2014

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 2013 to 30 June 2014

Minister Responsible for the Administration of the Act

The Hon. M. Mischin, MLC in his capacity as

Minister for Commerce

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Membership and Principal Officers

Western Australian Industrial Relations Commission

During the year to 30 June 2014, the Western Australian Industrial Relations Commission (WAIRC) was constituted by the following members:

President	The Honourable J H Smith (*Acting*)
Chief Commissioner	A R Beech
Senior Commissioner	P E Scott (*Acting*)
Commissioners	S J Kenner J L Harrison S M Mayman

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

Public Service Arbitrators

Senior Commissioner P E Scott (*Acting*) continued her appointment as a Public Service Arbitrator throughout the period. This appointment is due to expire on 21 June 2015.

Commissioner S J Kenner continued his appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 25 June 2015.

Commissioner J L Harrison continued her appointment as an additional Public Service Arbitrator throughout the period. This appointment is due to expire on 30 April 2015.

Commissioner S M Mayman continued her appointment as an additional Public Service Arbitrator. This appointment is due to expire on 9 November 2014.

Railways Classification Board

There are no appointments to this Board. Appointments will be made if and when an application is made to the 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* and s 16(2D) of the *Industrial Relations Act 1979* (the Act).

Registry

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

Ms S Bastian	**Registrar** *(Acting until appointed on 2 January 2014)*
Ms S Hutchinson	**Deputy Registrar**

The Western Australian Industrial Appeal Court

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

The Honourable Justice C J L Pullin	**Presiding Judge**
The Honourable Justice M J Buss	**Presiding Judge**
The Honourable Justice C McLure	**President**

Industrial Magistrates Court

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

Magistrate G Cicchini
Magistrate D Scaddan
Magistrate M Pontifex

Matters Before the Commission

1. Full Bench Matters

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

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

The Honourable J H Smith *(Acting)* 33

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

Chief Commissioner A R Beech 23
Senior Commissioner P E Scott *(Acting)* 12
Commissioner S J Kenner 13
Commissioner J L Harrison 11
Commissioner S M Mayman 7

Appeals

Heard and determined from decisions of the:

Commission – s 49 18
Industrial Magistrate – s 4 1
Coal Industry Tribunal 0
Public Service Arbitrator 0
Railways Classification Board 0
Occupational Safety and Health Tribunal 0
Road Freight Transport Industry Tribunal 0

Organisations – Applications by or Pertaining to

Applications to register an organisation pursuant to s 53(1) 0
Applications to amend the rules of a registered organisation pursuant to s 62 8
Applications relating to State branches of federal organisations pursuant to s 71 5
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 1

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 0
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 2013/2014 1

Orders

Orders issued by the Full Bench 32

2. President

Matters before the President sitting alone

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

Summary of s.66 Applications

Applications finalised in 2013/2014 2
Directions hearings 0
Applications part heard 0
Applications withdrawn by order 0
Applications discontinued by order 1

Orders issued by the President

Orders issued by the President from 1 July 2013 to 30 June 2014 inclusive:

Orders pursuant to s 49 (11) 2
Orders pursuant to s 66 3
References of rules by Full Bench under s 72A(6) 0
Applications pursuant to s 92 0
Remitted from the Industrial Appeal Court 0

Consultations

Consultations with the Registrar pursuant to s 62 of the Act 10

3. Commission in Court Session

The Commission in Court Session is constituted each time by three Commissioners with the exception of the 2014 State Wage order which was constituted by four 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 5
Senior Commissioner P E Scott (*Acting*) 2
Commissioner S J Kenner 4
Commissioner J L Harrison 2
Commissioner S M Mayman 3

These Commission in Court Session matters comprised of the following:

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

4. Federal Matters

Federal matters dealt with by WAIRC Commissioners 0

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

5. Rule Variations by Registrar

Variation of Organisation Rules by the Deputy Registrar 10

6. Boards of Reference

Long Service Leave - Standard Provisions 2
Long Service Leave - *Construction Industry Portable Paid Long Service Leave Act 1985* 1

7. Industrial Agents Registered by Registrar

Number of new agents registered during the period 2
Total number of agents registered as corporate body 22
Total number of agents registered as Individuals 15
Total number of agents registered as at 30 June 2014 37

Awards and Agreements in Force under the Industrial Relations Act 1979

Year	Number at 30 June
2010	2666
2011	2613
2012	2587
2013	2577
2014	**2570**

Industrial Organisations Registered as at 30 June 2014

	Employee Organisations	**Employer Organisations**
No. of organisations	43	18
Aggregate membership	**195,056**	**5,090**

Summary of Main Statistics

Western Australian Industrial Relations Commission

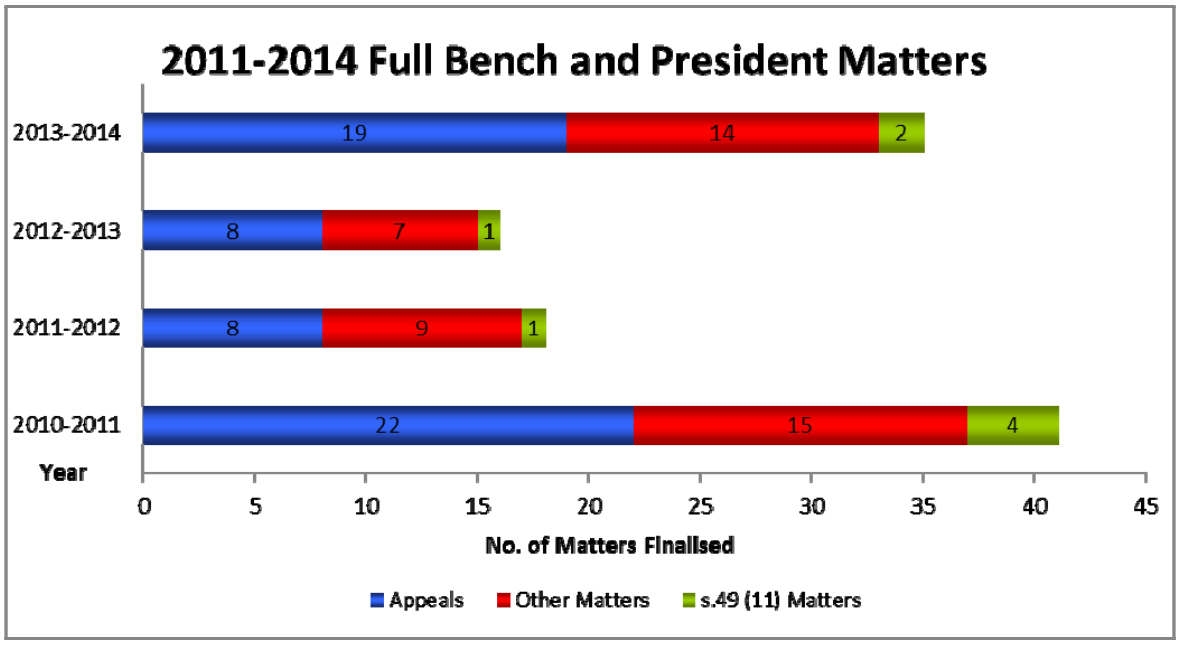
	MATTERS DEALT WITH			
	2010-2011	**2011-2012**	**2012-2013**	**2013-2014**
Full Bench:				
Appeals	22	8	8	19
Other Matters	15	9	7	14
President sitting alone:				
S 66 Matters (finalised)	0	0	7	2
S 66 Orders issued	4	21	7	3
S 49(11) Matters	4	1	1	2
Other Matters	0	0	0	0
S 72A(6)	0	1	0	0
Consultations under s 62	8	9	10	10
Commission in Court Session:				
General Orders	1	1	3	3
Other Matters	4	6	0	5
Public Service Appeal Board:				
Appeals to Public Service Appeal Board	26	40	19	28
Commissioners sitting alone:				
Conferences[1]	96	87	111	279
New Agreements	59	58	32	30
New Awards	5	0	0	1
Variation of Agreements	1	0	0	0
Variation of Awards	78	42	56	24
Other Matters[2]	213	58	44	50
Federal Matters	0	0	0	0
Boards Of Reference - Other Awards (Chaired by a Commissioner)	0	0	0	0
Boards of Reference – Long Service Leave	1	0	1	0
Unfair Dismissal Matters Concluded:				
Unfair Dismissal claims	135	188	176	159
Contractual Benefits claims	81	97	94	104
Unfair Dismissal & Contractual Benefits claims together	0	0	0	0
Public Service Arbitrator (PSA):				
Award/Agreement Variations	39	19	16	4
New Agreements	18	13	0	8
Orders Pursuant to s 80E	0	0	0	1
Reclassification Appeals	69	47	34	57
TOTALS:	**879**	**705**	**624**	**803**

