Industrial Relations Commission of New South Wales

ANNUAL REPORT 2020

ISSN 1832-2093

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The principal place of business of the Industrial Relations Commission of New South Wales is Level 10, 10 Smith Street Parramatta. We acknowledge that this land is the traditional land of the Darug people of the Eora Nation and we respect their spiritual relationship with their country.

The Commission also conducts proceedings remotely and in other locations across the State and we acknowledge and pay our respects to the traditional custodians of those locations.

Letter of transmittal to the Minister

The Honourable Don Harwin MLC
Special Minister of State, Minister for the Public Service
and Employee Relations, Aboriginal Affairs, and the Arts
52 Martin Place
Sydney NSW 2000

Dear Minister

I am pleased to submit to you the Annual Report of the operations of the Industrial Relations Commission for the year ended 31 December 2020 for presentation to each House of Parliament in accordance with s 161 of the *Industrial Relations Act 1996* (NSW).

Yours sincerely

Nichola Constant
Chief Commissioner

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FOREWORD

FOREWORD BY THE CHIEF COMMISSIONER

I am pleased to introduce the 2020 Annual Report for the Industrial Relations Commission of New South Wales.

On 2 March 2020, Australia reported its first local transmission case of COVID-19. This was also the day my appointment as Chief Commissioner commenced. The COVID-19 pandemic affected many aspects of our lives and brought significant changes to workplaces. Like most Courts and Tribunals, the pandemic affected the means by which the Commission performed its functions but did not disrupt the Commission's focus on discharging these functions.

The pandemic highlighted the importance of robust and modern systems and technology. Following the introduction of COVID-19 restrictions from March 2020, the Commission transitioned to using teleconference and, in Parramatta, videoconference facilities through the Virtual Court Room ("VCR"). After some initial challenges, the Commission, parties and representatives became adept at using the VCR. The VCR offers ongoing benefits and efficiencies for the Commission and its users in the reduction of travel time and improved access to justice. Where the circumstances are appropriate, such as urgent disputes, procedural matters, and matters involving parties and/or witnesses located in Regional NSW, remote hearings will continue beyond the pandemic.

The public counter of the Industrial Registry was closed during the height of the pandemic, from 24 March 2020 to 9 June 2020. During this time, the Registry staff continued to work at Parramatta, and the Registry accepted emailed material until 30 June 2021 which the Registry staff processed manually, in addition to their regular workload. The Commission looks forward to the advent of the digital court file which will allow users to upload electronically, through the internet, all documents to the Commission's file. In the meantime, the Rule Committee, including the non-Commissioner members who generously volunteered to be co-opted pursuant to sub-s 186(2) of the *Industrial Relations Act 1996* ("the Act"), will work to modernise the Commission's most common application and response forms so that these can be filed electronically by the end of 2021.

A broad suite of legislative and regulatory reforms designed to reduce the spread of COVID-19 and to mitigate job losses was introduced in 2020. These reforms provided workers with greater flexibility at work, and in taking leave during the pandemic, facilitated electronic signing and witnessing of documents, and provided for the enforcement of health and safety measures in court facilities.

The total number of Commission filings in 2020 was greater than 2018 and, when adjusted to remove s 19 reviews which are undertaken over two years in each three-year cycle, it was consistent with the number of filings in 2019. An expected increase in disputes as a consequence of the pandemic did not arise, largely because of the flexible principles-based approach taken by the NSW Government in respect of management of employees during the pandemic, and Local Government parties acting quickly to agree to the making of the Local Government (State) Award 2020 and the Local Government (COVID-19) Splinter (Interim) Award 2020.

Notwithstanding the disruption to the means by which the Commission discharged its functions throughout the pandemic; a vacancy in the Commissioner ranks from November 2019 and throughout 2020; the increase in the number of matters requiring arbitration; and the increase in the number of arbitrated hearing days compared with 2019, the Commission managed its listings so as to avoid a backlog in hearings, and achieved a completion rate of 105.4%. Key drivers for this efficiency were that Commissioners took very little leave during 2020, and due to the flexibility afforded by remote hearings, Commissioners listed matters outside of usual hearing times.

I am also pleased to report that we have improved our delivery against time standards for the listing of matters for conciliation and compulsory conference. The use of teleconferences assisted this achievement as listings were not dependent on parties' availability to attend the Commission's premises. However, the Commission's performance against time standards for the finalisation of matters has fallen from 2019, largely as a consequence of the reduction in the number of Commissioners, and because parties in the earlier stages of the pandemic preferred to wait for the resumption of in-person hearings rather than use the VCR.

Across 13 days in 2020, a Full Bench of the Commission arbitrated the first contested applications for increases to public sector salaries awards since 2012. The hearing of these applications by five unions in relation to 41 awards, collectively known as the "Crown Salaries Awards", took place using the VCR, allowing public sector employees across NSW to observe the proceedings, which would not have been possible with an in-person hearing. Following an earlier decision which rejected the applicants' argument that employees were entitled to, or guaranteed, an increase of 2.5% per annum, the substantive decision in the Crown Salaries Awards matters was delivered on I October 2020. The Crown Salaries Awards decision recognised the need for restraint and awarded a "nominal" pay increase of 0.3% to prevent employees suffering a real decrease in pay and allowances.

A Full Bench of the Commission also heard applications from the Police Association of New South Wales and the Australian Paramedics Association (NSW) for variations to awards covering their members across six days in 2020. Five of these hearing days were through the VCR and the sixth took place in-person in Parramatta with one member of the Bench using the VCR. Although outside the reporting period, I note that on 3 May 2021, the Full Bench determined that police officers were to receive a 1.75% increase to their salaries and allowances and paramedics were to receive a 0.3% increase to their salaries and allowances and a payment equal to the difference between $1,000 and 0.3% of their annual base salary.

At the beginning of 2020, approximately 140 industrial awards which had been made or varied by the Commission were awaiting publication in the Industrial Gazette. As a result, many parties could not access their latest award on the Commission's website and could not enforce their entitlements. Through the hard work of the Registry staff, by the middle of the year this backlog had been cleared, and a total of 188 awards were gazetted in 2020. Users should now find new or varied awards on the Commission's website within a month of the Commission making the relevant orders.

In 2020, the Commission endeavored to improve our services and to respond innovatively to the challenges of the pandemic. I thank the Registrar, the Registry staff and the Commission's Members who worked with dedication throughout 2020 to support the people of NSW.

We will continue to strive to innovate in 2021 to meet the ongoing needs of our users.

1. COMMISSION PROFILE

The Industrial Relations Commission is established under the *Industrial Relations Act 1996* ("the Act").

Purpose and role of the Commission

The Commission's principal role is to resolve industrial disputes and unfair dismissal claims, fix wage rates and set terms and conditions of employment by making industrial awards and approving enterprise agreements. The Commission seeks to ensure that industrial disputes arising between public sector employers, including Local Governments, and their employees in New South Wales, are resolved quickly, in a fair manner and with the minimum of legal technicality.

The Commission has conciliation and arbitral functions. Section 3 of the Act sets out the Commission's functions as follows:

- to provide a framework for the conduct of industrial relations that is fair and just;
- to promote efficiency and productivity in the economy of the State;
- to promote participation in industrial relations by employees and employers at an enterprise or workplace level;
- to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies;
- to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments;
- to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value;
- to provide for the resolution of industrial disputes by conciliation and, if necessary, by arbitration in a prompt and fair manner; and
- to encourage and facilitate cooperative workplace reform and equitable, innovative and productive workplace relations.

In particular, the Commission exercises its jurisdiction in relation to:

- establishing and maintaining a system of enforceable industrial awards which provide for fair minimum wages and conditions of employment;
- approving enterprise agreements;
- preventing and settling industrial disputes, initially by conciliation, but, if necessary, by arbitration;
- inquiring into, and reporting on, any industrial or other matter referred to it by the Minister;
- resolving unfair dismissal claims by conciliation and, if necessary, by arbitration to determine if a termination of employment is harsh, unreasonable or unjust;
- claims for reinstatement of injured workers;
- proceedings for relief from victimisation;
- dealing with matters relating to the registration, recognition and regulation of industrial organisations;
- determining the annual State Wage Case following the FWC Annual Wage Review, and dealing with other major industrial proceedings;

- various proceedings relating to removal and disciplinary actions under the *Police Act 1990* ("the Police Act");
- proceedings relating to disciplinary decisions in the public sector under the Act (Ch 2, Pt 7); and
- applications under the *Entertainment Industry Act 2013* ("the Entertainment Industry Act"); and
- various proceedings relations to contracts of carriage and bailment under the Act (Ch 6).

The Commission also has jurisdiction to hear proceedings arising under various other industrial and related statutes including the *Workers Compensation Act 1987*, the *Work Health and Safety Act 2011*, the *Essential Service Act 1988*, and the *Industrial Relations (Child Employment) Act 2006*.

A brief history of the Commission is set out in Appendix 7.

Membership of the Commission

Chief Commissioner

Chief Commissioner Nichola Constant was appointed Chief Commissioner on 2 March 2020.

Commissioners

Commissioner John David Stanton, appointed 23 May 2005
Commissioner John Vincent Murphy, appointed 4 December 2015
Commissioner Damian Sloan, appointed 30 July 2018
Commissioner Janine Webster, appointed 3 December 2018

1. COMMISSION PROFILE *CONT.*

Table 1.1 Commission Members

	2016[1]	2017[2]	2018[3]	2019[4]	2020[5]
President	1	NA	NA	NA	NA
Vice - President	NA	NA	NA	NA	NA
Deputy President	1	NA	NA	NA	NA
Presidential Members (Judges or Acting Judges)	0.5	NA	NA	NA	NA
Commissioners	4	6	8	5.4	4.4
Total Members of the Commission	**7.5**	**6**	**8**	**5.4**	**4.4**

[1] Deputy President Harrison to 3 January 2016; Acting Justice Kite to 7 December 2016.

[2] Although there were six Commissioners in 2017, there was a maximum of five Commissioners at any particular time in 2017.

[3] Although there were eight Commissioners in total in 2018, there were only five Commissioners at any point in time.

[4] Chief Commissioner Peter Kite SC retired on 20 December 2019. As at 31 December 2019 the number of members of the Commission was 4.4.

[5] Nichola Constant was appointed as Chief Commissioner on 21 February 2020 and commenced her appointment on 2 March 2020 after acting as Chief Commissioner from 22 November 2019

Table 1.1 above depicts the number of members and their respective positions. The total number of members of the Commission has decreased from 5.4 for most of 2019 to 4.4 in 2020.

Chief Commissioner Constant and Commissioners Murphy, Sloan and Webster are located at Parramatta.

Commissioner Stanton, whose appointment is on a part-time basis (two days per week), is based at the Commission's premises at 237 Wharf Road Newcastle.

The Industrial Registry

The Industrial Registrar has administrative responsibility for the operation of the Commission. The Registrar reports to the Executive Director of the Supreme Court in relation to reporting, staff and budgetary responsibilities. The Registrar works with the Chief Commissioner to manage the day-to-day operational procedures of the Commission.

The Industrial Registrar has duties under the Act and other legislation including:

- determining applications, and issuing certificates, for conscientious objection to union membership, and approving and revoking right of entry permits;
- publishing the orders, awards and other instruments made by the Commission in the Industrial Gazette so that these orders and instruments have legal effect;
- administering the registration, amalgamation and consent to alteration of the rules of industrial organisations;
- overseeing the election of officers of industrial organisations; and
- approving deferral of annual leave.

The Industrial Registry provides administrative support to the members of the Commission, supports the Industrial Registrar in carrying out her statutory functions, and provides services to its internal and external clients. The two key divisions of the Registry are the Client Services team and Commissioner Support team, described in more detail below. As essential workers, the Registry staff team continued to work at the Commission's Parramatta premises throughout the pandemic.

Client Services

The Client Services staff are usually the initial point of contact for the Commission's users.

The Client Services team assists users of the Commission who seek information about the operation of the Commission and appearing before the Commission and is responsible for receiving applications and evidence.

This team completes tasks related to the preparation of industrial awards, enterprise agreements and other orders made by members of the Commission, for publication in the New South Wales Industrial Gazette. Additionally, the team is responsible for maintaining records concerning parties to awards and Industrial Committees and their members.

Other key roles of the Client Services team include administering provisions relating to the regulation and corporate governance of industrial organisations under Ch 5 of the Act, assisting with research into historical records of the Commission, and processing applications for determination by the Industrial Registrar.

Commissioner Support

The Commissioner Support team provides administrative support to the Chief Commissioner and the Commissioners in Sydney and Newcastle. The team is responsible for listing matters to be heard by members and providing formal orders and decisions made by the Commission. Team members liaise with parties and their representatives in relation to case management.

1. COMMISSION PROFILE *CONT.*

Regional Sittings of the Commission and Remote Access to the Commission

The Newcastle premises of the Commission facilitates greater access to the services of the Commission for parties located in the Hunter region and other regional locations. During the pandemic however, Commissioner Stanton undertook hearings primarily by telephone as the Newcastle premises do not have audio-visual facilities.

Unlike in previous years, the Commission did not sit in any other regional or rural locations in 2020 due to the pandemic. The Commission plans to resume regional sittings in accordance with public health orders.

As set out in more detail in Section 4 (Other Matters), in 2020, the Commission relied on teleconference facilities and the VCR where available and appropriate. The increased use of teleconference and VCR facilities during the pandemic maintained, and potentially improved, access to justice by enabling parties to appear before the Commission with greater convenience and without incurring significant travel expenses. However, Commission members consider that there are often important and tangible benefits in requiring parties to industrial disputes and other proceedings to attend proceedings in-person. Accordingly, the Commission will require parties to attend in-person where it considers it to be appropriate and/or necessary.

Governance

The Registry of the Commission operates within the Superior Courts Division of the Courts and Tribunal Services Delivery division of the NSW Department of Communities & Justice. Commissioners are appointed by the Governor on the advice of the Minister for Industrial Relations, and, since 25 March 2021, which is outside the reporting period, the Attorney-General.

Decisions of individual Commissioners may be appealed to a Full Bench of the Commission. Decisions of a Full Bench can, in turn, be reviewed by the Supreme Court of NSW as part of its jurisdiction to undertake judicial review.

The Judicial Commission of NSW provides oversight of the Commission by reviewing complaints about the conduct or behaviour of judicial officers across the State, including Commissioners.

Corporate services, including human resources management, security, facilities and asset management, are largely managed by Courts and Tribunal Service Delivery, and financial and budget management is facilitated by the Industrial Registrar. The Industrial Registrar and Principal Registrar of the Superior Courts have financial delegations in relation to the operations of the Commission, including the delegation to enter into contracts on behalf of the Commission.

