Western Australian Prison Officers' Union of Workers	-	1	0	19
Western Australian Railway Officers' Union	-	0	2	2
TOTAL	106	87	72	98

Number of permits that have been issued since 8 July 2002 (gross total).....	808
Number of people who presently hold a permit.....	305
Number of permits that are current	339
Number and names of permit holders who have had their permit removed or suspended by the Commission in the current reporting period.....	0

9. Claims by Individuals – Section 29

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

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

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

Section 29 Applications Lodged

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

	2004-2005	2005-2006	2006-2007	2007-2008
Unfair Dismissal	703	700	154	127
Denial of Contractual Benefits	245	285	124	64
TOTAL	1293	1039	278	191

Section 29 Applications Finalised

	2004-2005	2005-2006	2006-2007	2007-2008
Unfair Dismissal	742	748	324	123
Denial of Contractual Benefits	261	259	191	86
Both in same application	436	207	16	1
TOTAL	1439	1214	531	210

Section 29 Applications Lodged Compared with All Matters¹ Lodged

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

	2004-2005	2005-2006	2006-2007	2007-2008
All Matters Lodged	2633	2061	829	659
Section 29 Applications Lodged	1293	1039	278	191
Section 29 as (%) of All Matters Lodged	49%	50%	33.50%	29%

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

Section 29 Applications Finalised Compared with All Matters Finalised

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

	2004-2005	2005-2006	2006-2007	2007-2008
All Matters Finalised	3012	2475	1239	382
Section 29 Applications Finalised	1439	1214	531	210
Section 29 as Percentage (%) of All Matters Finalised	48%	49%	43%	55%

Section 29 Matters – Method of Settlement

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

	Unfair Dismissal	Contractual Benefits	Both	Total	%
Arbitrated claims in which order issued	29	21	0	50	24
Settled after proceedings before the Commission	55	44	1	100	47
Matters referred for investigation resulting in settlement	0	0	0	0	0
Matters discontinued/dismissed before proceedings commenced in the Commission	33	17	0	50	24
Matters withdrawn/discontinued in Registry	6	4	0	10	5
Total Finalised in 2007 - 2008 Reporting Year	123	86	1	210	100

Demographic Data for Section 29 Applications

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

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

Representation

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

	Male	Female	No Data	Total	% Male	% Female	%No Data	%Total
Industrial Agent	11	4	0	15	73.3	26.7	0	7.8
Legal Representation	6	10	0	16	37.5	62.5	0	8.4
Personal	62	82	0	144	43.1	56.9	0	75.4
Other	1	8	0	9	11.1	88.9	0	4.7
No Data Provided	3	2	2	7	42.8	28.6	28.6	3.7
TOTAL	83	106	2	191	43.4	55.5	1.1	100

Age Groups

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

Age Group	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under 16	1	3	0	4	25	75	0	2.1
17 to 20	0	7	0	7	0	100	0	3.7
21 to 25	4	18	0	22	18.2	81.9	0	11.5
26 to 40	29	32	0	61	47.5	52.5	0	31.9
41 to 50	19	21	0	40	47.5	52.5	0	20.9
51 to 60	18	21	0	39	45.1	53.8	0	20.4
Over 60	8	3	0	11	72.7	27.3	0	5.8
No Data Provided	4	1	2	7	57.1	14.3	28.6	3.7
TOTAL	83	106	2	191	43.4	55.5	1.1	100

Employment Period

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

Period of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Under 3 months	21	24	0	45	46.7	53.3	0	23.6
4 to 6 months	9	13	0	22	40.9	59	0	11.5
7 to 12 months	13	14	0	27	48.1	51.8	0	14.1
1 to 2 years	11	16	0	27	40.7	59.3	0	14.1
2 to 4 years	10	14	0	24	41.7	58.3	0	12.7
4 to 6 years	2	8	0	10	20	80	0	5.2
Over 6 years	8	10	0	18	44.4	55.5	0	9.4
No Data Provided	9	7	2	18	50	38.9	11.1	9.4
TOTAL	83	106	2	191	43.4	55.5	1.1	100