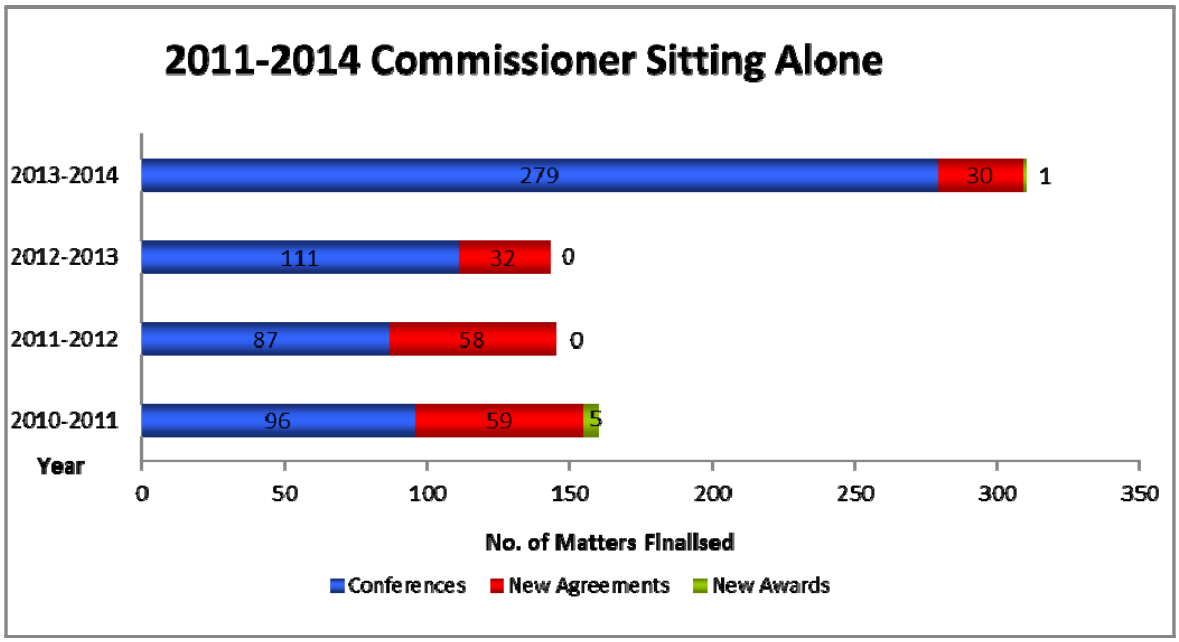
Notes

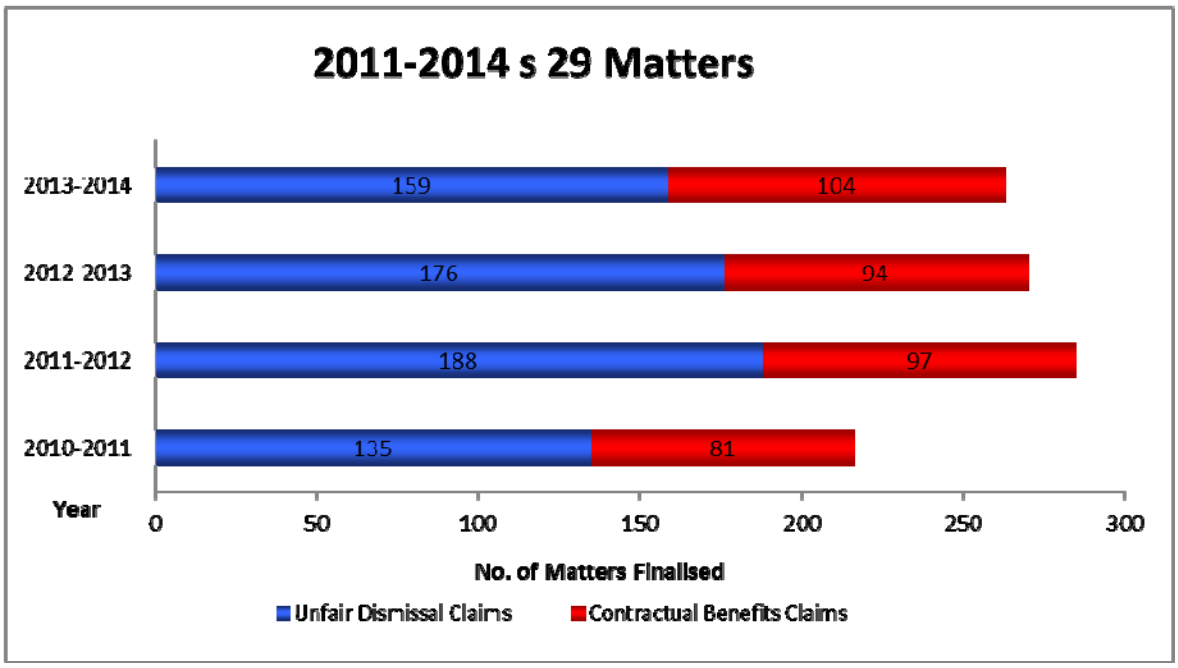
[1] **CONFERENCES include the following:**				
Conferences (s 44)	58	58	59	232
Conferences referred for arbitration (s 44(9))	8	5	12	11
Conferences divided	1	1	0	0
Conferences referred and divided	0	1	2	0
PSA conferences	27	18	34	33
PSA conferences referred	2	4	4	3
PSA conferences divided	0	0	0	0
TOTALS	**96**	**87**	**111**	**279**

[2] **OTHER MATTERS include the following:**				
Applications	0	0	0	0
Apprenticeship Appeals	0	1	0	4
Occupational Safety & Health Tribunal[#]	0	0	0	4
Public Service Applications	41	23	17	5
TOTALS	**41**	**24**	**17**	**9**

#*The Tribunal operates under the* Occupational Safety and Health Act 1984 *and thus its operation is outside the scope of this Report. This figure records the number of applications to the Tribunal which have been finalised. A further note on the operation of the Tribunal is at Part 14 of this Report.*


2011-2014 Full Bench and President Matters
2013-2014
2012-2013
2011-2012
2010-2011
Year
19
14
2
8
7
1
8
9
1
22
15
4
0
5
10
15
20
25
30
35
40
45
No. of Matters Finalised
Appeals
Other Matters
s.49 (11) Matters


2011-2014 Commissioner Sitting Alone
2013-2014
2012-2013
2011-2012
2010-2011
Year
279
30
1
111
32
0
87
58
0
96
59
5
0
50
100
150
200
250
300
350
No. of Matters Finalised
Conferences
New Agreements
New Awards


2011-2014 s 29 Matters
2013-2014
2012 2013
2011-2012
2010-2011
159
104
176
94
188
97
135
81
Year
0
50
100
150
200
250
300
No. of Matters Finalised
Unfair Dismissal Claims
Contractual Benefits Claims

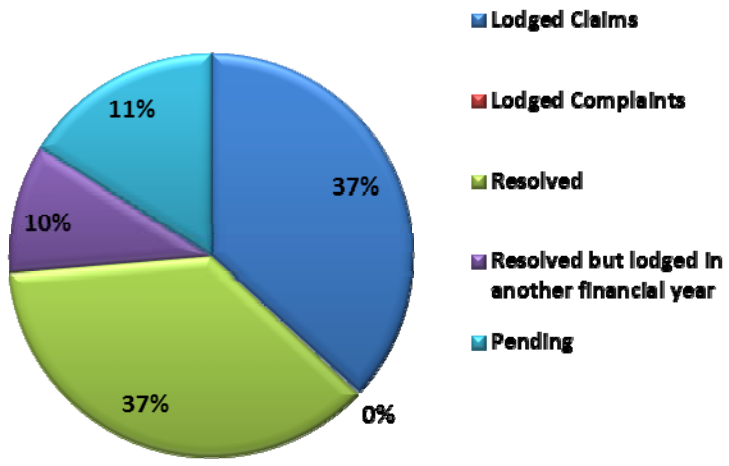
The Western Australian Industrial Appeal Court

Decisions issued by the Industrial Appeal Court during this period 1
Orders issued by the Industrial Appeal Court during this period 8

Industrial Magistrates Court

The following summarises the Court for the period under review:

Lodged Claims	175
Lodged Complaints	1
Resolved (total)	174
Resolved (lodged in the period under review)	125
Resolved but lodged in another financial period	49
Pending	76
Total number of resolved applications with penalties imposed	15
Total value of penalties imposed	$63,990
Total number of claims/complaints resulting in disbursements	9
Total value of disbursements awarded	$884
Claims/Complaints resulting in awarding wages	12
Total value of wages of Magistrate matters resolved during the period	$49,626



General Jurisdiction

Industrial Magistrates exercise general jurisdiction powers, most commonly, under the *Industrial Relations Act 1979*, the *Minimum Conditions of Employment Act 1993* and the *Fair Work Act 2009*. The regulations applicable to the Industrial Magistrates Court (IMC) are the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005*.

Under its general jurisdiction, the IMC deals with claims which allege breaches of industrial instruments and the enforcement of Commission Orders. Industrial instruments include Acts, awards (State and federal) and registered industrial agreements (State and federal).

Similarly, falling under the IMC's general jurisdiction, are claims which allege one or more contravention(s) by an employer, of their obligations under the *Construction Industry Portable Paid Long Service Leave Act 1985*. These claims amount to a significant proportion of the total number of claims lodged each year.

Prosecution Jurisdiction

Industrial Magistrates also exercise powers under the IMC's prosecution jurisdiction, in accordance with the *Criminal Procedure Act 2004*, constituted as a court of summary jurisdiction.

Support to Jurisdiction

The Department of the Registrar provides administrative support to the IMC by way of a public Registry and dedicated Registry Services Officers.

These officers deal with the lodgement and processing of documents, customer enquiries, the scheduling of trials and applications before the Court, and provide the necessary judicial support to the Industrial Magistrate when the Court is in session.