2. PERFORMANCE

Performance snapshot

Figure 2.1 Distribution of filings in 2020 by matter type

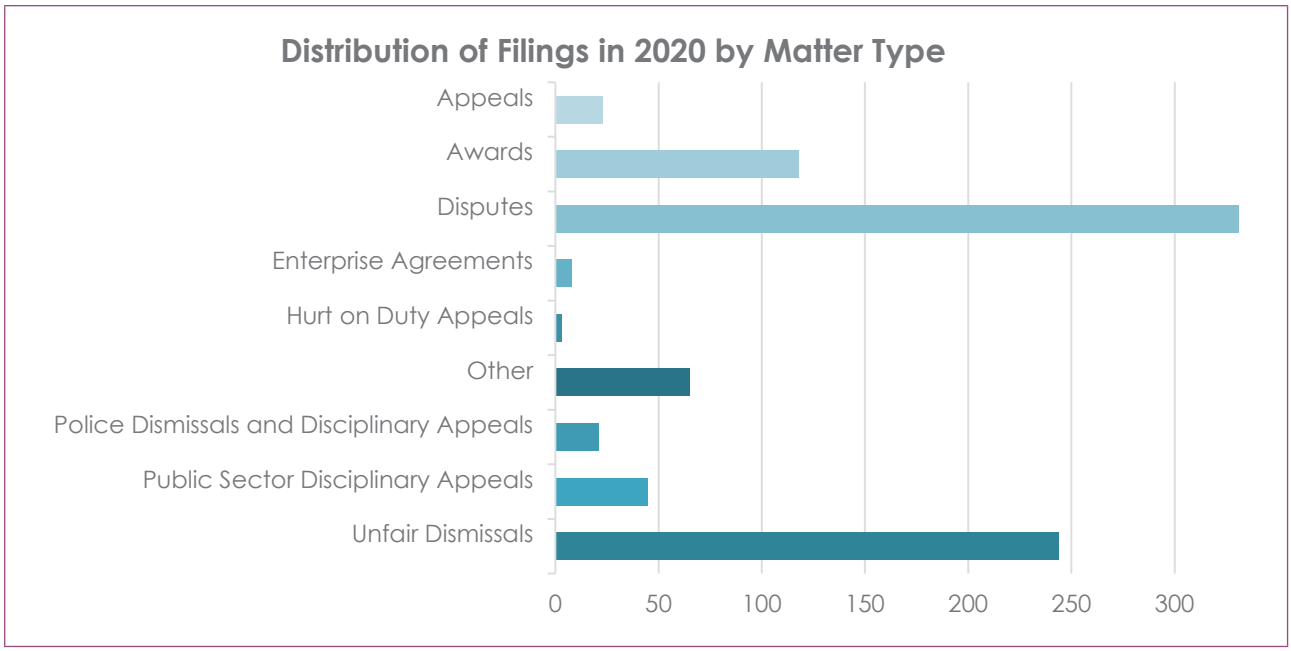
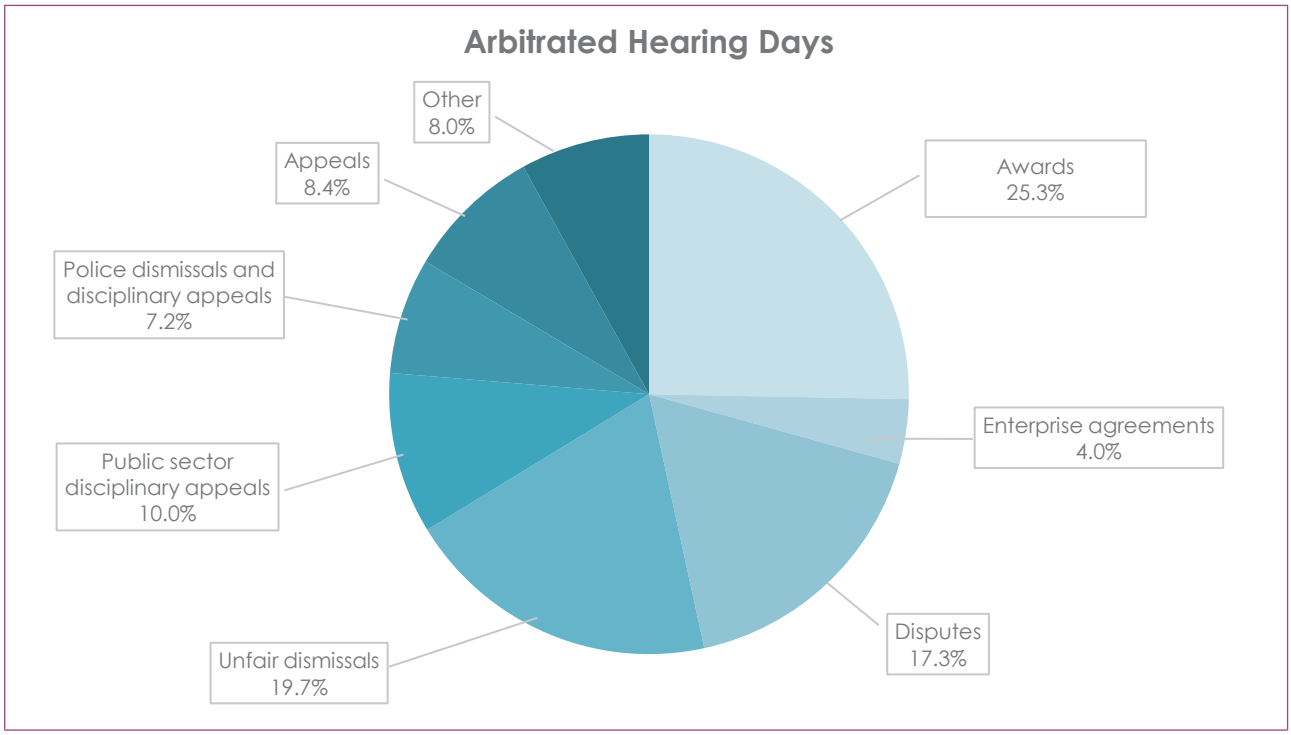


Figure 2.2 Distribution of arbitrated hearing days in 2020 by matter type



2. PERFORMANCE *CONT.*

Figure 2.3 Key statistics for the Commission

904
matters finalised by the Commission in 2020

12.1%
increase in clearance rate in 2020 from 2019

858
applications filed with the Commission in 2020

195.2
average number of matters per Commissioner

48.9%
increase in arbitrated hearing days per Commissioner from 2019 to 2020

268
days of arbitrated hearings and concilliations for unfair dismissals

2923
appearances before the Commission in 2020

Performance in Key Areas

- The clearance rate of matters filed with the Commission and finalised was 105.4% in 2020, a significant Increase from the clearance rate of 94% in 2019.
- The total number of filings decreased from 946 in 2019 to 858 in 2020, returning to the ordinary numbers of filings seen prior to 2019.
- In 2020 there was an average of 195.2 matters per Commissioner, a substantial increase from 175.2 in 2019. This is notable considering the increased clearance rate in 2020.
- The number of arbitrated hearings increased from 94 in 2019 to 104 in 2020, an 11% increase, and the number of arbitrated hearing days increased from 205 in 2019 to 249 in 2020, representing a 21.5% increase.
- In general, there were fewer matters in 2020 that met time standards set by the Commission for the time taken from commencement to finalisation.

2. PERFORMANCE *CONT.*

Overall Caseload

The comparative caseload statistics for the Industrial Relations Commission between 2016 and 2020 are summarised below in Table 2.4.

Table 2.4 Caseload Statistics

	2016	2017	2018	2019	2020
Appeals					
Filed	21	18	12	16	23
Finalised	23	11	15	12	16
Pending	2	9	6	8	15
Awards					
Filed	109	122	173	162	118
Finalised	160	112	147	181	86
Pending	32	42	67	16	48
Collaborative Employment Relations					
Filed	4	1	4	1	0
Finalised	4	4	5	1	0
Pending	5	2	1	0	0
Disputes					
Filed	343	354	300	372	331
Finalised	269	361	373	340	356
Pending	161	152	80	108	83
Enterprise Agreements					
Filed	11	6	7	6	8
Finalised	4	12	7	8	8
Pending	8	2	2	0	0
Unfair Dismissals					
Filed	202	241	218	248	244
Finalised	154	277	250	205	257
Pending	118	81	49	91	78
Public Sector Disciplinary Appeals					
Filed	24	29	47	55	46
Finalised	22	29	41	50	52
Pending	8	8	14	18	14

Table 2.4 Caseload Statistics (continued)

	2016	2017	2018	2019	2020
Police Dismissals and Disciplinary Appeals					
Filed	40	37	43	38	20
Finalised	26	54	38	40	27
Pending	35	18	23	21	14
Hurt on Duty Appeals					
Filed	18	3	1	2	3
Finalised	2	17	8	7	5
Pending	31	17	10	5	3
Other[1]					
Filed	115	72	70	53	65
Finalised	103	60	109	45	68
Pending	50	53	20	26	23
TOTALS					
Total filed for the year	**887**	**883**	**875**	**946**	**858**
Total finalised for the year	**789**	**937**	**993**	**889**	**904**
Total pending for the year	**415**	**366**	**267**	**324**	**278**

[1] 'Other' category includes reinstatements of contracts; orders to vary or void a contract; agreements on contract conditions; making of contract determinations; applications for relief from victimisation; applications to extend the duration of an Industrial Committee; registration pursuant to the Clothing Trades Awards; stand down orders; right of entry disputes and external reviews under the *Work Health and Safety Act 2011*; and reinstatement orders under the *Workers Compensation Act 1987*.

Table 2.4 above shows the following trends:

- Total filings (858) have decreased by 9.2% from 2019, largely because there were no award reviews under s 19 of the Act in 2020.
- The number of disputes in 2020 amounted to 38.5% of total filings, a minor decrease compared with 39.3% of total filings in 2019.
- Unfair dismissals constituted a higher proportion of the Commission's total caseload in 2020 compared with previous years, amounting to 28.4% of total filings.
- There has been a gradual decrease in the overall numbers of 'pending' matters between 2016 and 2020.

These filings do not include applications relating to industrial organisations (described In Table 2.34). Applications relating to industrial organisations are not in the ordinary course dealt with by a Commissioner (with certain exceptions, such as an inquiry into an alleged irregularity in an election following an application to the Industrial Registrar), and constitute a substantial proportion of the Commission's total filings. In 2020 there were 289 applications concerning industrial organisations, which include rule changes, right of entry permits, WHS permits and special wage permits.

2. PERFORMANCE *CONT.*

In 2020 the number of filings returned to the levels observed between 2016 – 2018. However, the Commission undertakes award reviews over a two year-period in each three-year cycle pursuant to s 19 of the Act. When the total number of filings in 2020, 2019 and 2018 are adjusted to remove s 19 award reviews, the total number of filings in 2020 is consistent with the levels observed in 2019.

The Commission initially expected an increase in dispute notifications and possibly unfair dismissal claims in 2020 due to the COVID-19 pandemic and associated disruption to workplaces across NSW. However, this was largely mitigated by the rapid response by the NSW Government, Local Government and industrial organisations to the pandemic.

Clearance Rates

The comparative clearance rate statistics for the Commission between 2016 and 2020 are summarised in Table 2.5.

Table 2.5 Clearance Rates: Finalised / Filed Matters

	2016	2017	2018	2019	2020
Commission Clearance Rate	**89.0%**	**106.1%**	**113.4%**	**94.0%**	**105.4%**

The clearance rate, representing the number of matters finalised in the year divided by the number of matters filed in that same year, showed a significant increase from 94.0% in 2019 to 105.4% in 2020. This result was achieved despite the challenges posed by the pandemic and there being only four full-time Commissioners available to conciliate and arbitrate matters in Sydney (whereas for the most part of 2019 there were five full-time Commissioners) and one part-time Commissioner in Newcastle who was largely restricted to telephone conciliations. Consequently, each member of the Commission took responsibility for more matters (as depicted below in Figure 2.8)

This high level of productivity is due to a number of factors including: Commissioners chose to take less annual leave in part because of the circumstances of the pandemic and in part in response to the increased workloads; and Commissioners listed matters outside usual Commission hours, which was facilitated by the VCR.

Appearances before the Commission

In general, matters filed with the Commission are initially listed for directions, conciliation or a compulsory conference, and often one or more reports back or further conferences. Although most matters before the Commission are resolved before arbitration, the number of matters proceeding to arbitration and the number of hearing days for each arbitration increased in 2020 from 2019.

Table 2.6 Distribution of Appearances before the Commission

Type of appearance	2019	2020
Arbitrated hearing	235	712
Conciliation	453	507
Conference	529	493
Directions	268	504
Mention	23	97
Motion	32	60
Report back	421	415
Other[1]	71	135
TOTAL	**2032**	**2923**

[1] Includes handing down decisions of the Commission; consent hearings; and interlocutory hearings

There was a 43.8% increase in the total number of appearances before the Commission in 2020 compared with 2019.

The primary cause of the significant increase in arbitrated hearings in 2020, while the number of arbitrated hearing days (below) increased only slightly, is that the arbitrations of the Crown Salaries Awards and the State Wage Case (see Section 4: Other Matters) each involved multiple matters that were heard simultaneously. Consequently, the data includes attendances at the hearing for each of these individual matters when calculating the number of arbitrations. Excluding the Crown Salaries Awards and State Wage Case arbitrations, there were 2523 appearances before the Commission in 2020, amounting to a 24.2% increase from 2019. This increase in appearances is notable given the reduced number of Commissioners.

When the Crown Salaries Awards and the State Wage Case matters are excluded, arbitrated hearings made up 10.7% of all appearances before the Commission in 2020.

2. PERFORMANCE *CONT.*

Arbitrated Hearing

In general, a matter will be listed for arbitrated hearing when parties have not achieved settlement following conciliation or compulsory conferences by the Commission. Ideally, by the time that a matter reaches arbitration, the issues will have been narrowed during conciliation to the key issues in dispute. When a matter is set down for arbitration, parties will gather evidence and prepare arguments in preparation for the arbitrated hearing, at which their evidence will be examined and cross-examined. Parties are encouraged to narrow the issues in dispute where possible and are given opportunities to reach settlement prior to and during arbitrated hearing. Consequently, arbitrated hearings (and the resulting published decisions) represent only a small proportion of all appearances before the Commission.

Table 2.7 Arbitrated Hearings

	2016	2017	2018	2019	2020
Total number of arbitrated hearings	110	104	103	94	104
Total number of hearing days	257	237	218	205	249
Average length of arbitrated hearing	2.34	2.28	2.12	2.18	2.39

The above table contains data for arbitrated hearings taking place in a particular year. The calculation of the total number of hearing days counts each hearing day before the Full Bench as three hearing days (as three members of the Commission are required for each Full Bench hearing).