Salary Range

	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under \$200 P/W	18	15	0	33	54.5	45.5	0	17.3
\$201 to \$600 P/W	7	27	0	34	20.6	79.4	0	17.8
\$601 to \$1000 P/W	22	37	0	59	37.3	19.4	0	30.9
\$1001 to \$1500 P/W	20	17	0	37	54	46	0	19.4
\$1501 to \$2000 P/W	12	7	0	19	63.2	36.8	0	9.9
Over \$2001 P/W	4	2	0	6	6.6	33.3	0	3.1
No Data Provided	0	1	2	3	0	33.3	66.7	1.6
TOTAL	83	106	2	191	43.4	55.5	1.1	100

Category of Employment

67% of all applicants stated that they were Full Time, Permanent, or Permanent Full Time employees at the time of their termination.

Period of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Casual	3	5	0	8	37.5	62.5	0	4.2
Casual F/Time	2	0	0	2	100	0	0	1
Casual P/Time	0	0	0	0	0	0	0	0
Fixed Term	5	2	0	7	71.4	28.6	0	3.7
Full Time	24	24	0	48	50	50	0	25.1
Permanent	6	16	0	22	27.3	72.7	0	11.5
Permanent F/Time	29	29	0	58	50	50	0	30.4
Permanent P/Time	1	15	0	16	6.3	93.7	0	8.4
Probation	2	1	0	3	66.7	33.3	0	1.6
Part Time	5	7	0	12	41.7	58.3	0	6.3
No Data Provided	6	7	2	15	40	46.7	13.3	7.8
TOTAL	83	106	2	191	43.4	55.5	1.1	100

Reinstatement Sought

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

Reinstatement Sought	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Yes	21	17	0	38	55.3	44.7	0	19.9
No	43	74	0	117	36.7	63.3	0	61.3
No Data Provided	19	15	2	36	52.7	41.7	5.6	18.8
TOTAL	83	106	2	191	43.4	55.5	1.1	100

Reinstatement Sought by Age Group

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

Age Groups	Yes	No	No Data	Total	%Yes	%No	%No Data	%Total
Under 16	0	3	1	4	0	75	25	2.1
17 to 20	1	6	0	7	14.3	85.7	0	3.7
21 to 25	0	20	2	22	0	90.9	9.1	11.5
26 to 40	14	35	12	61	22.9	57.4	19.7	31.9
41 to 50	10	23	7	40	25	57.5	17.5	20.9
51 to 60	7	22	10	39	18	56.4	25.6	20.4
Over 60	3	8	0	11	27.3	72.7	0	5.8
No Data Provided	3	0	4	7	42.9	0	57.1	3.7
TOTAL	38	117	36	191	19.9	61.3	18.8	100

10. Employer-Employee Agreements (EEAs)

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

INDUSTRIAL RELATIONS ACT 1979 PART VID

Applications to Lodge EEAs for Registration

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

EEAs Lodged for Registration and Finalised

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

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

Guidelines and Principles for No Disadvantage Test

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

Demographic Data for Registered EEAs

Registered EEAs by Gender	2006-2007	%	2007-2008	%
Female	17	49%	14	48
Male	18	51%	15	52
Total	35	100%	29	100

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

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

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

EEAs Registered by Term of Agreement

Term of EEA	2006-2007	%	2007-2008	%
<1 year	0	0%	13	45
1 to 2 years 25 12%	24	69%	2	7
2 to 3 years	11	31%	14	48
Total	35	100%	29	100

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

During the reporting period, one (1) appeal pursuant to s.33P of the *Police Act 1892* was lodged. It was adjourned to December 2008 pending the outcome of an appeal to the Court of Criminal Appeal. This was the only current appeal during the reporting period.

12. Information Technology

The Information Technology section has taken advantage of the post-Work Choices environment to develop a dual strategy of ensuring core business effectiveness and adopting an infrastructure more suited to possible future needs. This has allowed them to meet variable demands with more appropriate resource expenditure. The top priority for 2007/2008 was to reduce the number of older systems which had been maintained during the core system development phase. It was desired to ensure fallback capacity as well as taking a staged approach to the implementation of new systems. With a consistent effort from the Information Technology team this occurred without incident or impact on functionality within the organisation.