In addition, the same Registry Services Officers liaise with parties and schedule matters for Pre-Trial Conference before the Clerk of the Court, and provide the Clerk with relevant administrative assistance. The Clerk of the Court is also an officer of the Department of the Registrar.

Commentary

1. Legislation

INDUSTRIAL RELATIONS ACT 1979

During the period under review, there were no amendments made to the *Industrial Relations Act 1979.*

INDUSTRIAL RELATIONS COMMISSION REGULATIONS 2005

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

INDUSTRIAL RELATIONS (GENERAL) REGULATIONS 1997

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

2. State Wage Order Case

On 11 June 2014 the Commission in Court Session delivered its decision in the 2014 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 2014 State Wage order was created on the Commission's own motion. The Commission placed public advertisements of the proceedings and received submissions from the Hon Minister for Commerce (the Minister), UnionsWA, the Chamber of Commerce and Industry of Western Australia Inc (CCIWA), the Australian Hotels Association Western Australian Branch, Western Australian Council of Social Services Inc, and Mr Archie Marshall. The Minister, UnionsWA and CCIWA appeared in the proceedings and also made oral submissions.

After hearing submissions and considering the evidence, the Commission issued a General Order that adjusted the current minimum wage and rates of wages paid under awards by an increase of $20.00 per week from the first pay period on or after 1 July 2014.

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

From an administrative perspective, this year, a more advanced automated State Wage case processing tool was developed and implemented, which resulted in a more accurate and efficient application of the 2014 State Wage order. Diligent work by staff ensured that the newly adjusted pay rates were available to relevant parties for their feedback in a timely manner, and that the

awards and industrial agreements on the Commission's website reflected the new rates of pay on the effective date of 1 July 2014.

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

On 16 June 2014, 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 $665.90 on and from the commencement of the first pay period on or after 1 July 2014.

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 $572.20 per week on and from the commencement of the first pay period on or after 1 July 2014.

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

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

Apprentices under the MCE Act refer to the class of apprentice to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into. For this class of apprentice, it was ordered that the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award*. The date of operation was the commencement of the first pay period on or after 1 July 2014.

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 was the commencement of the first pay period on or after 1 July 2014.

6. Public Service Arbitrator and Public Service Appeal Board

Public Sector – General

The following is an overview of some of the public sector industrial matters dealt with during the reporting period.

Public Service Arbitrator

Representational Rights

In 2013, the Civil Service Association of Western Australia Incorporated (CSA) referred to the Arbitrator the issue of representational rights for members in disciplinary matters.

The matter has been held in abeyance while the parties considered whether the issue might be amenable to an agreement as part of their negotiations for a new general agreement. However, it was not resolved as part of that process and is likely to be the subject of arbitration. (*The Civil Service Association of Western Australia Incorporated v Director General of Housing* PSAC 1 of 2013).

Specified Callings

The specified callings are those professions where a specific tertiary qualification is required. Following a lengthy process of review and conciliation, a work value claim by the CSA regarding the specified callings has been resolved, and the Public Service Award 1992 and the Government Officers Salaries, Allowances and Conditions Award 1989 have been amended to recognise the reclassification which resulted from the recognition of increased work value.

Disputes Regarding Lack of Consultation

The CSA has referred to the Commission a number of claims relating to public sector agencies not complying with their obligations to provide information and to consult employees and the union when decisions are made which are likely to have a significant effect on employment, such as the reduction in staff numbers. Two such matters have been resolved through conciliation since the last annual report. A further matter was referred to the Commission in May 2014 in respect of the closure of a section of the Department of Finance. A number of conferences have been convened and conciliation is ongoing. (*Civil Service Association of Western Australia Incorporated v Director General, Department of Finance* PSAC 13 of 2014).

Classification Matters

Applications were made by 25 Coordinators, Regional Operations within the Department of Education for reclassification of their positions. They claimed that there were increased responsibilities and complexity within their positions. These positions provide support to Regional Directors and school principals within their region, and coordination services in respect of project and administrative work. The applications were dismissed on the basis that there was not a significant net addition to work value demonstrated such as to justify a higher level of classification.

(D & *Ors v Director General, Department of Education* [2014] WAIRC 00325; (2014) 94 WAIG 614).

Public Sector – Health

Structural Change

2014 and 2015 will see significant structural changes to the public health sector, with the new children's hospital and Fiona Stanley Hospital due to open, and other structural changes to follow in existing health services, including a new hospital being built at Midland. The Commission has conducted a number of conciliation conferences to deal with concerns raised by the Health Services Union of Western Australia (Union of Workers) regarding staffing issues associated with those changes. This has included concern about the redistribution of existing staff throughout the system and about the impact of new models of care.

Reclassification Matters

For the first time in this State, a position of Advanced Practice Physiotherapist, at Level P4, has been created. The Public Service Arbitrator granted a reclassification to three senior physiotherapist positions working at a high level, given the high level of skills required to be exercised in positions operating in a medical substitution model. The formal creation of the positions had taken an extraordinary amount of time as the model for this work was new, it required support from surgeons who would otherwise have seen the patients concerned, required regular funding approval and was subject to a trial period.

Although the Arbitrator granted the reclassification, the application, in so far as it applied for orders that the individuals concerned be appointed permanently to the positions which they had occupied by rolling fixed-term contracts over a number of years, was not granted. This was because the circumstances did not meet the requirements for permanent appointment, including that the physiotherapists had been advised in clear terms that they were applying for short-term, fixed-term contracts and that the positions would ultimately have to be advertised. . (*Health Services Union of Western Australia (Union of Workers) v Minister for Health* PSACR 2 of 2013; (2014) 94 WAIG 566)

The Health Services Union of Western Australia (Union of Workers) applied to have hundreds of front line clerical positions in the public health sector reclassified. These were clerical officers in emergency departments, wards, clinics and admissions departments within public hospitals. The hearing took nearly two weeks, as well as many days of site inspections and evidence from many witnesses. The areas of increased work value were said to have arisen from increased workflow/work volume; mentoring and training others; changes to the work environment including increased violence and problematic behaviour by patients and their visitors; increased exposure to trauma patients; requirements for increased accuracy and other matters. The Arbitrator considered the positions as they stood in 1999 and the changes which had occurred since then, and found that whilst there had been changes, they largely related to increased work volume and changes to processes and procedures. They did not amount to an increase in work value.

However, a position of Liaison Officer within the Emergency Department at Sir Charles Gairdner Hospital was found to be exceptional in terms of the circumstances under which the work is performed. This position alone amongst the front line clerical positions warranted reclassification. (*The Minister for Health v Health Services Union of Western Australia (Union of Workers)* [2013] WAIRC 00836; (2013) 93 WAIG 1516).

Public Service Appeal Board

Pursuant to s 80H(3) of the Act a Public Service Appeal Board must be constituted by the President as chairman where an appeal is instituted under s 80I(1)(a) by a public service officer against a decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994* (PSM Act), and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances).

Jurisdiction

The distinction between the jurisdictions of the Commission in its general jurisdiction, the Public Service Arbitrator and the Public Service Appeal Board is not always clear to employees who wish to claim that they have been unfairly dismissed, or to their representatives. A number of cases arise each year where applicants apply to the wrong jurisdiction. There is no capacity for applications to simply be referred to the other jurisdictions within the Commission. This arises because the provisions of the *Industrial Relations Act 1979* (WA) and the *Public Sector Management Act 1994* (WA) provide exclusive jurisdiction for each of the Public Service Arbitrator and Public Service Appeal Board separate from the Commission's general jurisdiction. Some employees who work in the public sector, but who are not Government Officers, make applications to the Arbitrator or the Board rather than to the Commission's general jurisdiction. This causes them frustration and confusion. It causes both parties cost and time, as it does to the Commission. This confusion of jurisdictions often means that by the time the correct jurisdiction has been identified, a claim properly referred to that jurisdiction would be out of time and would require a hearing and determination as to whether it ought to be received out of time (*B v. Director General, Department of Education* [2014] WAIRC 00487; (2014) 94 WAIG 755).

Members of the Board over the Last Year

The following people have served as members of Public Service Appeal Boards on the nomination of a party pursuant to s 80H of the *Industrial Relations Act 1979*:
Ms Michelle Andrews, Ms Donna Baker, Mr James Beckingham, Mr George Brown, Mr Kenneth Chinnery, Mr Nick Cinquina, Mr Matthew Coe, Ms Bethany Conway, Mr Brian Dodds, Ms Jodie Freeman, Ms Deborah Gould, Mr Matthew Hammond, Ms Lesley Heath, Mr Peter Heslewood, Ms Anne Hill, Ms Glenda Husk, Mr Bill Ielati, Mr Bill Landenburg, Mr Greg Lee, Mr Mark Madden, Ms Elizabeth McAdam, Ms Renata Owen, Ms Tracey Rainford-Watson, Ms Sandy Randall, Mr Gavin Richards, Dr Neil Rothnie, Ms Ngaro Sagar, Mr Steve Seeds, Mr Jeffrey Steedman, Mr Grant Sutherland, Mr Mark Taylor, Ms Christine Thompson, Mr Carlo Tognolini, Ms Valerie Tomlin, Mr Glen Townsing, Mr Kevin Trent, Mr Simon Ward and Mr John Wood.