The calculations of the total number of arbitrated hearings and the total number of hearing days exclude hearings of motions and other interlocutory hearings, consent hearings, appearances to hand down decisions and hearings of award matters before a single Commissioner which did not involve examination or cross-examination. In 2020, there were 49 notices of motion before the Commission and 29 short award applications before a single Commissioner which are not included in the above table.

There was an increase in the number of matters proceeding to arbitrated hearing, with 104 hearings in 2020, a return to the numbers observed in previous years.

The data indicates a significant increase in the number of hearing days and length of hearings from 2019 to 2020, with the number of hearing days increasing by 21.5%. This is in small part due to the challenges associated with adapting to technology such as the VCR, particularly at the beginning of the pandemic when parties and the system experienced regular dropouts caused by bandwidth limitations and user error. The more significant cause of the longer hearings is the amount of written evidence filed by parties and the length of cross-examination.

During the early days of the pandemic many parties initially chose to postpone their appearances, particularly arbitrated hearings, until they could be conducted in-person. This resulted in few hearings taking place during March and April 2020 compared with the remainder of 2020, which in turn contributed to reduced compliance with the Commission's time standards for the finalisation of matters.

The applications for the Crown Salaries Awards (which involved applications in respect of 41 awards, including the Crown Employees (Public Sector – Salaries 2019) Award, the Staff Specialists (State) Award 2019, the Health Employees' (State) Award 2019 and the Crown Employees Nurses' (State) Award 2019), and the variation of the Police and Paramedics Awards, were heard by a Full Bench of the Commission over a total of 19 days, with 3 Commissioners sitting each day (57 collective hearing days). The hearings therefore comprised a large proportion of the Commission's total hearing days for 2020, and the award applications involved large volumes of evidence, including expert evidence. The Crown Salaries Awards were the subject of three separate decisions by a Full Bench of the Commission in 2020. The Full Bench decision for the Police and Paramedics Awards remained as a reserve decision at the conclusion of 2020 but was handed down on 3 May 2021.

Time Standards

In 2004, the Commission established time standards for the time between lodgment (filing) and the first listing of a matter, and the time taken to finalise a matter after its commencement. These standards differ depending on the type of matter. Since the introduction of the time standards, the size of the Commission has been progressively reduced and the volume of evidence submitted by parties in arbitrations has increased significantly.

Commissioners are very aware of the need to list matters involving industrial action on an urgent basis, outside court hours and on weekends, regardless of workload. 2.7% of disputes (9) were listed in less than two hours from when the application was made; 15.7% of industrial disputes (52) were listed within one day of filing; 23.6% of disputes (78) were listed within two days; and 32.1% of disputes (106) were listed within three days. Many of these disputes were notified after court hours and after closure of the Registry, including after close of business on Fridays. Accordingly, these figures do not fully reflect the extent to which the Commission accommodates urgent disputes to reduce or prevent disruption to workplaces across NSW.

The Commission's delivery against the time standards for the time to first listing are not adjusted for circumstances when parties request that their first listing be delayed. Parties also often request that arbitration listings are vacated and relisted, which impacts the ability of the Commission to meet time standards for the finalisation of matters.

It should also be noted that the time standards include weekends and public holidays, meaning that it is not always practicable to list or finalise matters in accordance with the time standards; for example, where the time standard requires a matter to be listed within 72 hours of filing and the notification is made on a Friday and all Commissioners have matters listed on the Monday.

As noted above, there was a substantial increase in the number of appearances before the Commission in 2020. Parties regularly sought multiple compulsory conferences or conciliations for the one matter. This may have been a consequence of the increase in remote hearings held via teleconference and VCR facilities impacting on the ability of the Commission to resolve the matter in the first conciliation or conference. In any event, the increased number of appearances prolonged the time taken to resolve matters, thereby contributing to the Commission's reduced compliance with time standards for the time taken between commencement and finalisation of a matter.

The Commission plans to re-evaluate the appropriateness of these time standards before the end of 2021.

2. PERFORMANCE *CONT.*

Workload of Commissioners

Figure 2.8 Number of matters filed compared with number of Commissioners

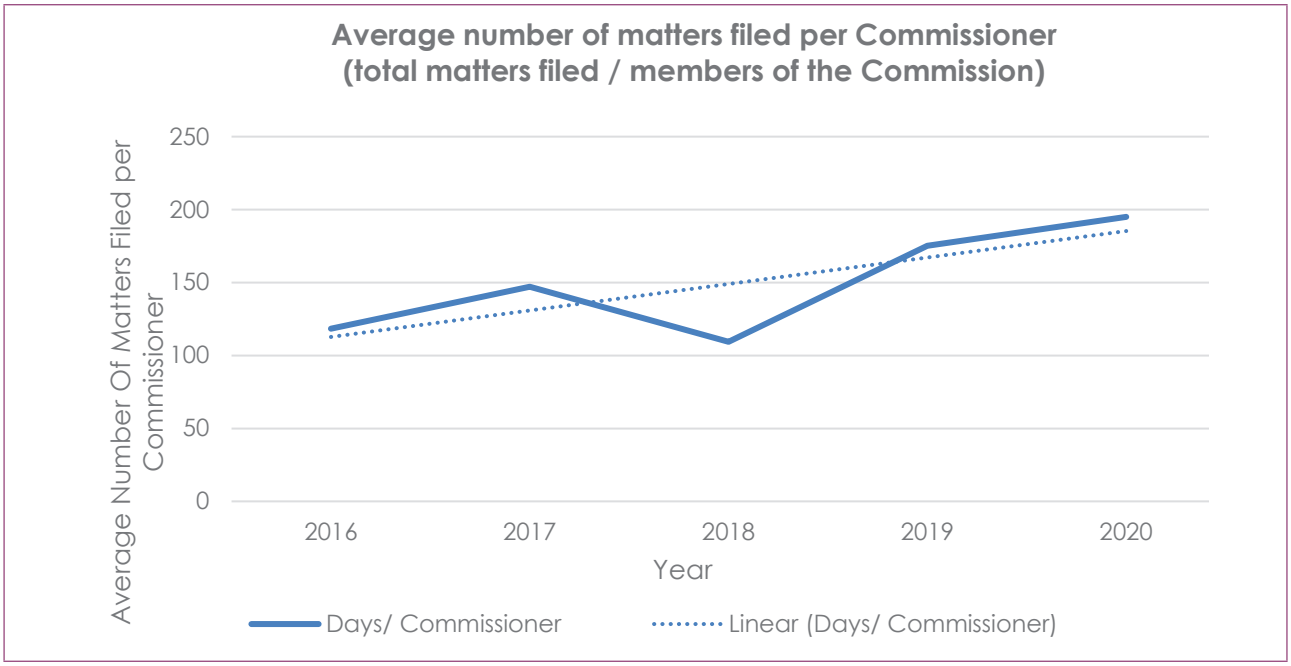


Figure 2.9 Number of arbitrated hearing days compared with number of Commissioners

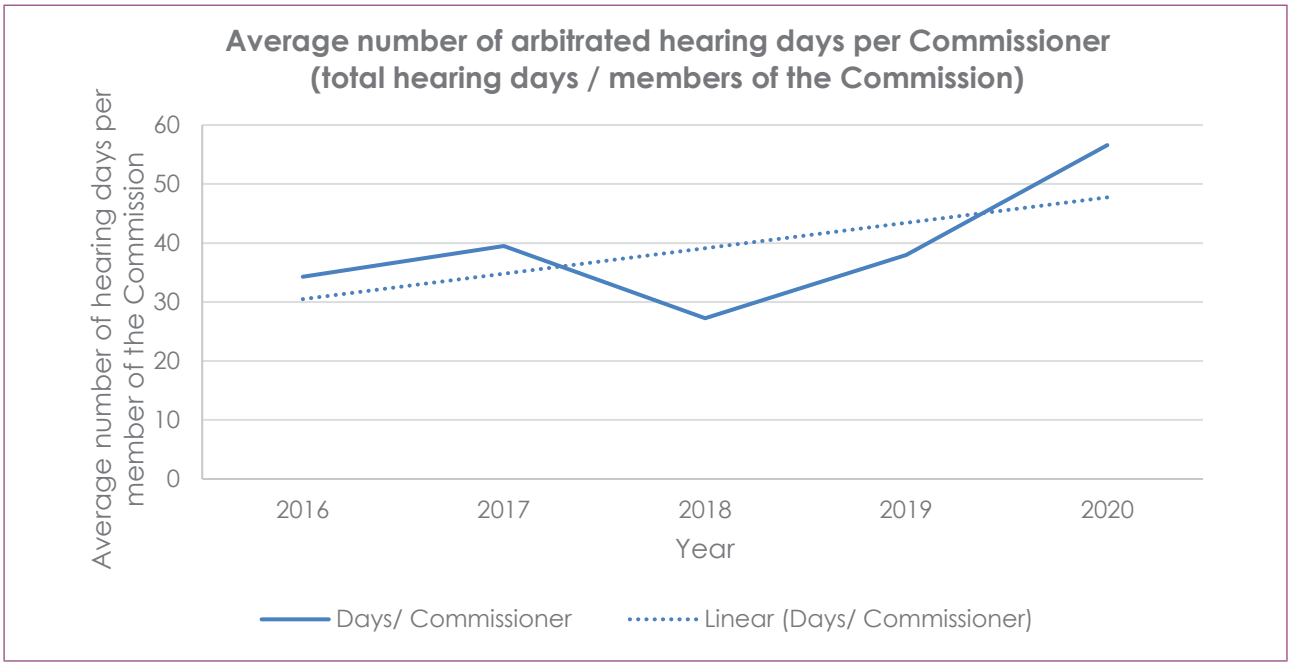


Table 2.10 Number of Cases per Commissioner

Year	Total matters filed	Total members of the Commission	Average number of cases per Commissioner	Average number of hearing days per Commissioner
2016	887	7.5	118.3	41.2
2017	883	6	147.2	39.5
2018	875	8[1]	109.4	27.3
2019	946	5.4	175.2	38.0
2020	859	4.4	195.2	56.6

Figure 2.8, Figure 2.9 and Table 2.10 indicate that the average number of cases per Commissioner has been increasing over the past five years, in part due to the reduction in the total number of members of the Commission, while the average number of hearing days per Commissioner is substantially higher. This has resulted in a significantly higher workload for each Commissioner in 2020, as discussed above.

In 2020 there were four full-time Commissioners located in Parramatta, and one part-time Commissioner located in Newcastle (0.4 FTE). Commissioner Murphy's appointment has been extended by a further period of one year and his appointment will end in July 2022, and Commissioner Stanton will reach the end of his extended appointment in October 2021.

The reduced number of Commissioners limits the ability to convene a Full Bench of the Commission to hear appeals and significant matters such as the Crown Salaries Awards and State Wage Case. An appeal to the Full Bench from the decision of a single Commissioner must be heard by three Commissioners (excluding the Commissioner who heard the matter the subject of the appeal and, where relevant, the Commissioner who initially conciliated the matter) requiring a minimum total of five Commissioners.

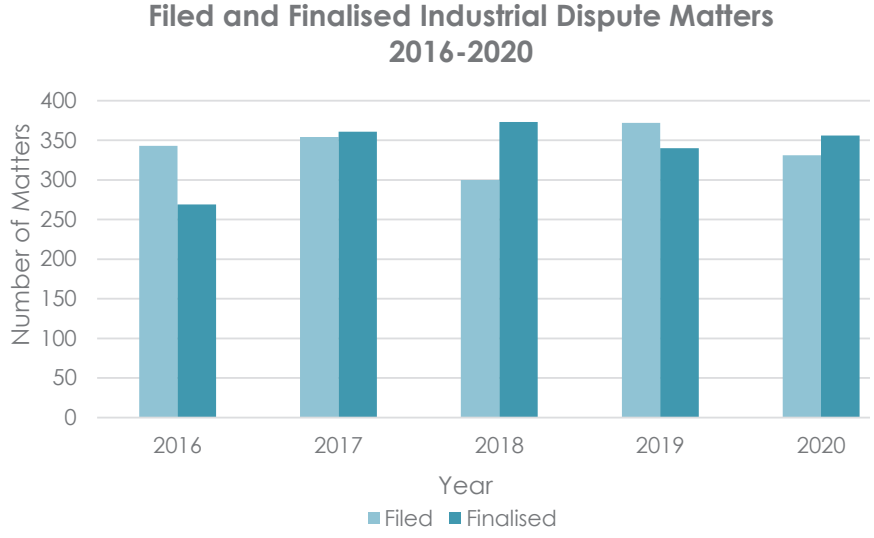
2. PERFORMANCE *CONT.*

Industrial Disputes

The Commission is responsible for the timely and efficient resolution of industrial disputes in NSW pursuant to Ch 3 of the Act. These include disputes filed under s 130 of the Act; disputes relating to contract determinations under s 332 of the Act; disputes under s 20 of the Entertainment Industry Act; and disputes over federal enterprise agreements under s 146B of the Act.

The Commission must first attempt to conciliate the dispute between the parties pursuant to ss 133 and 134 of the Act prior to any arbitrated hearing. This form of robust alternative dispute resolution usually involves a Commissioner meeting with the parties both separately and together to attempt to resolve the parties' differences and achieve agreement on key issues. If a dispute cannot be resolved by way of conciliation, the Commission will then arbitrate the dispute under ss 135 and 136 and is empowered to make a range of orders that are binding on all parties.

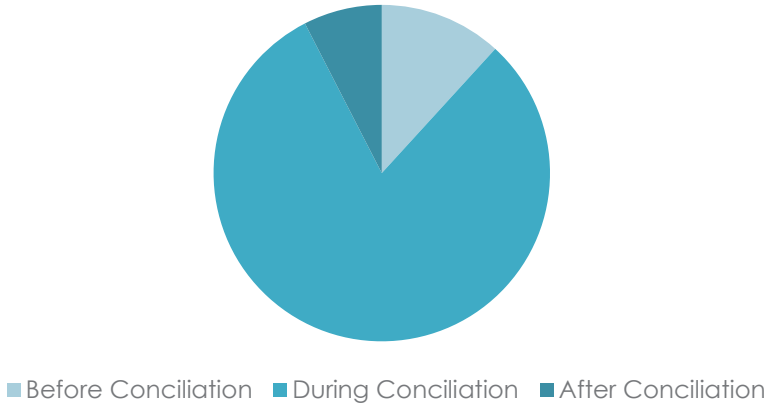
Figure 2.11 Filed and finalised dispute matters



The number of industrial dispute applications filed in 2020 decreased from 372 in 2019 to 331, while the number of finalised matters showed a slight increase.