The shutdown of the core Computerised Applications Management System (CAMS), which had underpinned the Commission's IT systems for at least 10 years, provided the opportunity to also phase out ageing hardware and adopt a virtual infrastructure environment. Most of the information repositories (servers) have been fully virtualised and are now manageable from a single console. This coupled with the establishment of an offsite data recovery system ensures that the servers can be used irrespective of the available hardware.

There has been some staff turnover this year due to the employment opportunities in the private sector. The Information Technology section is however building a strong team and investing in staff development to maintain a high level of service delivery.

Work has commenced on redesigning the Commission's intranet and internet sites. The intranet redevelopment will link with the Records management technology and is one of the strategies that will ensure that the core systems and the Records management systems are more closely aligned in the future.

13. Other Matters

Transport – Passenger Railcar

There were two major disputes between The Australian Rail Tram and Bus Industry Union of Employees, West Australian Branch (ARTBIU) and the Public Transport Authority (PTA) in this reporting period.

The first was an ongoing dispute about rostering and compensation payments agreed to be paid to coach operators for work carried out in 2006, 2007 and 2008. During this year, the 2006 and 2007 payments were resolved. The 2008 payments are still being negotiated.

The second dispute arose out of an agreement to make the *Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006* (the Award) and the *Public Transport Authority Railcar Drivers (Transperth Train Operations) Enterprise Agreement 2006* (the Agreement). The dispute resulted in a series of conferences being convened by the Commission and an application to vary the Award by the PTA. The dispute affected the progress of enterprise bargaining negotiations for a new agreement. During the early part of 2008 the Commission also dealt with and granted an application to the ARTBIU to extend the time for bargaining.

Transport – Other Government

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

Transport - General

A low level of disputation in this industry continued in this year. It has been reported anecdotally that demand for truck drivers is higher than supply. During the year the Commission convened a series of conferences to deal with nine applications by the Transport Workers' Union, Industrial Union of

Workers, Western Australian Branch (TWU) in respect of claims of unpaid contractual entitlements and unfair dismissal. Two of these matters involved employment claims of behalf of an aircraft pilot.

Local Government

The fundamental issue whether a particular local government authority is a trading corporation and not subject to the jurisdiction of this Commission by operation of s.6 and s.16 of the *Workplace Relations Act 1996* (Cth) continues to be raised as a threshold issue in most matters. Early in the reporting period the Commission issued a decision in which it determined that the Shire of Cue was not a trading corporation (see page 34) and then later went on to hear the substantive application whether the applicant was unfairly dismissed. That decision was not appealed. Some months later an unrelated application was filed in the Commission in which the respondent was the Shire of Cue. The jurisdictional issue was not raised and the matter settled at a conference before the Commission.

Whether a particular local government authority is a trading corporation was raised in four other matters. One application proceeded to hearing and the others were discontinued following conferences convened by the Commission.

The Commission registered one industrial agreement to cover the Shire of Pingelly's outside workers.

Education

State School Teachers

The Commission has continued to assist the State School Teachers' Union of WA (Incorporated) (SSTU) and the Department of Education and Training (DET) to reach agreement on a range of issues in dispute including reporting templates for primary and secondary students. The Commission also dealt with bans put in place by the SSTU with respect to literacy and numeracy testing and the Commission has been assisting the parties with respect to the implementation of Year 11 courses in 2009. The Commission has arbitrated some of these issues and orders have issued where relevant.

When discussions between the DET and the SSTU to finalise a replacement industrial agreement for school teachers and school administrators broke down in late 2007, the Commission held a number of conferences and mediation sessions to assist the parties to reach agreement. During this process, orders issued with respect to industrial action taken by SSTU members in support of a new agreement. The parties regularly reported back to the Commission about their negotiations and notwithstanding significant progress being made on a range of issues, the DET sought a declaration that bargaining between the parties had ended and after considering submissions from the parties the Commission issued a declaration to this effect on 6 June 2008. It is likely that the Commission will now arbitrate the DET's application for an Enterprise Order.