Education

Systemic School Matters

The Commission continues to conciliate between the State School Teachers' Union of Western Australia and the Director General of the Department of Education regarding a range of issues affecting the whole of the State education system, including:

- The devolution of authority from the Director General of the Department to principals of schools;
- The increasing number of Independent Public Schools and issues associated with transfers in particular;
- Plans for the movement of Year 7 into the high school system.

Resources for Performance Management Meetings

Each year, teachers meet with a senior member of the school staff to plan for improved performance. The SSTUWA and the Department have been engaged in a long-running dispute about circumstances under which teachers are to be available to attend these meetings, such as whether paid relief staff need to be engaged so that the meeting can occur during class time; whether the meeting could take place during DOTT (Duties Other Than Teaching) time, or outside of regular school hours. The dispute appeared to require arbitration which would have involved a detailed and lengthy examination of teachers' working hours, the purpose of DOTT time and other matters. However, following a series of conciliation conferences, agreement was reached on a protocol for agreements to be reached between the school principal and the teachers at school level, including a dispute settlement process.

Working with Children Legislation

The Full Bench has confirmed that the Commission cannot deal with a decision to dismiss a teacher where the decision was based on the issuing of an Interim Negative Notice under the *Working With Children (Criminal Record Checking) Act 2004* (WA). This means that where a person works with children and has been charged with certain types of offences, but not yet convicted, the dismissal cannot be dealt with by the Commission (*B v. Director General, Department of Education* [2014] WAIRC 00352; (2014) 94 WAIG 411). An appeal against this decision has been filed in the Industrial Appeal Court and will be dealt with in the next reporting period.

Offensive Jokes and Comments to a Co-Employee

In this appeal, the appellant, a motor driver licence assessor, was disciplined by the respondent for allegedly making inappropriate racial and sexual remarks to a co-employee.

Following an investigation, the respondent imposed a reprimand and improvement action in the form of training in the prevention of bullying, harassment and discrimination in the workplace. The appellant appealed the respondent's decision to the Public Service Appeal Board.

On the evidence, the Board accepted the investigator's findings that there existed a "permissive culture" where inappropriate exchanges, or "office banter", were part of normal interactions in the workplace. Regard was also had to the fact that the co-employee participated in some of the conduct. On a whole, the Board found that the appellant's offensive jokes and comments contravened Public Sector Code of Ethics and the respondent's Code of Conduct, and that the penalty imposed was not disproportionate to the appellant's conduct. ([2014] WAIRC 00134; (2014) 94 WAIG 319).

7. Award Review Process

During the year, Registry Services staff provided two reports on the status of awards to the Commission. These awards were reviewed for possible cancellation under s 47 of the Act on the grounds there were no longer any employees to which they applied. Registry Services staff also processed applications for new awards and industrial agreements, in addition to those which were cancelled, superseded or replaced.

8. Right of Entry Permits Issued

Organisation	2010/11	2011/12	2012/13	**2013/14**
Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees, The	1	2	2	**0**
Australian Medical Association (WA) Incorporated	0	0	0	**3**
Australian Nursing Federation, Industrial Union of Workers Perth, The	4	0	14	**13**
Australian Rail, Tram and Bus Industry Union of Employees, Western Australian Branch, The	0	2	1	**3**
Australian Workers' Union, West Australian Branch, Industrial Union of Workers, The	4	4	13	**0**
Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch, The	5	5	6	**1**
Civil Service Association of Western Australia Incorporated, The	16	20	22	**10**
Electrical Trades Union WA (formerly Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering & Electrical Division, WA Branch)	0	3	11	**1**
Construction, Forestry, Mining and Energy Union of Workers, The	5	0	5	**1**
Health Services Union of Western Australia (Union of Workers)	0	4	5	**3**
Independent Education Union of Western Australia, Union of Employees, The	1	2	1	**3**
Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, The	0	0	1	**1**
Shop, Distributive and Allied Employees' Association of Western Australia, The	5	0	5	**11**
State School Teachers' Union of W.A. (Incorporated), The	5	5	7	**6**
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	4	4	3	**6**
United Voice WA	60	93	38	**39**
Western Australian Municipal, Administrative, Clerical and Services Union of Employees	16	3	6	**6**
Western Australian Prison Officers' Union of Workers	0	9	0	**26**
TOTAL	**126**	**156**	140	**133**

Number of permits that have been issued since 8 July 2002 (gross total)……..1578

Number of permits issued during the 2013/14 financial year 135

Number of people who presently hold a permit..... 397

Number of permits that are current 402

Number and names of permit holders who have had their permit removed or suspended by the Commission in the current reporting period..... 0

9. Claims by Individuals – Section 29

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

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

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

Section 29 Applications Lodged

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

	2010-2011	2011-2012	2012-2013	2013-2014
Unfair Dismissal	128	187	157	168
Denial of Contractual Benefits	82	85	99	111
TOTAL	**210**	**272**	**256**	**279**

Section 29 Applications Finalised

	2010-2011	2011-2012	2012-2013	2013-2014
Unfair Dismissal	135	188	176	159
Denial of Contractual Benefits	81	97	94	104
Both in same application	0	0	0	0
TOTAL	**216**	**285**	**270**	**263**

Section 29 Applications Lodged Compared with All Matters[1] Lodged

Section 29 applications represent 34.4% of all the matters lodged in the Commission.

	2010-2011	2011-2012	2012-2013	2013-2014
All Matters Lodged	762	697	1064	810
Section 29 Applications Lodged	208	272	256	279
Section 29 as (%) of All Matters Lodged	**27.3%**	**39%**	**24.1%**	**34.4%**

[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

	2010-2011	2011-2012	2012-2013	2013-2014
All Matters Finalised	869	884	797	975
Section 29 Applications Finalised	215	285	270	263
Section 29 as Percentage (%) of All Matters Finalised	**24.7%**	**32.2%**	**33.9%**	**27%**

Section 29 Matters – Method of Settlement

The following table shows that 82.9% of s 29 matters were settled without recourse to formal arbitration.

	Unfair Dismissal	Contractual Benefits	Both	Total	%
Arbitrated claims in which order issued	22	22	0	44	17.1
Settled after proceedings before the Commission	74	44	0	118	45.9
Matters referred for investigation resulting in settlement	0	0	0	0	0
Matters discontinued/dismissed before proceedings commenced in the Commission	30	26	0	56	21.8
Matters withdrawn/discontinued in Registry	27	12	0	39	15.2
Total Finalised in 2013/2014 Reporting Year	**153**	**104**	**0**	**257**	**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	22	5	0	**27**	14.4	4.3	0	**9.7**
Legal Representation	20	19	0	**39**	13.1	16.5	0	**14**
Personal	98	73	0	**171**	64.1	63.5	0	**61.3**
Other	12	17	0	**29**	7.8	14.8	0	**10.4**
No Data Provided	1	1	11	**13**	0.7	0.9	100	**4.7**
TOTAL	**153**	**115**	**11**	**279**	**100**	**100**	**100**	**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	0	0	0	**0**	0	0	0	0
17 to 20	2	6	0	**8**	1.3	5.2	0	2.9
21 to 25	9	6	0	**15**	5.9	5.2	0	5.4
26 to 40	42	35	0	**77**	27.5	30.4	0	27.6
41 to 50	40	34	0	**74**	26.1	29.6	0	26.5
51 to 60	25	27	0	**52**	16.3	23.5	0	18.6
Over 60	29	5	0	**34**	19	4.3	0	12.2
No Data Provided	6	2	11	**19**	3.9	1.7	100	6.8
TOTAL	**153**	**115**	**11**	**279**	**100**	**100**	**100**	**100**

Employment Period

Period of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Under 3 months	24	18	0	**42**	15.7	15.7	0	**15.1**
4 to 6 months	15	7	0	**22**	9.8	6.1	0	**7.9**
7 to 12 months	15	21	0	**36**	9.8	18.3	0	**12.9**
1 to 2 years	34	23	0	**57**	22.2	20	0	**20.4**
2 to 4 years	24	15	0	**39**	15.7	13	0	**14**
4 to 6 years	8	6	0	**14**	5.2	5.2	0	**5**
Over 6 years	25	17	0	**42**	16.3	14.8	0	**15.1**
No Data Provided	8	8	11	**27**	5.2	7	100	**9.7**
TOTAL	**153**	**115**	**11**	**279**	**100**	**100**	**100**	**100**

Salary Range

	Male	Female	No Data	Total	%Male	%Female	%No Data	%Total
Under $200 P/W	26	22	0	**48**	17.1	19.1	0	**17.3**
$201 to $600 P/W	8	14	0	**22**	5.3	12.2	0	**7.9**
$601 to $1000 P/W	22	31	0	**53**	14.5	27	0	**19**
$1001 to $1500 P/W	47	25	0	**72**	30.9	21.7	0	**25.9**
$1501 to $2000 P/W	23	18	0	**41**	15.1	15.7	0	**14.7**
Over $2001 P/W	26	5	0	**31**	17.1	4.3	0	**11.2**
No Data Provided	0	0	11	**11**	0	0	100	**4**
TOTAL	**152**	**115**	**11**	**278**	**100**	**100**	**100**	**100**

Category of Employment

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

Period of Employment	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Casual	7	6	0	**13**	4.6	5.2	0	**4.7**
Casual F/Time	5	1	0	**6**	3.3	0.9	0	**2.2**
Casual P/Time	7	1	0	**8**	4.6	0.9	0	**2.9**
Fixed Term	6	5	0	**11**	3.9	4.3	0	**3.9**
Full Time	30	17	0	**47**	19.6	14.8	0	**16.8**
Permanent	15	6	0	**21**	9.8	5.2	0	**7.5**
Permanent F/Time	70	50	0	**120**	45.8	43.5	0	**43**
Permanent P/Time	10	21	0	**31**	6.5	18.3	0	**11.1**
Probation	0	0	0	**0**	0	0	0	**0**
Part Time	1	6	0	**7**	0.7	5.2	0	**2.5**
No Data Provided	2	2	11	**15**	1.3	1.7	15	**5.4**
TOTAL	**153**	**115**	**11**	**279**	**100**	**100**	**100**	**100**

Reinstatement Sought

This table shows whether applicants sought reinstatement as presented by gender. Almost half of the respondents did not seek reinstatement.