Industrial dispute matters represented 38.5% of the total filings for the Commission during 2020, slightly down from 39.2% in 2019, and are the most common type of matter filed with the Commission. The rate of filing of industrial disputes has remained relatively steady over the past five years. It was initially expected that the pandemic would cause an increase in industrial dispute matters in 2020, given the disruption that the pandemic caused to workplaces across NSW and the potential to use industrial disputes as a vehicle to bring about improved working conditions and work health and safety measures. This expected increase did not occur, partially due to the rapid response by the government, employer groups and industrial organisations to the pandemic.

Figure 2.12 Method of disposal of industrial disputes



80.7% of industrial dispute matters were resolved during conciliation and 11.8% were resolved before conciliation.

11.8% of industrial dispute matters were resolved before conciliation in 2020, nearly ten times the amount observed in 2019 (1.3%). This indicates a greater willingness of parties, even after notification of an industrial dispute, to consider resolution without the formal assistance of the Commission. This may be as a consequence of the lack of in-person conciliations in that parties did not wait to meet face-to-face at the Commission to explore options for settlement.

Time Standards

The successful discharge of the Commission's statutory functions requires the Commission to attend to industrial disputes in a timely manner. The Commission endeavours to have all dispute matters listed within 72 hours of a notification being filed.

Table 2.13 Time taken for first listing of industrial dispute matter after filing

Finalised within	72 Hours (50% Target)	5 Days (70% Target)	10 Days (100% Target)	Median Time to First Listing
2016	26.4%	41.7%	70.3%	7 Days
2017	24.8%	36.7%	63.9%	8 Days
2018	24.6%	38.5%	84.5%	8 Days
2019	25.0%	37.0%	65.2%	8 Days
2020	31.2%	44.6%	67.5%	8 Days

The median time to first listing has remained steady, although in 2020 there were more matters being listed within 72 hours of the matter being filed compared with previous years. The use of teleconference and VCR facilities has reduced the delay caused by parties seeking a postponed listing of their matter due to their availability.

2. PERFORMANCE *CONT.*

Industrial disputes are filed with the Commission for a broad range of reasons. Examples include disputes over: a decision to terminate or an alleged failure to comply with a contract of bailment or contract of carriage; working conditions (including hours, allowances and travel) and salaries under awards and enterprise agreements; and issues arising under the Entertainment Industry Act. Dispute notifiers include industrial organisations, employer groups and peak council bodies. Individual employees cannot notify the Commission of a dispute under s 130 of the Act.

As discussed under "Time Standards" above, industrial disputes may be listed before the Commission on an extremely urgent basis. This generally occurs: where employees may be engaging in, or threatening, industrial action; where an employer is making, or intends to make, changes to employees' working conditions and the employees' industrial organisation is seeking to maintain the status quo; or where employees refuse to undertake certain duties that they consider to be inappropriate. The Commission endeavours to hear these matters as early as practicable and often outside usual Commission sitting hours.

Table 2.14 Time taken to finalise industrial dispute matters

Finalised within	2 months (50% Target)	3 months (70% Target)	6 months (90% Target)	9 months (100% Target)
2016	45.8%	60.9%	84.4%	99%
2017	45.7%	59.9%	86.8%	99%
2018	25.4%	36.2%	76.9%	99%
2019	44.2%	60.3%	88.5%	99%
2020	44.3%	60.4%	80.8%	90.1%

The percentages of matters finalised within two and three months of filing remained steady from 2019 to 2020. However, fewer matters were finalised within the six and nine month targets in 2020. As in-person appearances were suspended during the height of the pandemic in NSW (except for exceptional circumstances), many parties sought to delay arbitrations until they could be heard in-person. This prolonged the resolution of industrial disputes, contributing to the lack of compliance with time standards.

The resolution of many industrial disputes requires extended periods of progressive adjustment of entrenched attitudes and positions which can often only be achieved through multiple listings before the Commission. For that reason, there will always be disputes which do not lend themselves to resolution within the prescribed time standards, particularly as disputes are often over complex subject matter involving conflicting perspectives between parties. This was particularly the case throughout the pandemic due to the difficulty of parties appearing in-person before the Commission.

Although many industrial dispute matters are resolved through compulsory conferences and do not result in a formal arbitrated hearing, there were 29 industrial disputes that went to arbitrated hearing in 2020, taking up 43 of the Commission's 249 arbitrated hearing days in 2020.

The dispute which was the subject of the decision of the Commission in Secretary, *Ministry of Health in respect of NSW Health Service*, *NSW Health Pathology Division v Health Services Union NSW* [2020] NSWIRComm 1047 is an example of a complex industrial dispute which required significant time and resources to resolve. This matter, which concerned an application to vary the award covering forensic mortuary technicians, was conciliated across 11 days of compulsory conference. Following extensive discussions and the filing of large volumes of evidence, the parties agreed to consent variations which the Commission determined were appropriate.

Australian Paramedics Association (NSW) v Health Secretary in respect of NSW Ambulance (On Call Allowance for Aeromedical Control Centre Officers) (No 2) [2020] NSWIRComm 1028 is an example of a dispute which required substantial investment of time in compulsory conferences but which ultimately required arbitration. In this matter, the APA notified the Industrial Registrar of a dispute concerning the classification of Aeromedical Control Centre Officers and their entitlement to be paid an on-call allowance. The HSU intervened in this dispute. Following compulsory conferences and two days of arbitration, the Commission issued a decision recommending that the Officers should continue to receive the allowance. As at the publication date of this Report, this matter is the subject of an appeal to the Full Bench.

2. PERFORMANCE *CONT.*

Unfair Dismissals

Under Pt 6 of Ch 2 of the Act, the Commission is responsible for determining applications by Public Sector and Local Government employees who claim to have been unfairly dismissed from their employment.

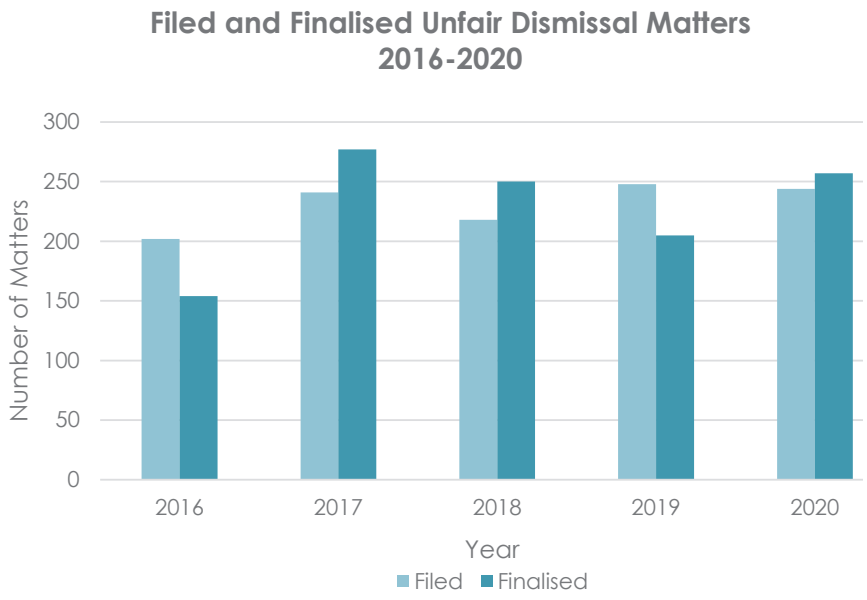
The Act provides that each unfair dismissal matter is to be initially listed for conciliation conference (per s 86) to assist the parties in reaching an early settlement. Where the conciliation is unsuccessful, the matter proceeds to an arbitrated hearing (often after multiple conciliations and reports back). The threshold for succeeding in an application for unfair dismissal is relatively high, as the applicant must persuade the Commission that the dismissal was "harsh, unjust or unreasonable", per 84 of the Act. In making this determination, the Commission may take into account a broad range of factors described in s 88, such as whether the employee was given an opportunity to defend their conduct, whether they were warned of their unsatisfactory performance prior to dismissal, and whether the applicant requested reinstatement or re-employment. The Commission then has power under s 89 of the Act to make orders either confirming the dismissal or ordering that the employee be reinstated, re-employed or paid compensation.

Availability of claims for unfair dismissal

Certain employees are exempted from the unfair dismissal provisions in Pt 6, Ch 2 of the Act. These exemptions include employees serving a probation period; casual employees engaged for a short period of time; employees contracted for a specified task or period of time; and employees whose employment is governed by special arrangements that cover termination of their employment. The Act requires that an application for unfair dismissal must be made within 21 days of the employee's dismissal, unless the Commission determines otherwise (s 85).

Until very recently, the generally accepted view was that police officers who are dismissed must seek recourse under s 181D of the *Police Act* rather than the unfair dismissal provisions of the Act. Consistent with this view, Commissioner Murphy in *Cottle v Commissioner of Police* [2017] NSWIRComm 1055 accepted that a police officer retired on medical grounds could not make an unfair dismissal claim. On appeal from Commissioner Murphy, a Full Bench of the Commission found that the unfair dismissal provisions of the Act were available to the medically retired officer: *Cottle v Commissioner of Police* [2018] NSWIRComm 1080. The Supreme Court in *NSW Commissioner of Police v Cottle* [2019] NSWSC 1588 determined that the Full Bench's decision was infected with jurisdictional error; however, in 2020 the Court of Appeal decided that the Full Bench did not err and that the Commission has jurisdiction to hear an application for unfair dismissal by a police officer: *Cottle v NSW Commissioner of Police; Police Association of New South Wales v Commissioner of Police (NSW Police Force)* ([2020] NSWCA 159). The question is now to be resolved by the High Court, which granted special leave to appeal to the Commissioner of Police on 12 April 2021.

Figure 2.15 Filed and finalised unfair dismissal matters



The number of unfair dismissal filings has increased by over 20% since 2016.

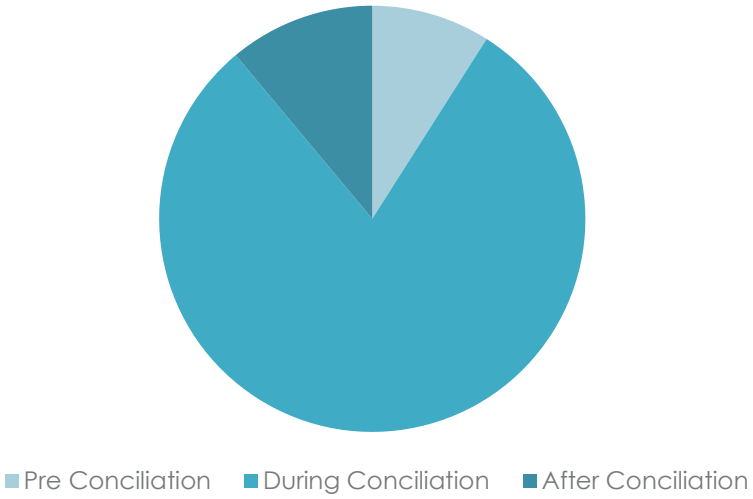
Unfair dismissals are the second most frequently filed type of matter before the Commission, after industrial disputes. The number of unfair dismissal matters filed in 2020 was 244, representing 28.4% of the Commission's total filings, a small decrease from the 248 matters filed in 2019. This result is unsurprising considering the commitments made by public sector employers during the pandemic to preserve employment and support employees. In 2020 unfair dismissal matters represented 28.4% of the Commission's finalised matters, compared with 23.1% of finalised matters in 2019, an increase of 23.3%.

Examples of dismissals that were the subject of applications for unfair dismissal in 2020 include dismissals: for criminal conduct constituting misconduct; for bullying and harassment amounting to misconduct; on the basis of redundancy that was alleged to constitute age discrimination; for accessing and altering files without justification; of casual and temporary employees; and of employees asserted to be within their probationary periods.

If an unfair dismissal matter proceeds to an arbitrated hearing, the Commission has jurisdiction to reinstate or re-employ the employee or to award compensation equivalent to up to six months of pay. The Commission therefore encourages parties to consider the utility of proceeding to hearing, particularly where they may reach a more favourable settlement, and avoid the making of any adverse findings in a formal written decision. In 2020 the Commission made orders ranging from dismissal of the application to reinstatement of employment, and payment equivalent to lost wages over a period of time.

2. PERFORMANCE *CONT.*

Figure 2.16 Disposal of Unfair Dismissal Matters in 2020



91% of unfair dismissal applications were resolved before and during conciliation in 2020.

Over twice as many unfair dismissal matters were resolved before conciliation in 2020 (9.0%) than in 2019 (4.0%), indicating a greater willingness of parties, even after filing an unfair dismissal application, to consider resolution without the formal assistance of the Commission. As hypothesised in respect of a similar increase in industrial dispute matters resolving before compulsory conference, this may be due to varied listing arrangements during the pandemic. Only 11.1% of unfair dismissal matters were finalised after conciliation in 2020 (including by way of arbitration) compared with 13.0% in 2019, while 79.9% of matters in 2020 and 83.0% of matters in 2019 were resolved during conciliation. The increase in matters resolving at or before conciliation in 2020 means that more parties were able to avoid the time, expense and emotional burden associated with proceeding to an arbitrated hearing.

Table 2.17 Filing of unfair dismissal actions

	2016	2017	2018	2019	2020
Application filed by:					
Individual (Unrepresented)	65	63	61	46	37
Legal Representative	47	56	53	32	22
Organisation Representative	90	121	104	169	185
TOTAL	**202**	**240**	**218**	**247**	**244**

In 2020 there was an increase in unfair dismissal actions initiated by industrial organisations compared with actions initiated by individuals or legal representatives, a trend which has been reflected over the past 5 years. In contrast, far fewer applications were commenced by legal representatives in 2020 compared with previous years.

Time Standards

There are two time standards relating to unfair dismissals:

1. an application for unfair dismissal should be listed for its first conciliation hearing within 21 days from filing; and
2. 50% of unfair dismissal applications should be finalised within 2 months; 70% within 3 months; 90% within 6 months and 100% within 9 months

Table 2.18 Time taken to first listing of unfair dismissal matters after filing

Listed within	7 Days	14 Days	21 Days	28 Days
2019	6.4%	19.7%	45.4%	72.9%
2020	9.4%	26.9%	51.4%	70.3%

The number of applications for unfair dismissal listed within 21 days of filing has improved in 2020, a 13% increase compared with 2019. However, 29.7% of applications were not listed within 28 days of filing in 2020. The primary reason for the failure to meet listing benchmarks is that parties frequently request that their matters be listed or relisted beyond 21 days after filing. It should also be noted that after an application for unfair dismissal is filed with the Commission, the employer is given 7 days to provide a response to the application before the matter can be listed. This makes it highly unlikely that a matter will be listed within 7 days of being filed, particularly as parties frequently seek to have their matters vacated to allow themselves further time to prepare and confer with the other party.