TAFE Lecturers

The Commission assisted the DET and the SSTU in relation to a dispute about health and safety issues with respect to class sizes at a number of TAFE campuses and after hearing from the parties and undertaking site inspections, the Commission determined an interim process for the parties to use to deal with these health and safety disputes. The parties are currently trialling this interim process.

Since October 2007 the Commission has been assisting the DET and the SSTU with negotiations for a replacement industrial agreement to cover TAFE lecturers employed in TAFE colleges in Western Australia. The parties have negotiated in the Commission and outside of the Commission in an attempt to reach agreement and the parties have regularly reported back to the Commission with respect to the progress of these negotiations. Notwithstanding substantial progress being made the DET sought a declaration that bargaining between the parties had ended and after considering submissions from the parties the Commission issued a declaration to this effect on

3 July 2008. It is likely that the Commission will now arbitrate the DET's application for an Enterprise Order.

Corrective Services

In 2007 the CSA and the Department of Corrective Services were in dispute over the workloads of Community Corrections Officers, Senior Community Corrections Officers, Juvenile Justice Officers, Senior Juvenile Justice Officers, Case Support Officers and Senior Case Support Officers. As Public Service Arbitrator, the Commission assisted the parties in an attempt to reach agreement on the workloads of these officers and issued interim orders pending the arbitration of this matter. After further conciliation in the Commission, and prior to the issue of workloads being determined by the Arbitrator, the parties reached an agreement with respect to a workplace management strategy in settlement of the dispute in April 2008 and a consent order issued containing the terms of the workplace management strategy on 18 April 2008. As part of this agreed process the parties will continue to report back to the Arbitrator to review progress on the implementation of this strategy.

Section 47

Following a request from the respondents to three single-employer awards binding two corporate employers, the Commission on its own motion heard from the parties as to whether the awards should be cancelled on grounds that the awards were defunct as no person is bound by the awards because of the operation of the *Workplace Relations Act 1996*. After hearing in part the substance of the reasons why the awards should be cancelled the parties agreed that two of the applications should be discontinued and the other adjourned to enable the parties to consider the effect of announced changes proposed to the *Workplace Relations Act* by the federal government.

14. Decisions of Interest

Jacqueline Ann Bysterveld v. Shire of Cue (2007) 87 WAIG 2462

The issue of whether an unfair dismissal claim by an employee of a Shire Council is or is not a matter within the Commission's jurisdiction is one which appears necessary to be decided on a case by case basis. In this matter, the Commission dealt with a claim by the caravan park manager of the Shire of Cue that she had been unfairly dismissed. The Shire of Cue raised the issue of jurisdiction on the basis that it believed the Shire of Cue is a constitutional corporation as defined in s.4 of the *Workplace Relations Act 1996* (Cth). The Commission noted the evidence that the Shire of Cue employs fourteen persons, it owns a moderate-sized caravan park which caters mainly to tourists visiting the Cue area, and also provides a range of sporting facilities such as basketball courts, cricket facilities and tennis courts. The Shire of Cue also has a town hall which is hired out for functions, cabarets, weddings and parties. The evidence from the Shire of Cue was that an average of 10% of the total revenue received by the Shire over the last three financial years constituted trading activities. The Commission noted that by virtue of the *Local Government Act 1995* (WA), each local government body is a body corporate and has the legal capacity of a natural person, and is run by elected councils. The Commission noted that when careful regard is had to the authorities referred to by the Full Bench of the Commission, inherent in the concept of "trading" or "trade" is the transaction of dealing between persons whether in person or through a corporate entity. The Commission found that administration fees, septic fees and rubbish collection charges are not income received as the result of trading activity, but rather they are statutory charges imposed on rate payers. Income received by the Shire as grants may or may not constitute trading. However, in this case the evidence did not establish that money received for the Community Safety Grant is used for or involved training and there was insufficient evidence about whether the Airport Grant involved training. Airport fees, cemetery fees, community bus fees and charges, hall, courts and equipment hire, office charges and caravan park site fees are however, income received from trading, as is also income from the sale of items from souvenirs and so on. Rent and income received from staff housing, other housing, utilities and commercial property

rentals similarly is income derived from trading. The same consideration applies to water sales, contract private works and plant hire.