Reinstatement Sought	Male	Female	No Data	Total	%Male	% Female	%No Data	%Total
Yes	39	34	0	**73**	25.5	29.6	0	**26.2**
No	60	52	0	**112**	39.2	45.2	0	**40.1**
No Data Provided	54	29	11	**94**	35.3	25.2	100	**33.7**
TOTAL	**153**	**115**	**11**	**279**	**100**	**100**	**100**	**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	0	0	**0**	0	0	0	**0**
17 to 20	1	6	1	**8**	1.4	5.4	1.1	**2.9**
21 to 25	1	9	5	**15**	1.4	8	5.3	**5.4**
26 to 40	21	30	26	**77**	28.8	26.8	27.7	**27.6**
41 to 50	21	33	20	**74**	28.8	29.5	21.3	**26.5**
51 to 60	18	17	17	**52**	24.7	15.2	18.1	**18.6**
Over 60	10	13	11	**34**	13.7	11.6	11.7	**12.2**
No Data Provided	1	4	14	**19**	1.4	3.6	14.9	**6.8**
TOTAL	**73**	**112**	**94**	**279**	**100**	**100**	**100**	**100**

10. Employer-Employee Agreements (EEAs)

Employer-Employee Agreements (EEAs) are employment agreements which are negotiated between an employer and an employee, and which contain employment terms and conditions relevant to those parties.

Applications to register an EEA are made to the Registrar. Initially, the EEA must first meet certain lodgement criteria. Following an assessment that the lodgement criteria has been satisfied, the content of the EEA must then be assessed to ensure that the employee is not, on balance, disadvantaged by the proposed terms and conditions of employment when the EEA is compared to the relevant award. That is achieved by conducting a *No Disadvantage Test* between the EEA and the award.

EEAs were first introduced in September 2002. At that time, and up until March 2006, the Registrar was authorised to register any EEA where the employer and the employee lived and worked in Western Australia. In March 2006, with the introduction of the Commonwealth legislation, the Registrar's authority has extended only those employers who fall within the Western Australian industrial relations system.

During this reporting period, there were four EEAs lodged in the Registry. Of those four, three were finalised prior to 30 June 2014, having been successfully registered.

The table below identifies statistics in relation to EEAs.

Applications to Lodge EEAs for Registration

Number of EEAs Lodged	**2010-11**	**2011-12**	**2012-13**	**2013-14**
Meeting Lodgement Requirements	2	5	3	4
Not Meeting Lodgement Requirements	0	1	0	0
Total	**2**	**6**	**3**	**4**

EEAs Lodged for Registration and Finalised

Outcome	**2010-11**	**%**	**2011-12**	**%**	**2012-13**	**%**	**2013-14**	**%**
Refused	0	0%	1	20%	1	33%	0	0
Registered	1	50%	3	60%	2	67%	3	100
Withdrawn	1	50%	1	20%	0	0	0	0
Total	**2**	**100**	**5**	**100**	**3**	**100**	**3**	**100**

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

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

During the reporting period, there were no appeals filed in the Commission, however an appeal filed in the last reporting period was heard, and a decision issued dismissing it. The appellant then filed an appeal in the Industrial Appeal Court. A listing date has not yet been set for that appeal.

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

The *Employment Dispute Resolution Act 2008* (EDR Act) was proclaimed on 1 December 2008. It provides that the Commission can be asked to mediate any question, dispute or difficulty that arises out of or in the course of employment. This is wider than an "industrial matter" under the Act.

During the reporting period, 17 mediation applications were lodged, and 11 of those were finalised. Of those 11, four did not proceed due to non-consent of each party to the Commission acting as mediator; four were withdrawn or concluded; and three were closed after an agreement was reached. Six mediation applications remain pending, one of which is listed for a date in the next reporting period.

Four pending mediation applications from the previous reporting period were finalised during this reporting period. Of those, two did not proceed - one due to non-consent from a party and the other withdrawn from the applicant. For the other two, a mediation was held in one, at the end of which an agreement was reached; and a hearing was held in the other, after which the Commissioner issued Reasons for Recommendation.

As is in the previous reporting period, the EDR Act has been utilised by parties to industrial disputes which would not be within the jurisdiction of the Commission pursuant to the Industrial Relations Act. This includes disputes in industries of significance to the State's economy, which highlights the importance of the EDR Act.

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

In the reporting period there has been a total of 23 applications to the Road Freight Transport Industry Tribunal (the RFT Tribunal). This is somewhat higher than the number of applications to the Tribunal in the previous two years.

As with previous reports, most applications to the RFT Tribunal relate to debt recovery claims. Several have related to negotiations for owner-driver contracts and a number have involved claims for damages for breach of contract, two of which are particularly large claims.

I record that in August 2013, the State Government initiated a Review of the *Owner-Drivers (Contracts and Disputes) Act 2007* (the OD Act) pursuant to s 59 of that Act which requires such a review take place as soon as practicable after the expiry of five years from the commencement of the legislation. In June 2014 the Department of Transport published the Review.

The Review recommended the retention of the OD Act in its current form and that the Department of Transport consider means to increase the awareness of the legislation throughout the WA road freight transport industry, and the duties and obligations that the legislation imposes on hirers and owner-drivers. Furthermore, the Review recommended that the Department evaluate the outcome of the national review of the *Road Safety Remuneration Act 2012* (Cth) due to be completed in 2014, and any impact it may have on the OD Act.

Insofar as the RFT Tribunal is concerned, the Review noted that "preliminary consultation with Stakeholders has indicated that the WA Tribunal has a high level of credibility and is valued by the Road Freight Transport Industry." The review further stated that "even though many disputes are resolved without reference to the Tribunal, it is widely considered that the Tribunal is operating effectively and that it plays an important role in settling disputes between owner-drivers and hirers. The decline in the number of cases referred to the Tribunal since 2010 also suggests that it has value in contributing to self-regulation of disputes between those parties."

14. Occupational Safety and Health Tribunal

At the conclusion of the reporting year, four applications had been filed. One of the applications was dismissed for want of jurisdiction after a hearing. The other three were discontinued, one after a hearing and inspection; and the other two after a conference.

15. Other Matters

Some examples of the matters dealt with in various industries are:

Construction Industry Portable Paid Long Service Leave Act 1985 (WA)

Under the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA), the Commission has jurisdiction to determine appeals from decisions of the Construction Industry Long Service Leave Payments Board as to calculation of contributions be made to the Board by employers. These calculations become complex because of the particular working hours arrangements for the construction industry, especially where there are lengthy periods of work followed by lengthy time off, on a rotating roster, as opposed to the more straightforward arrangements applying to standard working hours. The Commission has determined the

contributions applicable to work on a particular project. (*Cape Australia T/A Cape Marine & Offshore Pty Limited v The Construction Industry Long Service Leave Payments Board* [2013] WAIRC 00972; (2013) 93 WAIG 1823 and [2014] WAIRC 00118); (2014) 94 WAIG 231). An appeal against the determination has been made to the Full Bench.

Disability Services

The Commission assisted with a number of disputes involving the Disability Services Commission including the removal of a shift worked by an employee and a dispute about an employee undertaking outside employment. Conferences were also convened to assist parties with good faith bargaining for a new agreement covering disability support workers.

Health

The Commission continued to assist the Minister for Health and the Australian Nursing Federation in relation to a dispute about an industrial agreement to cover registered nurses and enrolled mental health nurses. A wage increase was agreed between the parties and a joint application was then lodged under s 42G of the Act for the Commission to arbitrate outstanding provisions to be included in a new agreement. The decision in this matter was delivered outside the reporting period. Preliminary issues about whether the applicant and the Minister for Commerce could be represented by a legal practitioner at the s 42G hearing were determined by the Commission. (*Australian Nursing Federation, Industrial Union of Workers Perth and Minister for Health* (AG 19 of 2013)).

The Commission arbitrated pursuant to s 42G of the Act the second and third wage increases to apply to support workers in a new agreement between United Voice WA and Minister for Health (AG 51 of 2012).

The Commission assisted with a number of disputes in the health sector lodged by the Australian Nursing Federation and United Voice WA. These issues involved fixed term contracts, changes to employees' rosters, a union member being transferred to another position and public holiday payments. Other matters included industrial action relating to a reclassification request for Hospital Support and Patrol Workers and bargaining for a new industrial agreement covering enrolled nurses, assistants in nursing and aboriginal and ethnic health workers.