Table 2.19 Time taken to finalise unfair dismissal matters after filing

Finalised within	2 months (50% Target)	3 months (70% Target)	6 months (90% Target)	9 months (100% Target)
2016	57.2%	69.0%	88.2%	98.6%
2017	56%	68.9%	88.9%	98.2%
2018	25.4%	36.6%	76.3%	99.2%
2019	43.0%	64.7%	90.7%	98.6%
2020	27.4%	50.2%	78.5%	91.3%

Fewer matters satisfied the finalisation benchmarks in 2020 compared with previous years. This occurred due to a variety of factors, particularly the decreased number of Commissioners in 2020.

In 2020 the Commission spent 219 days in conciliation (60.9 days per Commissioner on average) and 49 days in a total of 29 arbitrated hearings of unfair dismissal matters (not including Full Bench appeals). In addition, several matters that required a formal determination were determined on the papers without a hearing.

2. PERFORMANCE *CONT.*

Awards and Enterprise Agreements

Award and Enterprise Agreement Jurisdiction

One of the key objects of the Act is to facilitate the appropriate regulation of employment through industrial instruments which include awards, enterprise agreements, public sector industrial agreements, former industrial agreements, contract determinations and contract agreements.

The Commission is given power to:

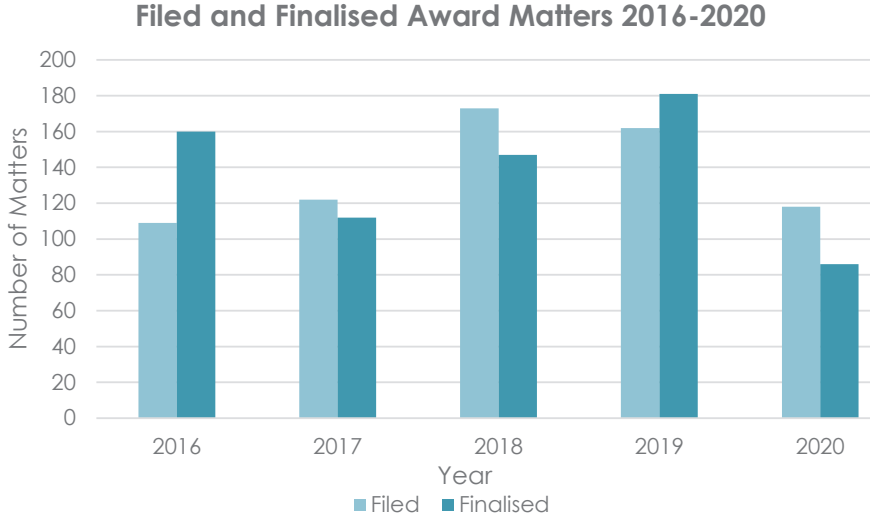
- make or vary awards (s 10 and s 17 respectively);
- approve enterprise agreements and variations of enterprise agreements (s 35 and s 43);
- review awards triennially (s 19); and
- consider the adoption of National decisions for the purpose of awards and other matters under the Act (s 50) (for example, the adoption of the Annual Wage Review decisions of the Fair Work Commission by the State Wage Cases).

Awards

An award may be made on the Commission's initiative; on application to the Commission by an employer, industrial organisation or State peak council; or during arbitration conducted by the Commission to resolve an industrial dispute (s 11 of the Act).

Once made, an award will be binding on all relevant employees and employers; any industrial organisations that were party to the making of the award; and, if the award applies to a particular industry, all employees and employers in that industry. It will then apply for a specified nominal term which must be between 12 months and 3 years, and after the expiry of the nominal term, applies until the Commission rescinds the award.

Figure 2.20 Filed and finalised award matters



The numbers of filed and finalised award matters were lower in 2020 due to the triennial award reviews undertaken in 2018 and 2019.

Filings of award matters decreased from being 17.1% of total filings for the Commission in 2019 to 13.7% in 2020, returning to levels in 2020.

While the Commission initially expected an increase in filings of award matters in 2020, the reduced volume of applications is in part due to the introduction of a suite of legislative amendments in response to the COVID-19 pandemic. These amendments allowed workers greater flexibility and support to remain in employment, such as by providing that annual and long service leave continue to accrue while a worker is stood down due to COVID-19 and by allowing workers to take long service leave in multiple periods, thereby reducing the need for award variations and new awards.

Finalisations of award matters decreased from 20.4% of all finalised matters before the Commission in 2019 to 9.5% in 2020, also due to the significantly higher numbers of filings and finalisations during the triennial award review.

Table 2.21 Award applications and award reviews between 2016-2020

	2016	2017	2018	2019	2020
Filing of Awards					
Application to make Award	59	82	78	82	41
Application to vary Award	41	37	12	26	72
Review of Awards pursuant to s 19					
Notice of Review issued	0	0	62	50	0
Awards reviewed	3	0	28	58	2
Awards rescinded	1	3	5	0	0
Awards determined to have effect as enterprise agreements	0	0	0	0	0
Declaration of Non-Operative Awards	0	0	0	0	0

The significantly higher numbers of filings of award matters in 2018 and 2019 were due to the triennial award review. In accordance with s 19(1) of the Act, the Commission undertook the triennial award review process in two tranches in 2018 and 2019. No award reviews under s 19 were commenced in 2020. As at 31 December 2020 there were two award reviews awaiting completion.

Award reviews accounted for 62 of the total 173 award filings in 2018 and 50 of the total 162 award filings in 2019. Taking into account only applications to make and vary awards under sections 10 and 17 of the Act, there was an increase in the number of filings in 2020, with 113 applications filed in 2020 and 108 applications in 2019.

The number of applications to vary awards increased from 26 to 72 in 2019 and 2020, respectively, nearly tripling. Applications to vary awards amounted to 8.4% of all filings with the Commission in 2020, up from 2.7% in 2019. The increased volume of variation applications is largely set off by the reduction of new award applications reflecting consent award variation applications made following the Crown Salaries Awards decision.

2. PERFORMANCE *CONT.*

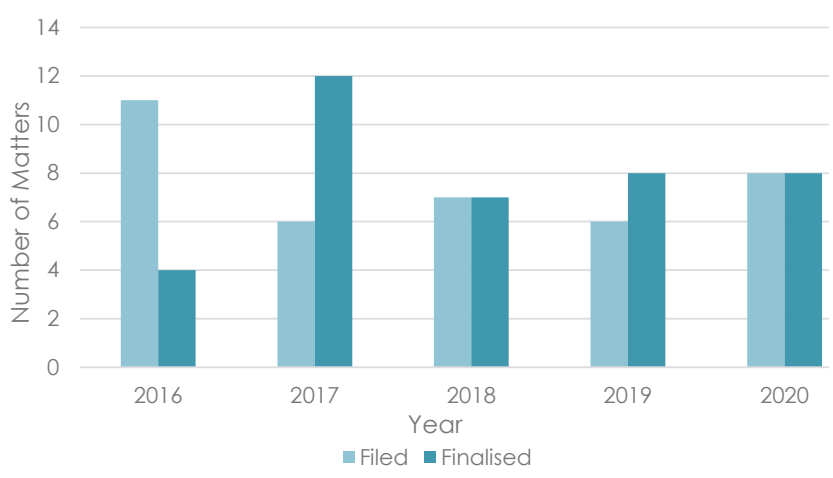
In 2020 award matters took up a significant portion of the Commission's hearing days, with hearings of award matters before the Full Bench taking up 63 Commissioner hearing days (where each calendar day before a Full Bench represents three hearing days due to the three Commissioners involved in the hearing). This is largely due to the hearing of the applications in respect of the 41 awards known as the Crown Salaries Awards, which required 39 collective hearing days before the Full Bench, and the hearing of the Police Award and Paramedics Awards, which required 18 collective hearing days before the Full Bench.

Once an award is made by the Commission (either by consent or following arbitrated hearing), it must be published in the Industrial Gazette by the Client Services Team as required by s 15 of the Act. This involves receiving an electronic copy award from the parties and manually formatting it to ensure consistency with other awards in the Gazette. The award must then be signed off by the Registrar and the Commissioner who made the award before it can be uploaded online and made publicly available.

Enterprise Agreements

Enterprise agreements operate to govern the terms and conditions of employment and are generally developed through a process of bargaining or negotiation between employers and industrial organisations. An enterprise agreement may be made in relation to a group of employees under s 30 of the Act: specifically, employees of a single employer, employees of two or more associated employers, employees involved in a project or proposed project, and public sector employees. The Commission must give approval to an enterprise agreement for it to have effect (s 32). In determining whether to approve an enterprise agreement, the Commission is to follow principles established by a Full Bench of the Commission, which are to take into account various factors including the public interests and the objects of the Act (s 33).

Figure 2.22 Filed and finalised enterprise agreement matters



Although the number of filings for enterprise agreements remains relatively low, the number of finalised matters has been gradually increasing over time.

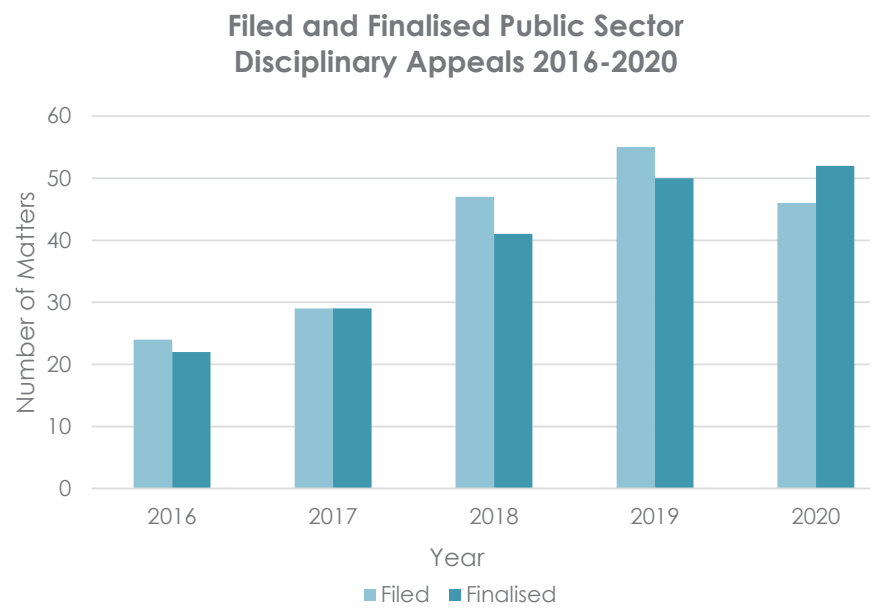
Enterprise agreements represented 0.9% of the total filings for the Commission during 2020, a minute increase from 0.7% of total filings in 2019.

Public Sector Disciplinary Appeals

Section 98 of the Act empowers a public sector employee to appeal certain disciplinary decisions made by their employer to the Commission. Decisions capable of being appealed to the Commission are listed in s 97 of the Act, and include decisions to dismiss an employee, require an employee to resign, reduce the "rank, classification, position, grade or pay" of an employee, and to defer the payment of an increment for over six months. However, an employee engaged for less than 6 months or who is serving under a probation period of three months of less generally cannot file a public sector disciplinary appeal with the Commission (s 98 of the Act).

The Act provides that each public sector disciplinary appeal is initially dealt with by listing for conciliation (s 100E). Where the conciliation is unsuccessful, the matter proceeds to an arbitrated hearing. The Commission has a broad discretion to uphold or dismiss an appeal and may make a wide range of orders that must be given effect by the employer; for example, ordering an employer to repay forfeited pay to an employee.

Figure 2.23 Filed and finalised public sector disciplinary appeal matters

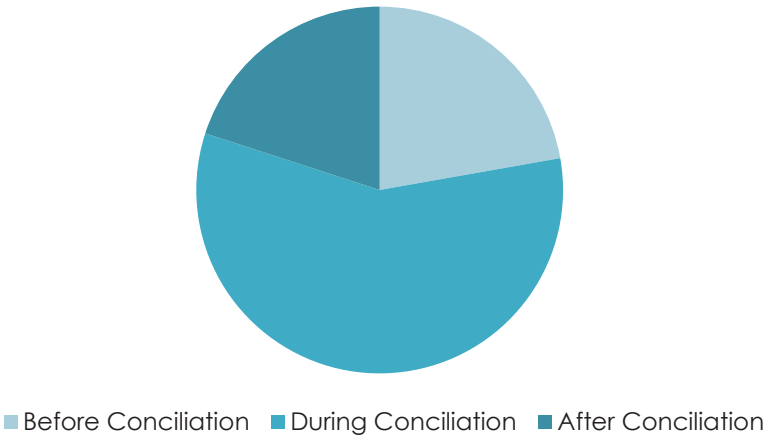


Filings of Public Sector Disciplinary Appeal applications have been increasing over time, despite decreasing slightly in 2020.

Public sector disciplinary appeals decreased from 6.4% of the total filings for the Commission in 2019 to 5.2% in 2020; however, there has been an overall increase in filings over the past 5 years. Despite this, public sector disciplinary appeals took up 25 out of the Commission's 249 total hearing days in 2020 (10.0% of total hearing days, with an average of 2.5 hearing days per matter), a disproportionately high number of hearing days. Finalisations increased again in 2020 and amounted to 5.8% of the Commission's total finalisations in 2020.

2. PERFORMANCE *CONT.*

Figure 2.24 Disposal of public sector disciplinary appeals in 2020



22.2% of public sector disciplinary appeal matters were resolved before conciliation and 20% were resolved after conciliation in 2020.

In 2020 there was a substantial increase in the percentage of public sector disciplinary appeals disposed of before conciliation (22.2%), over four times the percentage observed in 2019 (4.6%). 20% of matters were finalised after conciliation in 2020 compared with 27.7% in 2019. This is consistent with the increase in the number of industrial disputes and unfair dismissal matters being resolved before conciliation.

Time Standards

Table 2.25 Time taken to finalise public sector disciplinary appeals after filing

Finalised within	1 month (30% Target)	2 months (60% Target)	3 months (90% Target)	6 months (100% Target)
2016	7.5%	60.0%	66.7%	88.9%
2017	9.8%	63.0%	69.6%	89.1%
2018	10.3%	62.9%	70.0%	88.6%
2019	43%	55.1%	68.2%	85.0%
2020	11.1%	33.3%	44.4%	73.3%

In 2020 there was a noticeable decrease in the percentage of matters meeting the three and six months' time standards compared with 2019. Under the time standards set by the Commission, 90% of matters and 100% of matters should be resolved within 3 months and 6 months of commencement, respectively. The Commission's failure to meet time standards for public sector disciplinary appeals is due to several factors including the increasing complexity of these matters, the disproportionate number of hearing days and parties seeking to delay hearings during the pandemic until they could be conducted in-person.