The Commission concluded that although the Shire of Cue engages in activities which are of a trading nature, the trading activities as a whole do not impose the character of a trading corporation on the Shire of Cue. Therefore, the claim of unfair dismissal was held to be within the jurisdiction of the Commission.

Merredin Customer Service Pty Ltd as Trustee for Hatch Family Trust t/a Donovan Ford Merredin Nissan and Donovan Tyres v. Roslyn Green (2007) 87 WAIG 2771

The power of the Commission to order compensation when an employee has been found to have been unfairly dismissed came before a Full Bench of the Commission in this matter. The Full Bench was required to consider whether Ms Green had taken reasonable steps to mitigate or lessen the amount of loss after her unfair dismissal. The probable effect of this is that the amount of the compensation ordered to be paid by the Commission must be reduced. Ms Green had been found to have been unfairly dismissed and the Commission had ordered the former employer to pay the sum of \$8,840 as compensation. The former employer appealed seeking a variation to the amount of compensation which had been ordered to be paid. The Full Bench noted that the onus of proof of failure to mitigate loss is upon the former employer. The lack of diligence by the former employee in seeking suitable alternative employment was apparent from the evidence as a whole. The issue arose as to whether this lack of diligence was sufficient to discharge the onus which rested on the former employer given there was no evidence as to the availability of alternative employment, together with the question of the consequent effect of the failure to mitigate on the quantification of compensation. The Full Bench held that the process is first to make a finding as to loss, followed by findings as to mitigation and once the impact of this is assessed, then a determination of compensation, capped when required by the Act, is made. Loss and compensation are separate considerations, compensation being affected by findings as to mitigation. The judgment as to mitigation is dependent on whether the actions of the claimant post-termination, when viewed in the context of the circumstances as a whole, are found to be reasonable.

Mark Costa v. The Chief Executive Officer of the City of Bayswater (2007) 87 WAIG 2835

The Commission was required to consider a circumstance where an agreement between parties to settle a matter was reached outside the Commission, and in consideration of this, the Commission subsequently discontinued the application, however, the agreement between the parties was not implemented. The former employer considered that the discontinuing of the application was due to the former employee's failure to conclude the settlement agreement entered into and to communicate the status of the matter to the Commission. As a result the former employer believed that the settlement agreement lapsed when the Commission discontinued the matter. Subsequently, an application was received to amend and vary the order which discontinued the matter. The Commission concluded that the face of the minutes and order, and the reasons given for making the order to discontinue the application did not reflect the facts known to the Commission at the time the minutes and the order were issued. The Commission considered whether the agreement between the parties to settle the matter had been concluded, lapsed or extinguished. The Commission noted that the terms of a deed were agreed by the parties. The Commission did not accept the argument that the agreement between the parties had not been concluded by the former employee. The Commission also did not accept that the agreement to settle the matter had been extinguished by the order of discontinuance.

After considering matters, the Commission held that it was questionable whether the order of discontinuance actually took effect. The Commission found that the minutes of the order of discontinuance had not been delivered to the former employer and that until a decision is perfected in the manner required in ss.34, 35 and 36 of the Act, it is not an order and is thus unenforceable. Nevertheless, the order was to be treated as being "on foot" because a single member of the Commission is not empowered to quash an order of the Commission.

The Commission held, however, that it does have the power to correct the order. The Commission was satisfied that the terms of the agreement to settle the matter were themselves unimpeached.

The Commission was satisfied that the order discontinuing the application should be amended requiring the former employer to pay the sum agreed to the former employee.