Police

The Commission made a new consent award, the *Civil Service Association Western Australia Police Auxiliary Officers' Award 2013*, covering previously award-free police auxiliary officers who are eligible to be members of the Civil Service Association of Western Australia employed by Western Australia Police. This award arose out of an extensive history involving a Full Bench hearing about union coverage of these employees, intervention by another union and numerous conciliation conferences. (PSAA 1 of 2010).

Prison Officers

The proposed transfer of prison officers was the subject of two disputes before the Commission which were not able to be resolved by conciliation and were referred for hearing and determination.

A Prison Officer First Class who has been a Prison Officer for about 34 years, commenced at Bandyup Women's Prison where she worked for about 26 years and then subsequently relocated to the Wooroloo Prison Farm. In September 2012, the Officer, along with another Officer, was alleged to have engaged in bullying conduct against a fellow Officer. As a consequence of an external investigation, it was recommended that the Officer be transferred to Hakea Prison. The forced transfer of the Officer was strongly opposed by the Union.

At issue in the proceedings, was compliance by the Minister for Corrective Services with Departmental policies and procedures in relation to grievance management; the substantive allegations against the Officer; and the investigation undertaken and its outcome.

A preliminary issue of jurisdiction was taken to the effect that as there exists a Public Sector Standard concerning employment matters in the public sector, then by s 23(2a) of the Act, the Commission did not have jurisdiction to enquire into and deal with the matter. The Commission considered the terms of the Employment Standard and concluded that its scope was limited to "filling a vacancy" and the matter in question before the Commission, concerned the forcible transfer of an Officer arising from a disciplinary matter, and the Employment Standard had no application.

In terms of the merits, the Commission found that the Minister had acted contrary to its policies and procedures in relation to grievance management and furthermore, that a number of the allegations against the Officer were without foundation. Accordingly, the Commission determined that the forced transfer of the Officer not proceed. ([2014] WAIRC 00313; (2014) 94 WAIG 581).

The second dispute involving a contested proposed transfer of a prison officer occurred where the Officer concerned was based at Casuarina Prison. He was charged with negligence and carelessness in the performance of his duties when transferring a high profile prisoner, with a history of violent offending, within the prison. The disciplinary charges were proven and an appeal to the Prison Officers Appeal Tribunal was dismissed. The Officer concerned received a penalty of a suspension from duty without pay and entitlements for six days.

In the proceedings before the Commission, the Commission found that based upon the findings from the disciplinary hearing, affirmed by the Appeal Tribunal on appeal, the Officer had engaged in a serious dereliction of duty when undertaking an internal transfer of a violent and notorious offender. Furthermore, the Commission concluded that the proposed transfer of the Officer was consistent with the powers of the Corrective Services Commissioner and other senior officers under the Prisons Act, and such operational decisions should not be called into question unless there was a clear breach of industrial principle. The Commission also concluded that the proposed transfer was consistent with the terms of the industrial agreement applying to the parties. ([2014] WAIRC 00349; (2014) 94 WAIG 575).

Public Transport

A dispute between the Public Transport Authority (PTA) and the Australian Rail, Tram and Bus Industry Union of Employees (ARTBIU) involved an application under s 44 of the Act concerning a dispute between the parties in relation to negotiations for a new industrial agreement to cover train drivers. The last industrial agreement between the parties was made in 2006. Since that time, the parties have been unable to reach agreement and terms and conditions have in the main, been determined by enterprise orders made by the Commission under the Act.

An extensive range of issues was before the Commission for conciliation. Conciliation conferences commenced in early September 2013 and continued until mid-November 2013.

As a consequence of the conciliation conferences and negotiations between the parties facilitated by the Commission, agreement was reached for a new industrial agreement which was registered under s 41A of the Act on 28 November 2013.

Another dispute between the PTA and the ARTBIU related to extensive negotiations between the parties for a replacement industrial agreement to apply to prisons throughout the State. The new industrial agreement reached involves a consolidation of all formal and informal industrial instruments into a single industrial agreement and a significant revision and streamlining of terms and conditions of employment. The new agreement was registered by the Commission on 27 September 2013. (C 219 of 2013).

16. Decisions of Interest

Industrial Appeal Court

Interpretation of Industrial Agreements [2013] WASCA 287; (2014) 94 WAIG 1

This was an appeal of a decision of the Full Bench which upheld an appeal against a decision of an industrial magistrate, in which it was found that the employer did not breach a provision of its agreement in relation to inductions for Education Assistants. In this appeal, the Industrial Appeal Court set out the modern principles that apply to the interpretation of industrial agreements:

(a) the industrial agreement has to be construed to determine what the intention of the parties was at the time the agreement was entered into. This has to be determined by ascertaining what a reasonable person would have understood the words of the industrial agreement to mean taking into account the text, the surrounding circumstances known to parties and the purpose and object of the transaction;

(b) surrounding circumstances may only be taken into account if the ordinary meaning of the words used by the parties is ambiguous or susceptible of more than one meaning;

(c) words in the industrial agreement have to be construed in the context of the Agreement read as a whole;

(d) allowance is to be made for the fact that industrial agreements are not always framed with that careful attention to form and draftsmanship which one expects to find in an Act of Parliament and

(e) events subsequent to the making of an industrial agreement should not be taken into account.

The Industrial Appeal Court dismissed the appeal.

Full Bench Appeals

Jurisdiction – Constitutional Law – Trading Corporation

The Full Bench heard two appeals against decisions of the Commission which turned solely upon the question of whether the employer was a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution.

In the first matter ([2013] WAIRC 00812; (2013) 93 WAIG 1471), the applicant brought an unfair dismissal claim to the Commission in which an issue arose whether the employer, the Potato Marketing Corporation was a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution and if so, was a national system employer for the purposes of s 14(1)(a) of the *Fair Work Act 2009* (Cth) (FW Act) which would mean the Commission would have no jurisdiction to hear and determine the claim. The Commission had held that the Corporation was a constitutional corporation and dismissed the claim for want of jurisdiction. On appeal, the majority of the Full Bench found that when regard was had to the regulatory activities of the Corporation set out in the *Marketing of Potatoes Act 1946* (WA), the heart of its activities was setting and varying the price of potatoes by having regard to commercial considerations and that, at all material times, the Corporation carried out its activities in a business-like and commercial way. For these reasons, the majority of the Full Bench dismissed the appeal.

In the second matter ([2013] WAIRC 00816; (2013) 93 WAIG 1488), the applicant, a medical practitioner, appealed the decision of the Commission that dismissed his unfair dismissal claim for want of jurisdiction on grounds that the employing medical practice was a constitutional corporation within the meaning of s 51(xx) of the Commonwealth Constitution. The Full Bench found there was no contract entered into between a patient and the medical practice as there was no intention on behalf of the medical service to effect an exchange of services for a fee. They simply provided a gratuitous medical service and it was apparent that the transactions between the medical practice and patients lacked a commercial aspect or a commercial character. Regard was also had to the fact that whilst the financial statements of the medical practice had recorded a modest profit in the financial years from 2008 to 2011 and a loss in 2012, the medical practice was a non-profit organisation whereby no profits could be distributed. In these circumstances, the Full Bench found that the provision of medical services was inconsistent with the concept of 'trade' or 'trading' within the meaning of s 51(xx) of the Commonwealth Constitution and that the commercial practice was not a constitutional corporation.

Nature and Scope of a Hearing Referred to the Commission under s 78(5) of the PSM Act 1994 (WA) Considered [2014] WAIRC 00074; (2014) 94 WAIG 425

The Full Bench considered the nature of a matter referred to the Commission pursuant to s 78(3) of the *Public Sector Management Act 1994* (WA) (PSM Act) which enables a teacher whose employment is terminated to refer the decision to the Commission, as if that decision or finding were an industrial matter mentioned in s 29(1)(b) of the Act. In particular, it considered the effect of the enactment of s 78(5) of the PSM Act which provides that if it appears to the Commission that an employing authority failed to comply with the rules of procedural fairness, the Commission:

(a) is not required to determine the reference or allow the appeal solely on that basis and may proceed to decide the reference or appeal on its merits; or

(b) may quash the decision or finding and remit the matter back to the employing authority with directions as to the stage at which the disciplinary process in relation to the matter is to be recommenced by the employing authority if the employing authority continues the disciplinary process.

The Full Bench found that s 78(5) of the PSM Act ended the debate about the nature of a matter referred to the Commission under s 78 of the PSM Act, and that the nature of a hearing will depend not only on the grounds set out on behalf of the person who brings the referral to the Commission, but also any matters agreed or pleaded in dispute in the respondent's notice of answer and counter proposal.

The Full Bench also observed:

(a) a referral of a matter of termination of employment on grounds of substandard performance found pursuant to s 79 of the PSM Act to the Commission under s 29(1)(b)(i) of the IR Act, in the absence of consent by the parties, or at least by a party aggrieved by a decision, on grounds that include alleged breaches of procedural fairness would not usually enliven a hearing de novo, so as to enable a matter to be determined on its merits without regard to any breaches of procedural fairness; and

(b) where any matter of breach of procedural fairness is raised, the Commission is empowered under s 78(5) with a discretion not to determine the reference solely on the basis of a breach of rules of procedural fairness.

The Full Bench also made an observation that it was arguable that matters of substandard performance do not appear to be matters of 'discipline' in Part 5 of the PSM Act, that s 78(5)(b) has no application to a referral of a decision made under s 79(3) in respect of substandard performance. The Full Bench, however, made the observation that it was not necessary to resolve that issue in the appeal. The appeal was dismissed.