Police Dismissals and Disciplinary Appeals

Section 173 of the Police Act allows the Commissioner of Police to make reviewable and non-reviewable orders arising from a police officer's misconduct or unsatisfactory performance. Under s 174 of the Police Act, a police officer may apply to the Commission seeking a review of such orders (a "disciplinary appeal").

Under s 181D of the Police Act, the Commissioner of Police has power to remove a NSW police officer for loss of confidence in their suitability to continue as a Police Officer having regard to the officer's competence, integrity, performance or conduct. Section 181E of the Police Act empowers an officer to seek review of such a removal (a "dismissal appeal") by the Commission.

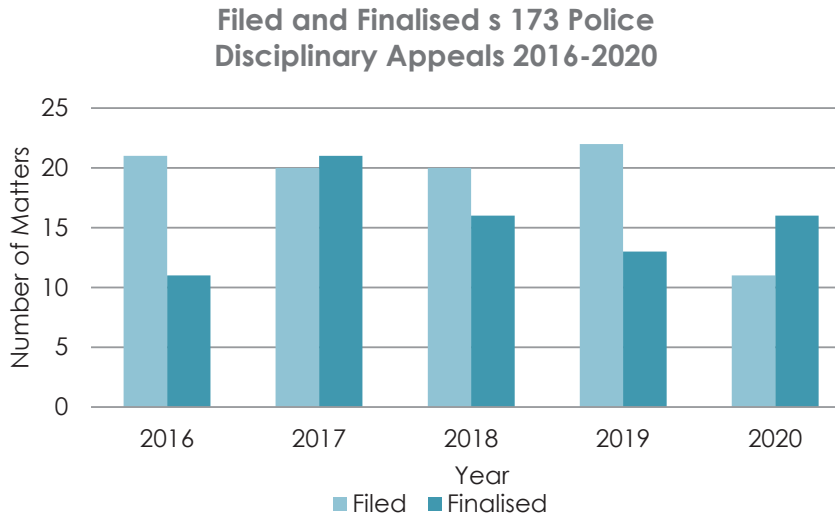
Each matter is initially dealt with by listing for a conciliation conference in which the Commission will attempt to conciliate an agreed settlement between the parties. If conciliation is unsuccessful, the matter proceeds to an arbitrated hearing where the affected officer must establish that the action taken by the Commissioner of Police was harsh, unreasonable or unjust.

The Police Act (ss 179(2), 181 and 181K) requires, unless the Chief Commissioner otherwise directs in the case of disciplinary appeals, that each stage of the process is dealt with by a member of the Commission who is an Australian lawyer. All Commissioners in 2020 were Australian lawyers.

While police dismissals and disciplinary appeals represent only a small proportion of the Commission's total filings (2.4% of filings in 2020), they take up a larger proportion of hearing days compared with other matter types. In 2020 there were seven arbitrations of police dismissals and disciplinary appeals, taking up 18 of 249 of all hearing days (7.2%), which is disproportionate to the number of hearing days required by other matters. Contributing factors include the large volumes of evidence adduced by parties, and the highly contentious nature of such matters.

Section 173 Police Disciplinary Appeals

Figure 2.26 Filed and finalised police disciplinary appeal matters

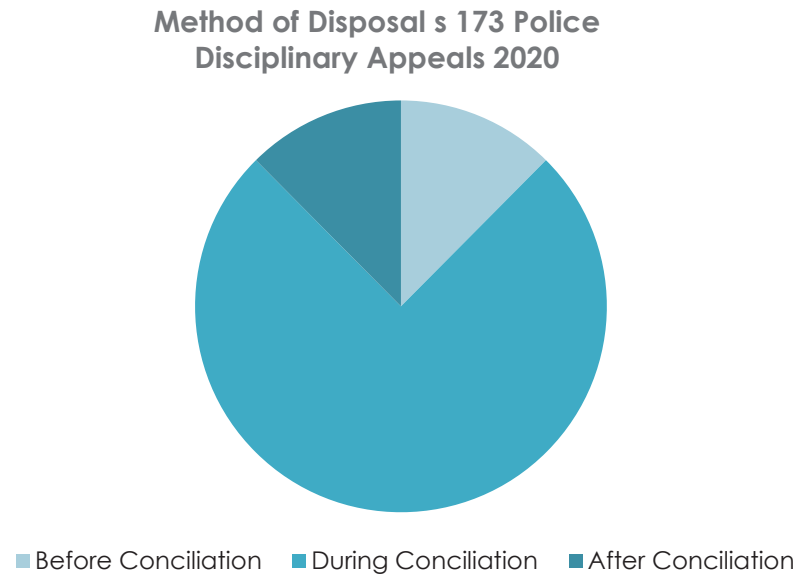


The number of applications made under s 173 in 2020 was significantly lower compared with previous years.

Police disciplinary appeals under s 173 of the Police Act represented 1.3% of the Commission's total filings in 2020, down from 2.3% in 2019.

2. PERFORMANCE *CONT.*

Figure 2.27 Disposal of police disciplinary appeal matters in 2020

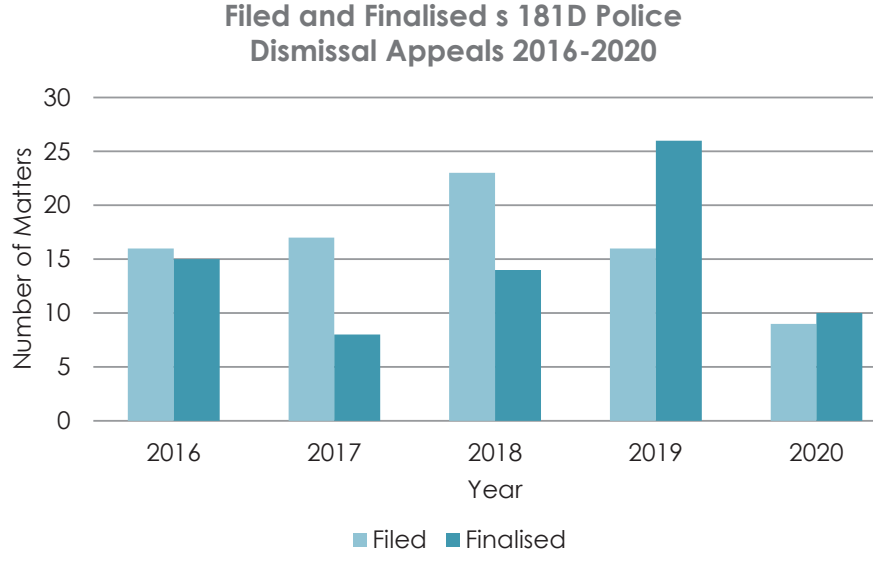


87.5% of police disciplinary appeals were resolved prior to arbitrated hearing in 2020.

In 2020 12.5% of police disciplinary appeals were resolved prior to conciliation, whereas in 2019 all matters proceeded either to conciliation or hearing. Only 12.5% of these matters were resolved after conciliation in 2020 compared with 27.7% in 2019, representing a trend towards earlier dispute resolution.

Section 181D Police Dismissal Appeals

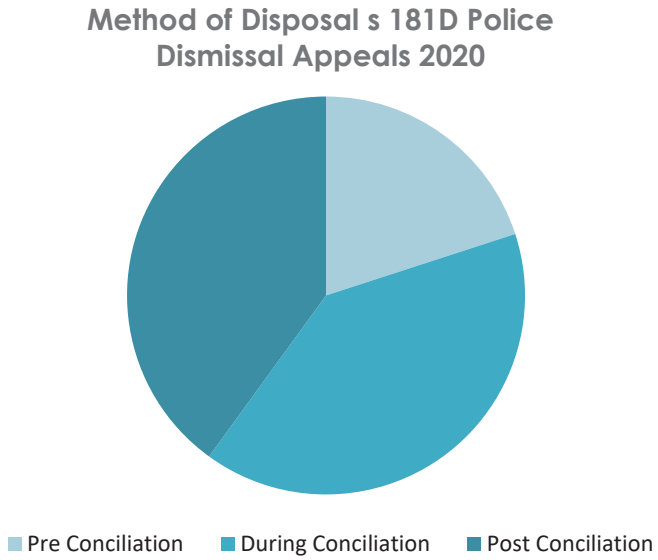
Figure 2.28 Filed and finalised police dismissal appeal matters



In 2020 there were fewer filed and finalised cases compared to previous years.

Although police dismissal appeals represented 1.0% of total filings for the Commission during 2020, they represented a statistically higher proportion of hearing days (5.2%).

Figure 2.29 Disposal of police dismissal appeal matters in 2020



60% of matters were resolved before or during conciliation in 2020.

In 2020 the percentage of police dismissal appeals resolved before conciliation was 20.0%, nearly five times higher than that in 2019 (4.2%). 60.0% of matters were resolved either before or during conciliation, a notable increase from 45.8% in 2019, and only 40% matters were resolved after conciliation compared with 54.6% in 2019.

When considered together with the data concerning applications under s 173, this suggests a trend towards earlier settlement, possibly influenced by the increased access to the Commission by way of teleconference and VCR facilities. Due to the small sample size of applications, the data must be monitored over the coming years to determine whether this is an ongoing trend or as a result of the specific circumstances in 2020.

2. PERFORMANCE *CONT.*

Time Standards

Table 2.30 Time taken to finalise police disciplinary and dismissal appeals after filing

	2016	2017	2018	2019	2020
S 173 Police Disciplinary Appeals					
Completed within 6 Months	73.1%	82.2%	83.3%	83.0%	53.3%
Completed within 12 Months	88.4%	98.3%	99.3%	98.1%	73.3%
S 181D Police Dismissal Appeals					
Completed within 6 Months	87.5%	90.5%	90.6%	93.2%	50.0%
Completed within 12 Months	100%	100%	99.8%	98.8%	80.0%

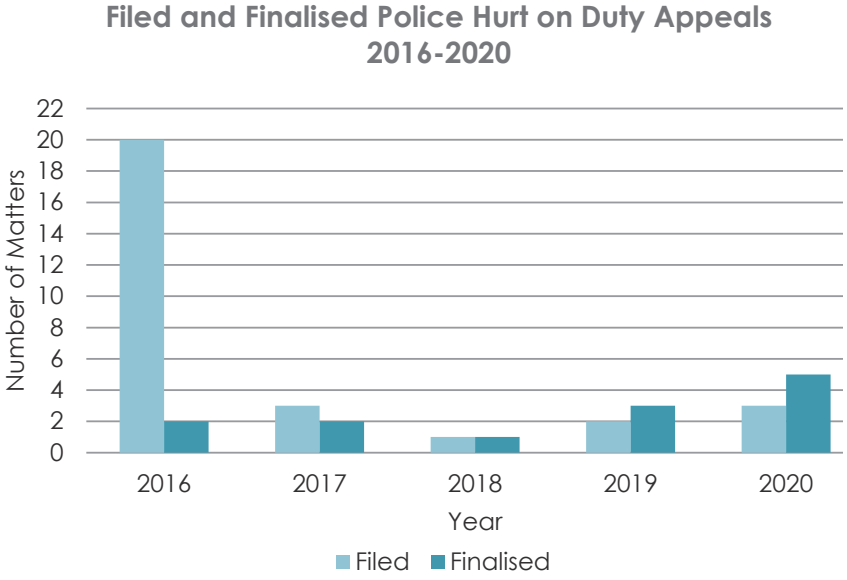
There was a significant decrease in the percentages of police disciplinary and dismissal appeals being completed within six and twelve months of filing in 2020.

Applications under ss 173 and 181D matters typically involve large volumes of evidence from an extended period and are highly contentious, and therefore take longer to resolve. The decrease in the number of matters finalised within six and 12 months was as a result of the reduced availability of Commissioners for court appearances in 2020, particularly in light of the increase in the number of matters per Commissioner in 2020.

Police Hurt on Duty Appeals

Under s 186 of the Police Act, the Commission is responsible for determining applications made by police officers to appeal against a decision of the NSW Police Commissioner in relation to leave of absence by a police officer as a result of being hurt on duty.

Figure 2.31 Filed and finalised hurt on duty appeals



The numbers of filed and finalised matters were slightly higher in 2020.

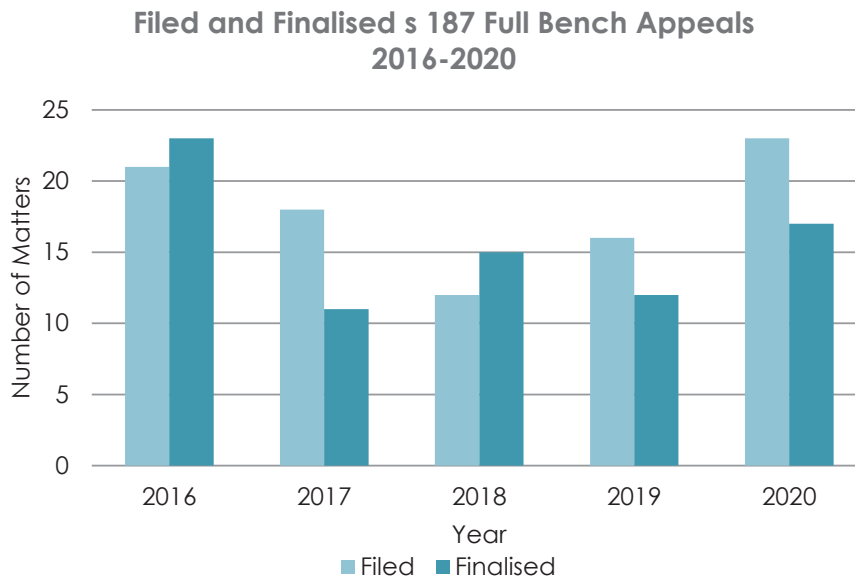
There was a spike in filings of hurt on duty appeals made by police officers in 2016. Since then there have been very few filings of these matters.

Appeals to a Full Bench

Pursuant to s 187 of the Act, an appeal may be filed against a decision of a single Commission member to the Full Bench of the Commission made up of three Commissioners. An appeal to the Full Bench is not a new hearing; instead, with limited exceptions, the appeal is to be determined based on the evidence in the decision of the single Commissioner. Section 188 provides that an appeal may only be made with leave of the Full Bench of the Commission, and that leave is to be granted where the matter is of such importance to the public interest that it ought to be granted.

The Commission provides legal representatives with advance notice of the likely listing of appeals by setting aside a week each quarter for the hearing of appeals to the Full Bench. These appeal weeks are notified on the Commission's website prior to the end of the previous year.

Figure 2.32 Filed and finalised appeals to the Full Bench



Filings and finalisations of appeals to the Full Bench increased in 2020.