Joe Visser v. Eral Pty Ltd as trustee for the Prestige Products Unit Trust trading as Compleat Angler and Camping World Rockingham (2007) 87 WAIG 2850

The Commission considered a claim of unfair dismissal brought against a trust. The Commission considered that the proper identity of the employer was the corporate trustee, in that it was the corporate trustee that conducted the business of the trust. The Commission found that at all material times the corporate trustee had conducted the business of the trust and as part of its responsibility, employed all relevant staff. A trust, such as the unit trading trust in this case, does not have liabilities or assets as those assets and liabilities vest in and are imposed on, the trustee. The Commission then raised with the parties the issue of whether, if a corporation was found to be the applicant's properly identified employer, it is a trading corporation and beyond the Commission's jurisdiction by virtue of the operation of the Commonwealth's *Workplace Relations Act 1996*. In this case, the evidence which referred to the profits and financial position of the employer satisfied the Commission that in conducting the business of the employer, it engaged in trading activities in terms of the buying and selling of goods and services and other activities associated with the conduct with a commercial enterprise. The Commission concluded that the former employer is a trading corporation and accordingly, the application was dismissed for want of jurisdiction.

Christine Anne Miles and Richard Ginton Miles t/as Milesaway Tours and Melrose Farm Pty Ltd t/as Milesaway Tours v. Warren Graham Milward, Department of Consumer & Employment Protection (2007) 87 WAIG 2991

The Full Bench dealt with the often difficult situation of the notion of "casual" employee and the consequences of being a casual worker under an award. The Full Bench held that the meaning of "casual" when used in legislation, industrial awards, other industrial instruments or contracts of employment depends upon the particular text used and the relevant context. The context includes the reason for determining if an employee is "casual". Casual employment or engagement is not a description which only applies to employment on the basis of a series of single contracts. The Full Bench examined what was encompassed within the expression that a casual worker is someone who has been "engaged and paid as such". For the purpose of the award in question, it was held that a casual worker is one who is not engaged to work so regularly that he/she is properly characterised as a part time worker; instead he/she is a worker whose work is intermittent, uncertain, lacking in a firm advanced commitment, spasmodic, occasional or involving a non-predetermined attendance. (An appeal against this decision has been lodged in the Industrial Appeal Court, however, the decision was not delivered during the time covered by this Annual Report.)

Kershaw v. Sunvalley Australia Pty Ltd (2008) 88 WAIG 2

The Industrial Appeal Court dealt with circumstances where an employee claimed unpaid annual leave entitlements pursuant to the MCE Act were owed by his present employer. The present employer had bought the assets and business of the employee's former employer pursuant to a deed. The employee argued that his present employer thereby assumed the liability to pay the annual leave that was accrued during service with the former employer. The employee's claim was dismissed by the Industrial Magistrates Court, and on appeal by the Full Bench of the Commission. In the Industrial Appeal Court, it was held that the obligation of the present employer to pay the employee annual leave entitlements owing to the employee from the former employment relationship arose, if at all, from the provisions of the deed, and not from the provisions of the MCE Act. Accordingly, the Industrial Magistrate had been correct at first instance when it determined that it did not have the jurisdiction to determine that part of the employee's claim which related to annual leave entitlements accrued whilst working for the former employer.

Jim Victor Pooley, Alan Joseph Gordon and James Michael Nevin v. Commissioner of Police (2008) 88 WAIG 309

A Full Bench of the Commission considered the issue of payments made retrospective under an industrial agreement. The issue arose when the Commission registered an industrial agreement on 18 December 2006. By a clause within that industrial agreement, employees were to receive payment of increased salary and allowances from 1 July 2006. Mr Pooley was appointed a police officer in 1969 and retired on 31 July 2006. Mr Gordon was appointed a police officer in 1973 and retired on 26 July 2006. Mr Nevin was appointed a police officer in 1968 and retired on 24 August 2006. The majority of the Full Bench, upon a consideration of the Act held that an industrial agreement cannot bind an employer to make payments to former employees even if by the terms of the agreement there is an obligation to make increased payments to employees for a period prior to its commencement. The words of s.41(4) of the Act which refer to "employees who are employed" does not encompass a past tense to include people who were employees. The concluding words of s.41(4) of the Act specifically say that no other employee or employer is bound by an industrial agreement and additionally, s.41A(2) prohibits the Commission registering an industrial agreement to which an organisation or association of employees is a party unless the employees who would be bound by the agreement upon registration are members or eligible to be members of that organisation or association. This is consistent with the scope of an industrial agreement covering only present, and not past, employees or members of organisations or associations of employees. (An appeal to the Industrial Appeal Court against this decision has been lodged but not yet determined: IAC 3 of 2008.)