Contracts of Employment

In the following two appeals, the Full Bench considered whether claims for unpaid contractual benefits were made out on grounds that the terms of a contract provided for the amount claimed.

This was an appeal ([2013] WAIRC 00872; (2013) 93 WAIG 1628 against a decision of a single Commissioner sitting as the Road Freight Transport Industry Tribunal. The appellant, a sub-contractor driver, sought damages of $41,700 for pay in lieu of reasonable notice, on grounds that the respondent had terminated their contract.

The central issues and findings in the appeal were as follows:

(a) Was the contract between the parties varied to include a term to undertake an additional run that was an informal arrangement made subsequent to the agreement? The Full Bench concluded that there was no legally enforceable agreement between the parties to incorporate an additional run.

(b) The appellant removed the respondent's signage from its truck after a breakdown in the relationship. Was the requirement for signage on the appellant's truck a condition of the contract or a non-essential term? The Full Bench found that the requirement for signage was not a term requiring strict or substantial performance (a condition), rather an intermediate term (not an essential term), because there was no evidence that the effect of the removal of the signage made further commercial performance of the contract impossible.

(c) Was the respondent entitled to terminate the contract between the parties without notice? It was found that even if it were established by the evidence that the removal of the signage deprived the respondent of uniformity in its branding, there appeared to be little, if any, consequence that flowed from the breach of contract. Thus, it could not be said that the removal of the signage was serious enough to give rise to a right to terminate the contract on grounds of a breach of an intermediate term.

This was an appeal ([2014] WAIRC 00034; (2014) 94 WAIG 37) *n* against the decision of the Commission to dismiss a contractual entitlement claim. The employee was a fly-in/fly-out kitchen hand in the northwest of Western Australia.

The appeal turned firstly on the issue of whether the terms of employment were partly oral or wholly in writing. The second issue was whether a term or terms could be implied into the contract, as a matter of fact, to the effect that the employee was entitled to be paid reasonable remuneration for each hour of work in a shift, that was in addition to standard hours of work. It was found that even if it could be inferred that the statement made to her before commencing employment to the

effect that 'we will be working 10-hour days' created an oral term of the contract that the length of each shift was to be fixed at 10 hours for the weekly rate of pay, such a warranty was inconsistent with the express terms of the contract.

The appellant's argument that the term sought to be implied by law into the contract as part of the 'wages-work' bargain and a 'right to reasonable remuneration' was rejected.

In these circumstances, the Full Bench found there was no scope to imply a term on grounds of fact of a right to 'reasonable remuneration for each hour of work' and the appeal was dismissed.

Should Allowances be Made in Awards of Compensation for Tax? [2014] WAIRC 00028; (2014) 94 WAIG 179

In this appeal, the Full Bench considered the principles that apply to assessment of awards of compensation and whether the Commission should take into account in an assessment, amounts of taxation required to be withheld from an employment termination payment made to an employee. It was argued on behalf of the employee that the Commission erred by not including an allowance in the award of compensation for taxation at the rate of 31.5% by grossing up the amount awarded for loss of wages. The Full Bench found the Commission did not err. The majority of the Full Bench found it was not necessary to take the taxation liability into account as the tax payable on an award of compensation is incorporated into a taxpayer's assessable income.

Implied Power of the Full Bench to Make a Consequential Order [2014] WAIRC 00451; (2014) 94 WAIG 787

This was an appeal to the Full Bench against a decision of the Commission dismissing an application made by the Union in relation to the alleged unfair dismissal of a transit officer who had been convicted of assault charges The Full Bench found that the Commission at first instance had erred in dismissing the application on grounds that further proceedings were not necessary or desirable in the public interest. The Full Bench issued a minute of proposed order that included suspending the Commission's decision and remitting the matter to the Commission at first instance for further hearing and determination.

The Union sought that the proposed order be amended to quash the Commission's decision; dismiss the PTA's application under s 27(1)(a) to dismiss the substantive application; and remit it to the Commission at first instance for further hearing and determination.

The Full Bench found that an order could not be quashed and remitted to the Commission for further hearing and determination; it could only remit a decision of the Commission where it suspends the decision under s 49(5)(c).

In relation to the s 27(1)(a) application, it also found that under s 49, the Full Bench has no express power to dismiss an application made at first instance as it is an inferior court of record and as such it has implied powers that arise by necessary implication out of the effect of the exercise of a jurisdiction which is expressly conferred.

The Full Bench then found that it was clear that in suspending the Commission's decision it was also necessary to make an order to dismiss the s 27(1)(a) application. This was because the s 27(1)(a) application should not remain on foot in light of the reasons of decision of the Full Bench and that such an order was necessary for the effective exercise of the Full Bench's jurisdiction to dispose of the matters raised in the appeal.

Full Bench Applications

Applications for s 71 Certificates and Related Matters

Declarations were made by the Full Bench under s 71 of the Act in favour of three unions in separate matters. These were the *Western Australian Prison Officers' Union of Workers* [2014] WAIRC 00377; (2014) 94 WAIG 454, *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* [2014] WAIRC 00438; (2014) 94 WAIG 687, and *The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers* [2014] WAIRC 00439; (2014) 94 WAIG 698. In each matter, the State organisation sought declarations that (1) the rules of the State organisation and its counterpart federal body, relating to the qualifications of persons for membership, be deemed to be the same and (2) the rules of the counterpart Federal body prescribing the offices which exist in the Federal branch can be deemed to be the same as the rules of the State organisation prescribing the offices which exist in the State organisation. This can facilitate the orderly and efficient administration of their organisations by only having one set of elections to fill the corresponding offices in each organisation.

Whilst these three State organisations sought to operate more closely with their respective counterpart federal organisations, one organisation sought to separate itself from its counterpart federal body. In *Re The Australian Nursing Federation, Industrial Union of Workers Perth* [2014] WAIRC 00542; (2014) 94 WAIG 813, the ANF made an application under s 62(2) of the Act to delete rule 10(5) of its rules which enabled its counterpart federal body to hold corresponding offices of the State organisation. The Full Bench observed that the effect of deleting rule 10(5) meant the ANF would henceforth be required to have separate elections for members of its council which is the committee of management of the State organisation. The State organisation had a s 71 certificate issued by the Registrar under s 71(5) of the Act. However, the Full Bench observed as s 71(5)(d) provides that a certificate which declares that persons holding office in a State organisation in accordance with a rule made pursuant to s 71(5)(a) shall, for all purposes, be the officers of the State organisation, once rule 10(5) was deleted there will be no rule as contemplated in s 71(5)(a). Thus, there will be no officers of a counterpart federal body holding office in the State organisation and the s 71 certificate of the ANF will cease to have effect.

Applications involving Organisations that have Ceased to Function

In *Re Health Services Union of Western Australia (Union of Workers)* [2013] WAIRC 00861; (2013) 93 WAIG 1499 the Full Bench granted an application to authorise the Health Services Union of Western Australia (Union of Workers) (the HSU) to alter its qualifications of persons for membership to extend coverage to persons who were at that time eligible to be members of the Salaried Pharmacists' Association Western Australian Union of Workers and the WA Dental Technicians' and Employees' Union of Workers, Perth. The reason why the alterations were sought was that those two organisations had ceased to function. Whilst these organisations had existed separately, they did so in name only and their members had been serviced by an administrative arrangement by the HSU.

In *The Registrar v Sales Representatives' and Commercial Travellers' Guild of WA Industrial Union of Workers* [2014] WAIRC 00373; (2014) 94 WAIG 460 the Full Bench made an order to cancel the registration of that organisation on grounds that the membership had fallen to three, and the union was no longer financially viable, nor could it meet the quorum numbers of a general meeting or an executive committee meeting.

Contractual Entitlement Applications

Jurisdiction - Status of Applicant and Location of Business (2013) 94 WAIG 726

This matter involved a contractual benefits claim brought by the applicant against the respondent who was engaged in the industry of internet website design and development. The respondent contended that the applicant was not an employee; rather he was engaged in a partnership or joint venture with the respondent.

The Commission considered in detail the relevant legal issues in relation to formation of contracts of employment, and the distinguishing relationships of partnership and joint venture. The Commission considered on all of the evidence, that the applicant was at all material times an employee of the respondent and was not engaged in partnership or a joint venture with the respondent. Furthermore, even though the respondent's business was principally located in Queensland, the Commission considered, in applying *Parker v Tranfield* (2001) 81 WAIG 2505, that the applicant, in performing work in Western Australia, for Western Australian clients, resulted in a sufficient connection with Western Australia such that the Commission had jurisdiction to deal with the applicant's claim.

Jurisdiction – Prescribed Amount of Salary of Applicant (2013) 94 WAIG 539, 545

This matter involved a contractual benefits claim brought by the applicant against an iron ore company. A preliminary issue was determined that being whether the applicant's salary was within the prescribed amount for the purposes of s 29AA of the Act and the Commission held that it was.

The substantive claim involved an allegation that the respondent's human resources handbook called the "Oresome Handbook" was incorporated into the applicant's contract of employment consistent with two decisions of the Full Court of the Federal Court in *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193 and *Goldman Sachs JB Were Services Pty Ltd v Nikolich* FCAFC 120.