There were 23 filings of appeals to the Full Bench of the Commission in 2020, up from the 16 filings in 2020. These matters concerned industrial disputes, unfair dismissals, awards, workers' compensation, and police disciplinary appeals.

Appeals comprised 8.4% of the Commission's arbitrated hearing days in 2020.

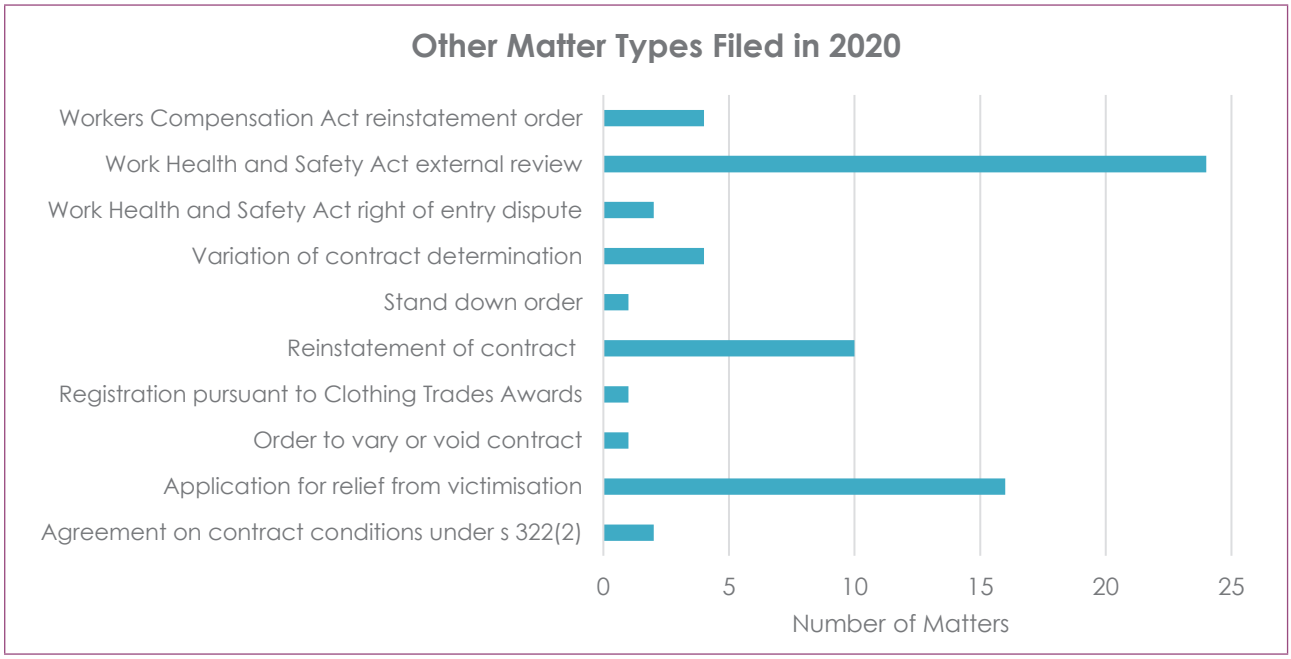
75.0% of appeals were finalised within six months of filing and 93.8% within 12 months of filing, meeting the time standards of resolving 50% of matters within 6 months and 90% within 12 months.

Other Matters

The Commission deals with a range of matters that do not fall under the above categories, including:

- Agreement on contract conditions (s 322(2) of the Act)
- Application for relief from victimisation (s 213 of the Act)
- Application to extend duration of Industrial Committee (s 200(3) of the Act)
- Making of contract determination (s 316 of the Act)
- Order to vary or void contract (s 106 of the Act)
- Registration pursuant to Clothing Trades Awards
- Reinstatement of contract (s 314 of the Act)
- Stand down order (s 126 of the Act)
- Variation of contract determination (s 320 of the Act)
- Work Health and Safety Act right of entry dispute (s 142 of the Work Health and Safety Act 2011 ("the WHS Act"))
- Work Health and Safety Act external review (s 229 of the WHS Act)
- Workers Compensation Act reinstatement order (s 242 of the *Workers Compensation Act 1987*)

Figure 2.33 Matters filed in 2020 falling into the 'Other' category



2. PERFORMANCE *CONT.*

Applications for relief from victimisation comprised 16 of the Commission's total filings in 2020. The Act prohibits an employer or industrial organisation from victimising an employee or prospective employee for various reasons, including being a member of an industrial organisation, engaging in public or political activity, or engaging in or refusing to engage in industrial action. Section 213 of the Act empowers the Commission to enforce these provisions of the Act to protect employees from victimisation through mechanisms such as ordering the reinstatement of an employee, and to preserve their right to freedom of association.

The Commission also conducts matters concerning reinstatement of contracts and variations of contract determinations. Section 314 of the Act empowers the Commission to make a contract determination in relation to the reinstatement of a contract of carriage or bailment that has terminated on any terms and conditions the Commission sees fit, while s 320 enables the Commission to vary or rescind a contract determination and, where appropriate, to replace it with a new determination.

In 2020 there were 24 external reviews under s 229 of the WHS Act of reviewable decisions made by the relevant regulator (SafeWork NSW) and/or decisions made on internal review, amounting to 2.7% of the Commission's total filings.

Industrial Organisations

Under the Act, its Regulations and the WHS Act, the Commission has specific responsibilities relating to industrial organisations.

These responsibilities include the provision of WHS Permits and Right of Entry Permits under Pt 7 of the WHS Act and Ch 5 of the Act. Other responsibilities include processing applications regarding elections of office holders and approving rule changes for registered industrial organisations. These functions generally are carried out by Registry staff under the direction of the Industrial Registrar.

Table 2.34 Matters filed in 2020 concerning industrial organisations

	2016	2017	2018	2019	2020
Work Health and Safety Permits	298	162	150	282	200
Right of Entry Permits	175	108	72	106	31
Special Wage Permits	43	25	25	34	36
Conscientious Objection Certificates	7	1	0	0	0
Rule Changes to Registered Organisations	18	10	10	9	9
Election Requests for Registered Organisations	36	19	10	14	12
Others	3	5	1	2	1
Total Filed for the Year	**580**	**330**	**268**	**447**	**289**

These applications are not included in the data of filings set out above in Table 2.1; however, when added to the applications before Commissioners they accounted for an additional 25.2% of applications to the Commission in 2020. This is a decrease from 2019, when they comprised an additional 32.1% of applications.

Right of Entry permits were significantly lower in 2020 compared with the 2016-2019 period, which was primarily due to the restrictions on attending the workplace (applying to both workers and other individuals, including industrial officers) throughout the pandemic. Work Health and Safety Permits were also lower than in 2019 for the same reason.

The COVID-19 *Legislation Amendment (Emergency Measures-Miscellaneous) Act 2020* amended the Act to introduce ss 412 and 413 to manage the elections of industrial organisations in response to the COVID-19 pandemic. Section 412 allows regulations to be made to postpone an election or the term of office of an organisational officer for up to 12 months from the date of commencement of the provision (14 May 2020), and s 413 empowers the Industrial Registrar to defer an election (upon application by an industrial organisation) by up to 12 months where the returning officer such as the NSW Electoral Commission is unable to conduct the election due to the COVID-19 pandemic. As the Electoral Commission conducts most elections for industrial organisations, this prevented industrial organisations being in breach of their obligations to conduct elections in accordance with legislation where the pandemic prevented the Electoral Commission from operating.

3. LEGISLATIVE AND REGULATORY CHANGES

Amendments to Legislation and Regulations

A range of amendments were introduced to legislation and regulations in 2020 in response to the COVID-19 pandemic.

The *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Act 2020* commenced on 14 May 2020 and amended the Act by inserting new provisions permitting an election of officers in State industrial organisations to be postponed for up to 12 months from the commencement of the amendment (as described above in "Industrial Organisations" in Part 2). This legislation also introduced amendments to the *Annual Holidays Act 1944* and the *Long Service Leave Act 1955* to provide workers with greater flexibility during the COVID-19 pandemic in relation to their leave and associated payments and to ensure that leave continues to accrue during any period for which workers may be stood down without pay.

The *Industrial Relations (Public Sector Conditions of Employment) Amendment (Temporary Wages Policy) Regulation 2020* (NSW) sought to amend the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2014* (NSW) by implementing a temporary wages policy involving a 12-month pause on wage increases for public sector employees subject to the Act. This would have prevented the Commission from making an award for public sector employees which included any increase in employee-related costs without a corresponding employee-related costs saving for the period of the wages pause. The amending Regulation was made on 29 May 2020 and was disallowed by the Legislative Council on 2 June 2020.

Other legislative amendments were introduced in 2020 that facilitated the operation of the Commission throughout the pandemic. The *Court Security Act 2005* enables a security officer to make certain requirements of persons entering or in court premises to determine whether a person is suffering from a symptom related to COVID-19 or is likely to have been exposed to COVID-19; for example, conducting thermal imaging scans and temperature checks. A person may also be refused entry to or required to leave the court premises for the remainder of the day. Further, new provisions inserted by the former *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW), now transferred to the *Electronic Transactions Act 2000*, enable a document to be witnessed by audio visual link.

On 1 September 2020 the *Industrial Relations (General) Regulation 2020* replaced the *Industrial Relations (General) Regulation 2015*. This Regulation, which is substantively similar to the 2015 Regulation, deals with matters including pay slips, employers' records that must be kept, the operation of the Commission, fees payable in relation to proceedings in the Commission, and the introduction of Sch 3 regarding elections of officers in industrial organisations (which was previously contained in the *Industrial Relations Act 1991*). Notably, the Regulation abolished the Industry Panels that had been reconstituted in 1998 to deal with applications relating to specific industries and awards for metropolitan and regional areas.

The *Statute Law (Miscellaneous Provisions) Act 2020* made minor amendments to the Act, replacing references to 'Roads and Maritime Services' with 'Transport for NSW', and making minor changes in relation to the Police Act.

Commission Rules

From the commencement of the 2010 Law Term (1 February 2010) the Commission transitioned to the Uniform Civil Procedure regime that operates in the Supreme, Land and Environment, District and Local Courts. Essentially, this means that much of the procedure of the Commission is now determined under the *Civil Procedure Act 2005* and the Uniform Civil Procedure Rules 2005; however, there are 'local rules' that prevail. These local rules are known as the Industrial Relations Commission Rules 2009 and took effect from 1 February 2010.

The Industrial Relations Commission Rules 2009 require revision following the passage of the *Industrial Relations (Industrial Court) Amendment Act 2016*. Pursuant to s 186 of the Act, the Rules of the Commission are to be made by a Rule Committee comprising the Chief Commissioner and two other members appointed by the Chief Commissioner (Commissioner Murphy and Commissioner Sloan).

The Chief Commissioner may co-opt other (non-Commissioner) members to the Rule Committee pursuant to subs-s 186(2) of the Act. In December 2020, the Chief Commissioner gratefully accepted the self-nominations from the 17 volunteers named below to be co-opted to the Rule Committee:

Anthony Britt
Jodie Camden
Adam Dansie
Mark Dunstan
Charlie Heuston
Tony Howell
Sue Huang
Stephen Hurley-Smith
Ayshe Lewis
Alison McRobert
Christopher Miles
Sascha Peldova-McClelland
Kathryn Presdee
Andrew Reid
Marina Rizzo
Alistair Sage
Ben Trainor

The Commissioner members and the co-opted members of the Rule Committee will meet in 2021 to establish priorities including updating the Rules and updating key forms to be accessed and filed electronically.

Practice Notes

No new practice notes were issued in 2020. However, a review of practice notes commenced in 2017 and has continued throughout 2018, 2019 and 2020. Practice Note 32, which provides directions as to the length, presentation and formatting of documents filed with the Commission, was developed in 2020 and issued on 11 February 2021.

4. OTHER MATTERS

Impact of COVID-19 on the Commission

Despite the challenges posed by the COVID-19 pandemic in 2020, the Commission rapidly adapted its practices to allow it to maintain a safe working and courtroom environment.

On 17 March 2020, the Commission limited in-person attendances to arbitrations, other than by leave of the Chief Commissioner. Conciliations, reports back and directions hearings were undertaken by teleconference facilities, and in some circumstances, the VCR, from that date.

On 24 March 2020, the Commission closed its Registry and moved all appearances to remote means. Arbitrated hearings were conducted through the VCR (except in exceptional circumstances where in-person appearances were required) and other matters were primarily conducted by teleconference. In general, Registry staff continued to work at the Parramatta premises, although those staff considered vulnerable worked remotely at times. The Sydney-based Commission members worked 50% from home and 50% at Parramatta on a rotational basis to minimise the possibility of cross-infection across members. Commissioner Stanton worked from the Commission premises in Newcastle and from home, conducting his matters by teleconference as the Newcastle premises does not have access to VCR.

From 19 May 2020 the Commission recommenced in-person appearances for arbitrations, but controlled the number of persons attending the premises. As a consequence of the limitations on in-person appearances, some hearings involving matters which require consideration of credit, in particular matters alleging dishonesty against employees, were delayed. Other significant and contentious matters, including the NSW public sector award cases, continued throughout 2020. Despite the initial variable performance of the VCR and the parties' use of this technology contributing to longer hearing times, the Commission and parties have made efficient and effective use of the technology.

The Registry reopened on 9 June 2020 and has remained open since that date.

The Commission adjusts the number of persons permitted to attend the premises in accordance with the Government's COVID-19 restrictions. At the beginning of December 2020, the Commission's capacity increased to allow one person per two square metres in its Hearing and Meeting Rooms, and the Commission determined that all hearings should take place in-person unless otherwise directed. Certain attendances, such as urgent industrial disputes and matters involving parties located in regional NSW, will continue to be conducted using VCR and teleconference technology, providing ongoing flexibility and allowing the Commission to provide an agile and appropriate response to any new outbreaks of COVID-19.

Public Sector Award Matters and State Wage Case

Public Sector Award Matters

From March 2020, the Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales ("PSA"), the New South Wales Nurses and Midwives' Association ("NAMA"), the Health Services Union NSW ("HSU"), the Australian Salaried Medical Officers' Federation (NSW) ("ASMOF") and the Independent Education Union of Australia NSW/ACT ("IEU") representing employees in the NSW public sector, filed various applications in respect of 41 existing awards, seeking a 2.5% wage increase. A Full Bench of the Commission (Chief Commissioner Constant, Commissioner Murphy and Commissioner Sloan) commenced hearing the joined applications known as the "Crown Salaries Awards" on 18 June 2020 and the hearing continued across a further 12 days in 2020.