The Registrar of the Western Australian Industrial Relations Commission v. The State School Teachers' Union of WA (Incorporated) (2008) 88 WAIG 331

The Full Bench enforced an order of the Commission made against the SSTU. The Department of Education and Training and the SSTU had been negotiating for an enterprise bargaining agreement to replace one then due to expire on 1 March 2008. The Department of Education and Training had lodged an application with the Commission to initiate a bargaining period for a replacement agreement and the SSTU had agreed to participate in it. On 21 February 2008 the SSTU issued a directive to its members to stop work on the morning of 28 February 2008 for the purpose of attending meetings to receive an update on negotiations and to "consider member responses to negotiations". Despite an order of the Commission not to proceed with the planned stop work meetings on 28 February 2008, stop work meetings were held in Perth and other locations on that day. Most full- or part-time teachers who participated in the meetings were absent from school for 50-60% of the whole day and it resulted in the closure of the day for 35 schools and the absence from school of more than a third of teachers. The SSTU proffered to the Full Bench an undertaking that it would, in the future, comply with orders of the Commission, however, the Full Bench did not consider that this undertaking sufficiently disposed of the issue. Having regard to the seriousness of the contravention, the members of the Full Bench agreed that the appropriate disposition was a financial penalty of \$1,500. The Acting President also commented that the maximum financial penalty of \$2,000 is comparatively low and that it is difficult to see that it can still achieve its objective to punish and deter conduct that is in breach of a Commission order.

State School Teachers' Union of WA (Incorporated) v. Director-General, Department of Education and Training (2008) 88 WAIG 698

In this matter the SSTU appealed against an order of the Commission which amongst other things directed the SSTU's officers, employees and members not to take industrial action. Order 3 stated that the SSTU, "its officers, employees and members" are not to hold any further stop work meetings in relation to the negotiations for a new agreement whilst the order remained in force. The Full Bench determined that an order of the Commission against a union directing it not to take industrial action cannot be binding upon the members of the union. The Acting President stated that the type of orders expressly contemplated by s.42E(2) of the Act can only be made against the "negotiating parties". In this instance they were the Department of Education and Training and the SSTU. In addition s.44(6a) provides that an order made under s.44(6)(ba) or (bb) binds only the "parties" to the relevant conference. Again the "parties" to the conference were the Department of Education and Training and the SSTU. Accordingly no orders could have been made against the

officers, employees and members of the SSTU. These individuals are a different legal person/entity to the SSTU who was the "party".

Re The Western Australian Police Union of Workers (2007) 88 WAIG 52

In what is believed to be for the first time under the Act, a union which has a certificate under s.71 of the Act relating to it being not only a union registered under the Act but also the WA Branch of a counterpart federal union has had registered by the Commission an agreement relating to the management and control of the funds or property of the union. The WA Police Union entered into such an agreement and applied for its registration under s.71(7) of the Act. The Full Bench found that the purpose of the agreement is to protect the union's members by ensuring the preservation of its assets. It ensured the funds of the union remain under the full control of the union when at the same time it formed the WA Branch of its counterpart federal union. The agreement was accordingly registered.

15. Conclusion

During the period of this Report, on 6 September 2007, the Hon Michelle Roberts MLA, the then Minister for Employment Protection, appointed Commissioner Stephen Kenner to conduct a review of the operation and effectiveness of the *Mines Safety and Inspection Act 1994* which was obliged to be carried out by s.110 of that Act.

On 4 April 2008 the Deputy Prime Minister, the Hon Julia Gillard MP appointed Commissioner Stephanie Mayman to the National Occupational Health and Safety Review Panel which was established to review model occupational health and safety laws for Australia.