The applicant claimed that she was entitled, although a fixed term employee, to redundancy benefits in accordance with the handbook, along with an incentive payment of 20% of her base salary.

The Commission considered the factual circumstances in relation to the formation of the contract of employment, along with a detailed consideration of the terms of the handbook. Having regard to the fact that the majority of the provisions of the handbook conferred benefits on the employee, and having regard to the terms of the written contract of employment, and the relevant legal principles, the Commission concluded that the applicant was entitled to redundancy benefits as a term and condition of her employment, arising from the incorporation of the handbook. The Commission rejected the applicant's claim that she was entitled to an incentive scheme payment.

Payment of Sales Commission (2013) 94 WAIG 109

This matter involved a contractual benefits claim by the applicant against the respondent that she was denied benefits in the form of commission payments under an incentive scheme available for sales staff.

The applicant contended that she was entitled to payment of commission on a number of bases. These bases included that the scheme was expressly incorporated into her contract of employment; alternatively that it was an implied term in her contract of employment based on the principles in *BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266. It was also contended that implication arose based on a custom and usage and additionally, that the incentive scheme was incorporated as a consequence

of the operation of an implied term of mutual trust and confidence, arising from the decision of the Full Court of the Federal Court in *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450.

Having considered the terms of the contractual arrangements between the parties, the Commission determined that the written contract expressly excluded the incorporation of external documents and was an entire contract. The Commission also rejected contentions advanced by the applicant that in any event, the applicant met the terms of the incentive scheme, even if they were incorporated contractually.

Other

Cancellation or Termination of an Apprentice's Employment [2014] WAIRC 00199; (2014) 94 WAIG 394

The appellant, an apprentice bus driver, entered into a training contract with his employer which was registered under the *Vocational Education and Training Act 1996* (WA) (VET Act). Following an allegation that the appellant engaged in serious misconduct, the employer initially applied to the Department of Training and Workforce Development (the respondent) to "terminate" the training contract. Ultimately, the respondent relied on its power to "cancel" the registration of the training contract on the ground that the employer was not able to train the apprentice adequately, due to an irretrievable breakdown in their relationship. The employer had lost confidence in the appellant, and the appellant had accused his employer of fraudulent conduct.

The Commission considered the distinction between cancellation of the registration of a training contract, and termination of a training contract under the VET Act and Regulations. It was held that the appellant failed to establish that there was an error in the respondent's decision that it was appropriate to cancel the registration of the training contract. The appellant was not denied procedural fairness. Given the training contract was cancelled, the appellant's employment inevitably ceased.

Payment by Commission is not 'Salary' [2014] WAIRC 00313; (2014) 94 WAIG 581

In this matter, the Commission decided that a provision of the Act, namely s 29AA(3) and (4)), which prevents the Commission from hearing a claim for a denied contractual benefit where the employee's contract of employment provides for a salary exceeding $145,800, does not apply in the case of an employee who was remunerated wholly by commission, and who did not receive a salary.

17. Conclusion

The Act generally continues to operate efficiently for those employers and employees in WA covered by it which, in the private sector, generally are employers who are sole traders, partnerships, trusts where the trustee is not a company and employers which are companies, or are incorporated, but which do not substantially engage in trading or financial activities, and their employees.

Significantly, the Commission's jurisdiction in s 29(1)(b)(ii) to hear and determine a claim by an employee that they have not been allowed by their employer a benefit under their contract of employment includes employers which are constitutional corporations and their employees.

In the public sector, again in general terms, the Commission's jurisdiction is over industrial matters affecting public service officers and government employees where the employer is a not a constitutional corporation. This is illustrated by the case of the Potato Marketing Corporation of Western Australia which is referred to earlier in this Report.

The importance of s 44 of the Act as a vehicle by which the Commission can be asked to convene a compulsory conference urgently was illustrated when a stop-work meeting was foreshadowed by Public Transport Authority train controllers on 16 April 2014 which threatened to disrupt suburban trains. An application for an urgent compulsory conference was filed on 15 April 2014 and the Commission (Kenner C) convened a compulsory conference within 2 hours. An order issued from the conference which required the train controllers who were rostered on for 16 April 2014 to remain on duty for the duration of their rostered shift and not to attend the stop work meeting called by the Union (PSAC 11 of 2014 [2014] WAIRC 0307).

The Commission reconvened the conference at short notice the following morning after having been informed that the train controllers concerned had indicated that they would attend the stop work meeting despite the Commission's order. The Commission issued an order to join each train controller individually as a party to the proceedings ([2014] WAIRC 0309). As a consequence of the Commission's intervention, there was minimal disruption to the suburban train services on the day. The Commission then held further conferences and a recommendation issued based on discussions between the parties.

Section 44 is a most useful vehicle for the Commission to act speedily when necessary, whether at the request of an employer or an employee organisation. In particular, I note the power given to the Commission to summons persons to attend is a vital part of the process. It is a power well known in the industrial relations community and it gives the conference a significant standing. This was an example of it in operation.

The Commission, and the staff of the Registry, continue to be alert to the issue of whether a former employer named as a respondent to a claim of unfair dismissal appears to be a national system employer. At the time of filing, this will depend entirely upon the identity of the former employer stated by the applicant on the application form. Where appropriate, the issue of jurisdiction is drawn to the attention of the applicant at the time of filing and an opportunity extended to the applicant to seek advice before the application is allocated to a Commissioner to be dealt with. In this way, a claim which would otherwise not be within the jurisdiction of the Commission may be withdrawn with a consequent saving of time and effort by both the applicant and the former employer and also by the Commission.

In the conclusion to last year's Report, I drew attention to the urgent need for the Act to be amended to deal with the effect of the overriding coverage of Commonwealth legislation, particularly to give the power to the Commission to make, on its own motion, modern awards to wholly replace the present State awards. The issue is not so much whether the present awards contain wage rates and conditions which are in need of modernisation, although that is an issue; it is that they are awards which have been made on the application of, usually, registered organisations and are made on the basis of the coverage of the Act prior to 2006. Since 2006, the

Commonwealth coverage of employers which are constitutional corporations and their employees has meant that the structure, not the content, of awards made prior to 2006 is inappropriate. Experience has shown since that time that registered organisations have shown no interest in modernising the private sector State awards to which they are parties; nor have the employers named in those awards. The exception has been where applications have been made since 2006 to confirm, or provide, private sector State award coverage for employers who are not constitutional corporations and their employees who were covered by a pre-2006 Commonwealth award and who would become award-free after the transitional provisions of the Commonwealth legislation expired in 2011. That urgent need for the Act to be amended remains.

In addition the power given to the Commission in s 47(1) and (2a) to cancel an industrial agreement is not designed to address the significant number of pre-2006 private sector industrial agreements which have been left behind in the wake of the 2006 changes. Those sections require a separate investigation to be undertaken by the Registrar into each agreement, which is an unnecessary and labour-intensive exercise. I have previously recommended that the Commission should be given the power on its own motion to cancel such industrial agreements which no longer have application by giving public notice of an intention to do so.

Issues arising from the distinction between the jurisdictions of the Commission in its general jurisdiction, the Public Service Arbitrator and the Public Service Appeal Board are referred to earlier in this Report. The reasons for the distinction are historical and of no present practical function. I note that the removal of the Public Service Arbitrator and the Public Service Appeal Board as constituent authorities has been foreshadowed in draft legislation and that such amendments are likely to assist to reduce the confusion arising from employees applying to the wrong jurisdiction.

The Commission's mediation function, which applies to all workplaces in WA whether or not they are covered by the Industrial Relations Act, continues to provide a useful resource for both small and large businesses. As a consequence, over the last few years Commission has arranged for members to attend formal mediation conferences, seminars and workshops for continuing professional development in this discipline.

I record that during this reporting period the Commission completely refurbished its hearing and conference rooms as a consequence of the renewal of its accommodation lease by the WA government. Its hearing and conference rooms occupy one floor and during this six month period the whole floor was closed. For the period, suitable rooms on the Commission's other floors were converted to temporary hearing and conference rooms and used as required. In addition, on those occasions where we needed additional facilities, the Commission was able to sit in the WA Supreme Court mediation rooms on level 17, and in a hearing room of the Fair Work Commission on level 12, of the building.

I record here my thanks to the Hon. Chief Justice of WA and to the Hon. President of the Fair Work Commission for the willing permission they gave to use their facilities. I also express my thanks to the WA Supreme Court listing staff, and the Fair Work Commission SA/WA Deputy Registrar and local listing staff, with whom daily liaison became the norm, for their kind assistance during this period.

I also thank my colleagues for their forbearance and understanding. It also dislocated a number of Registry and Library staff (including by the loss of their amenities room while it was used as a hearing room) and I express my thanks to them. I also extend my thanks to Corporate Services and IT staff who assisted in various ways to ensure the Commission was properly supported while also being involved in the commissioning of the new facilities.

The Commission's Registrar and CEO Susan Bastian worked tirelessly during this period and deserves special thanks for the significant contribution she made during this time in addition to her more regular duties.

As a result, the Commission now has state-of-the-art hearing and conference rooms with world standard audio/visual capability which will be of benefit to those who attend the Commission and the community. It has also allowed us to permit some external parties to use some facilities on a short-term basis, for a fee, which I see as providing a facility of benefit to the community.

A.R. Beech
Chief Commissioner

18 September 2014