In my last Report to you I commented upon the coverage of the Commission's jurisdiction resulting from the Commonwealth Government's Work Choices legislation. I stated then that slightly less than 40% of the State's workforce remains in the State's industrial relations system. Of these, approximately 30% are in the private sector and approximately 8% are in direct State government employment. At my request, the Australian Bureau of Statistics (ABS) has since provided a breakdown of all employees according to the method of setting pay (awards, agreements or unregistered agreements) and jurisdiction based upon type of legal organisation. For Western Australia, the ABS estimation was that approximately 69.3% of employees in WA were in the federal jurisdiction. Of the balance, the ABS estimated approximately 13.9% of employees were in the State jurisdiction; a further 16.8% were in a category defined as "Unable to be determined", a category which referred to persons whose pay was set by State registered individual or collective agreements or State awards or unregistered individual arrangements. This suggests that it is highly likely these employees are in the State's industrial relations system and that it is open to conclude that in total approximately 30% of the State's workforce is within the jurisdiction of the State's industrial relations laws, including the Act. These figures remain the best available as it represents an inquiry by the ABS specifically aimed at determining jurisdiction. It appears to me therefore that the figure of approximately 30% of employees in the State's industrial relations system is more reliable than the figure of 40% which I referred to in last year's Annual Report.

The Commission has regularly been required to determine whether or not it has jurisdiction in matters because of the operation of the Commonwealth's Work Choices legislation. These particularly relate to claims of unfair dismissal, or of denied contractual benefit, brought by employees themselves. In many cases, applications are lodged in the Commission by employees who are unaware of the correct legal identity of their employer, and also unaware of the overriding effect of the operation of the Act by the Commonwealth's Work Choices legislation.

In a number of cases, such applications have required the Commission to determine jurisdiction where the question whether the employer is or is not a trading or financial corporation is not easily determined or is the subject of opposing views. One case of significance concerning the Aboriginal Legal Service of WA resulted in an appeal during the term of this Report to the Industrial Appeal Court; the appeal has been heard but a decision has not yet issued (IAC 4 of 2007, *Aboriginal Legal Service of WA (Inc) v. Mark James Lawrence*). Applications brought to the Commission

relating to WA local government have required decisions on a case by case basis as the circumstances of the operation of local government vary significantly. The passage through the Parliament during the period of review of the *Employment Dispute Resolution Act 2008* (EDR Act) (which was not proclaimed during the period of this Report), represents one possibility of overcoming some of these difficulties regarding jurisdiction: parties to a matter in the Commission where jurisdiction is to be dealt with as a threshold issue may well agree to the Commission providing a mediation function as an alternative to the formal, and possibly lengthy, determination of jurisdiction. The EDR Act enables this to occur at the request of the parties involved.

In similar vein, the numbers of applications to the Commission by employees alleging that they have been denied a benefit under their contract of employment suggests a continuing awareness in the community of this remedy in the Commission. The Commission still receives a number of claims where the employer is a financial or trading corporation. While there has yet to be a decision at the appeal level regarding whether the Commission has jurisdiction to deal with denied contractual benefits where the employer is a trading or financial corporation, I respectfully suggest that the continuing number of applications to the Commission is evidence of the need for separate legislation preserving the right of employees to bring to the Commission claims that they have been denied benefit under their contract of employment irrespective of the business structure of the employer.

The Commission's ability to deal with urgent situations promptly continues to provide a benefit for the State. This occurs not only in cases where an employer feels that there is threatened or impending industrial action and seeks the urgent intervention of the Commission; there are occasions where a union seeks the urgent intervention of the Commission. Conferences are able to be listed either the same day, or the next day, after the application has been received.

During the period of this Annual Report, at the invitation of the President of the Australian Industrial Relations Commission, the Hon G Giudice, I attended meetings of the heads of the federal and State Commissions to discuss matters of mutual concern. I wish to record the courtesy extended to me by His Honour in this regard. It is also appropriate that I draw attention to the absence in the WA Commission of any person who is also dually appointed as a member of the AIRC. I remain of the view that in the absence of legislation directed to reducing the differences between the federal and State jurisdictions, dual appointments encourage a greater working relationship between the two jurisdictions which is of benefit to the State as a whole and the employers and employees within it.

I wish to thank my colleagues for their advice and assistance during the year. I especially thank the Registrar, John Spurling for the considerable assistance provided to me and to the Commission in his dual capacities of Registrar and head of the Department of the Registrar. I consider the work of the Department staff worthy of commendation.



A.R. Beech
Chief Commissioner
10 September 2008