A threshold issue was whether the Commission was required to award increases of 2.5% per annum. The union parties asserted this to be the consequence of s 146C of the Act combined with cl 6(1) of the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014 ("2014 Wages Regulation"). In Application for *Crown Employees (Public Sector – Salaries 2020) Award and Other Matters* [2020] NSWIRComm 1044 a Full Bench of the Commission determined that the Commission was not required, pursuant to the 2014 Wages Regulation, to award an increase of 2.5% nor were the employees entitled to a pay rise of this amount, but rather that the Regulation imposed a cap of 2.5% on the Commission's power to award increased employee-related costs.

In its decision handed down on 1 October 2020, *Application for Crown Employees (Public Sector – Salaries 2020) Award and Other Matters (No 2)* [2020] NSWIRComm 1066, a Full Bench of the Commission recognised the need for restraint in the economic circumstances of the pandemic but in order to prevent employees suffering a real decrease in pay and allowances, awarded a "nominal" pay increase of 0.3% for each of the 41 awards, effective from the first full pay period on or after 1 July 2020.

The PSA and NAMA commenced judicial review proceedings of the Crown Salaries Awards decision. These proceedings were heard by the Court of Appeal (Bathurst CJ; Bell P; Leeming JA) on 24 March 2021. On 23 April 2021, the Court of Appeal dismissed the application for judicial review, on the basis that no jurisdictional error was established: *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary of New South Wales* [2021] NSWCA 64.

The Full Bench of the Commission heard the applications by the Police Association of New South Wales ("Police Association") and the Australian Paramedics Association (NSW) ("APA") for the variation of the Crown Employees (Police Officers – 2017) Award ("Police Award") and Paramedics and Control Centre Officers (State) Award ("Paramedics Award"), collectively known as the "Police and Paramedics Awards", across six days from on 13 August 2020 to 18 December 2020. On 2 March 2021, following the Court of Appeal's judgment in the judicial review of the Crown Salaries Awards, the Full Bench ordered a 1.75% increase to salaries and salary-related allowances in the Police Award on the bases of work value changes and productivity and efficiency gains, and a 0.3% increase to salaries and salary-related allowances under the Paramedics Award in addition to a payment to employees equivalent to the difference between $1,000 and 0.3% of their annual base salary on the basis of a special case.

4. OTHER MATTERS *CONT.*

State Wage Case

On 22 June 2020, following the decision of the Fair Work Commission in the Annual Wage Review 2019-20 [2020] FWCFB 3500 of 19 May 2020 ("the FWC Decision"), the Industrial Registrar caused to be issued a Summons to the relevant parties to the 2020 State Wage Case. By consent of the parties the State Wage Case was adjourned pending the determination of the Crown Salaries Award matter. Following a hearing before a Full Bench of the Commission (Chief Commissioner Constant, Commissioner Murphy and Commissioner Sloan), the Commission in *State Wage Case 2020* [2021] NSWIRComm 1015, which was delivered on 2 March 2021, adopted the FWC Decision as a National decision and awarded increases of between 0.3% to 2.5% on a consent basis depending on the relevant award, although most awards were increased by 1.75% consistent with the FWC Annual Wage Review. As at the publication date of this Report the Commission was yet to finalise its review of the Wage Fixing Principles in the 2020 State Wage Case.

Education and Engagement Programs

- The User Group forum continued in 2020 and facilitated the engagement of key stakeholders of the Commission.
- The Commission sought expressions of interest for representatives of employers, industrial organisations and other relevant persons to be co-opted to the Rule Committee pursuant to sub-s 186(2) of the Act.
- The Commission's introductory educational course to relevant employer and employee groups was suspended in 2020 due to operational issues resulting from the COVID-19 pandemic.
- Various external presentations and conferences were postponed and/or cancelled as a result of the pandemic.

Projects of the Commission

Various projects were in development for the Commission throughout 2020. These projects include the following:

- Re-development of the Commission's website on a modern content management system, which was implemented and 'went live' on 17 December 2020.
- Implementation of a NSW Courts-wide transcript portal, which allows registered users to request, pay for and access transcripts from any jurisdiction, including the Commission. The first stage of the portal was implemented across most jurisdictions in NSW in 2020. The portal will remove multiple administrative steps for Registry staff and clients. The public access phase of this project is yet to be rolled out to the NSW Courts, Tribunals and Service Delivery Division of the Department of Communities & Justice, of which the Commission is a part.
- Development of online forms, focusing on integrating the Commission's most common forms into the NSW Online Registry, a portal for the filing of applications and related documents in NSW Courts. It is estimated that implementation should occur in mid to late 2021.
- Initial software and hardware development for a digital court file. This project has already been commenced by the digital transformation team within Courts and Tribunal Service Delivery and will span the criminal and civil jurisdiction of the Local, District and Supreme Courts as well as the Commission and Land and Environment Court.

5. APPENDICES

APPENDIX 1

TIME STANDARDS – Industrial Relations Commission

Time from commencement to finalisation	Time Standard	Achieved in 2019	Achieved in 2020
Applications for leave to appeal and appeal			
Within 6 months	50%	90.3%	75.0%
Within 12 months	90%	96.8%	93.8%
Within 18 months	100%	100%	93.8%
Award Applications [including Major Industrial Cases]			
Within 2 months	50%	52.6%	32.4%
Within 3 months	70%	71.8%	35.1%
Within 6 months	80%	91.2%	36.5%
Within 12 months	100%	99.0%	97.3%
Enterprise Agreements			
Within 1 month	75%	57.0%	100%
Within 2 months	85%	63.7%	100%
Within 3 months	100%	72.7%	100%
Industrial disputes			
Within 2 months	50%	44.2%	44.3%
Within 3 months	70%	60.3%	60.4%
Within 6 months	90%	88.5%	80.8%
Within 9 months	100%	99.0%	90.1%
Public Sector Disciplinary Appeals			
Within 1 month	30%	43.0%	11.1%
Within 2 months	60%	55.1%	33.3%
Within 3 months	90%	68.2%	44.4%
Within 6 months	100%	85.0%	73.3%

5. APPENDICES *CONT.*

Time from commencement to finalisation	Time Standard	Achieved in 2019	Achieved in 2020
Unfair dismissals			
Within 2 months	50%	43.0%	27.4%
Within 3 months	70%	64.7%	50.2%
Within 6 months	90%	90.7%	78.5%
Within 9 months	100%	98.6%	91.3%

Time from filing to first listing	Time Standard	Achieved in 2019	Achieved in 2020
Industrial Disputes			
Within 72 Hours	50%	25.0%	31.2%
Within 5 Days	70%	37.0%	44.6%
Within 10 Days	100%	65.2%	67.5%

There are no formal time standards in place for the time from filing to first listing of other matters before the Commission, including appeals, awards, enterprise agreements, police matters, public sector disciplinary appeals, or unfair dismissals.

APPENDIX 2

Matters Filed in Industrial Relations Commission

Matters filed and completed during period 1 January to 31 December 2020 and continuing matters as at 31 December 2020.

Nature of Application	Filed 1.1.2020 – 31.12.2020	Completed 1.1.2020 – 31.12.2020	Continuing as at 31.12.2020
APPEALS TO THE FULL BENCH	**23**	**11**	**12**
Appeal – Dispute	3	2	1
Appeal – Unfair dismissal	4	3	1
Appeal – Police review appeal	5	1	4
Appeal – Public sector disciplinary appeal	2	1	1
Appeal – Award	0	2	0
Appeal – Other	9	2	7
AWARDS	**118**	**73**	**45**
Application to make an award	41	21	20
Application to vary an award	72	48	24
Stage Wage Case	1	0	1
Review of an award	0	2	0
Other – including rescission, interpretation etc.	4	2	2
COLLABORATIVE EMPLOYMENT RELATIONS	**0**	**0**	**0**
Collaborative employment relations	0	0	0
DISPUTES	**331**	**323**	**8**
S 130 dispute notification	298	293	5
S 332 contract determination	27	25	2
S 146B federal enterprise agreement	0	0	0
S 20 of the *Entertainment Industry Act 2013*	5	4	1
ENTERPRISE AGREEMENTS	**8**	**8**	**0**
Application for approval with employees	4	4	0
Application for approval with industrial organisation	4	4	0
Principles for approval of Enterprise Agreements	0	0	0

5. APPENDICES *CONT.*

Nature of Application	Filed 1.1.2020 – 31.12.2020	Completed 1.1.2020 – 31.12.2020	Continuing as at 31.12.2020
UNFAIR DISMISSALS	**244**	**146**	**99**
Application by the employee	60	34	27
Application by an industrial organisation on behalf of employee	184	112	72
PUBLIC SECTOR AND POLICE APPEALS	**69**	**41**	**28**
Public sector disciplinary appeal	46	29	17
Review of order under s 181D of the Police Act	9	4	5
Review of order under s 173 of the Police Act	11	6	5
Hurt on duty appeal under s 186 of the Police Act	3	2	1
OTHER MATTERS			
Contract determinations and variation of contract	16	10	6
Compensation for termination of certain contracts of carriage	0	0	0
Application for relief from victimisation s 213	16	7	9
Application to extend duration of Industrial Committee	0	0	0
Registration pursuant to the Clothing Trades Award	1	1	0
Workers Compensation Act – s 242 reinstatement order	4	1	3
Application for external review Work Health & Safety Act	24	15	9
Determination of demarcation questions	0	0	0
Other	4	2	2

APPENDIX 3

The Chief Commissioner of the Industrial Relations Commission of New South Wales

The position of Chief Commissioner of the Industrial Relations Commission was created with the assent of the *Industrial Relations (Industrial Court) Amendment Act 2016* on 8 December 2016.

Name	Held Office		Remarks
	From	To	
Tabbaa, Innam[1]	8 December 2016	30 March 2017	Retired on 20 April 2017
Kite SC, Peter	3 April 2017	4 December 2019	Retired 20 December 2019
Constant, Nichola[2]	2 March 2020	Present	Acted as Chief Commissioner from 22 November 2019

[1] Appointed as Acting Chief Commissioner under the Act

[2] Appointed as Acting Chief Commissioner under the Act prior to being appointed as Chief Commissioner.

APPENDIX 4

The Presidents of the Industrial Relations Commission of New South Wales

Name	Held Office		Remarks
	From	To	
Cohen, Henry Emanuel	1 April 1902	3 July 1905	Died 5 January 1912
Heydon, Charles Gilbert	4 July 1905	December 1918	Died 6 March 1932
Edmunds, Walter	August 1920	6 January 1926	From February 1919 to August 1920 held appointment as Acting President and President of Board of Trade. Died 15 Aug 1932.
Beeby, George Stephenson	August 1920	July 1926	President, Board of Trades Died 18 July 1942
Piddington, Albert Bathurst	July 1926	19 May 1932	Died 5 June 1945
Browne, Joseph Alexander	20 June 1932	30 June 1942	Died 12 November 1946
Taylor, Stanley Cassin	28 December 1942	31 August 1966	Died 9 August 1982
Beattie, Alexander Craig	1 September 1966	31 October 1981	Died 30 September 1999
Fisher, William Kenneth	18 November 1981	11 April 1998	Died 10 March 2010
Wright, Frederick Lance	22 April 1998	22 February 2008	Retired
Boland, Roger Patrick	9 April 2008	31 January 2014	Retired and continued as Acting Judge until January 2015
Walton, Michael John	3 February 2014	7 December 2016	Appointed Justice of the Supreme Court of NSW.

APPENDIX 5

The Vice-Presidents of the Industrial Relations Commission of New South Wales

The position of Vice-President of the Industrial Relations Commission was created with the assent of the *Industrial Arbitration (Industrial Tribunals) Amendment Act 1986* on 23 December 1986.

The position was created:

> "to achieve a more cohesive single structure. In future, responsibility for assignment of conciliation commissioners to chair conciliation committees and the allocation of disputes to them will reside in a judicial member of the Industrial Commission who will be appointed as Vice-President of the Industrial Commission. This will assist in the achievement of a closer relationship between the separate structures of the Industrial Commission and conciliation commissioners and will allow a more uniform approach to industrial relations issues."

Hansard, Second Reading Speech, Legislative Council, 21 Nov 1986 per The Hon. J R Hallam at p 7104

Name	Held Office		Remarks
	From	To	
Cahill, John Joseph	19 February 1987	10 December 1998	Died 21 Aug 2006
Walton, Michael John	18 December 1998	31 January 2014	Appointed as President 3 Feb 2014

APPENDIX 6

Industrial Registrars of the Industrial Relations Commission of New South Wales

Name	Held Office		Remarks
	From	To	
Addison, George Campbell	1 April 1902	1912	Returned to the Bar. Appointed Chief Industrial Magistrate 1917.
Holme, John Barton	1912	9 February 1914	Appointed first Undersecretary, Department of Labour and Industry 10 Feb 1914.
Payne, Edward John	1914	1918	Retired from the public service in 1939 as Chairman, Public Service Board.
Kitching, Frederick William	12 July 1918	30 June 1924	Appointed Undersecretary, Office of the Minister for Labour and Industry 1 July 1924.
Webb, Alan Mayo	1 September 1924	19 June 1932	Appointed Judged of the Industrial Commission 20 June 1932.
Wurth, Wallace Charles	1932	1936	Appointment to Public Service Board; Appointed Chairman of the Public Service Board in 1939.
Ebsworth, Samuel Wilfred	1936	1947	Retired.
Kelleher, John Albert	1947	13 May 1955	Appointed Undersecretary and Industrial Registrar, Department of Labour and Industry and Social Welfare 1949. Appointed Judge of Industrial Commission 16 May 1955.
Kearney, Timothy Joseph	1955	1962	Appointed Undersecretary, Department of Labour and Industry.
Whitfield, John Edward	1962	1968	Appointed Executive Assistant (legal) Department of Labour and Industry; Later appointed as Deputy Undersecretary Department of Labour and Industry.
Fetherston, Kevin Roy	3 June 1968	1977	
Coleman, Maurice Charles Edwin	29 April 1977	1984	Retired.

Name	Held Office		Remarks
	From	To	
Buckley, Anthony Kevin	23 January 1984	30 March 1992	Appointed as Commissioner, Industrial Relations Commission 31 March 1992.
Walsh, Barry[1]	19 February 1992	15 July 1994	Appointed as Commissioner, Water Conservation and Irrigation Commission.
Szczygielski, Cathy[2]	18 July 1994	4 November 1994	Returned to position of Deputy Registrar, Industrial Court.
Williams, Louise[3]	7 November 1994	16 August 1996	Returned to position of Deputy Registrar, Land & Environment Court.
Robertson, Gregory Keith[4]	31 March 1992	26 October 1999	To private practice.
McGrath, Timothy Edward	27 October 1999	9 August 2002	Appointed Assistant Director General, Court and Tribunal Services, Attorney General's Department 12 August 2002.
Grimson, George Michael	22 August 2002	18 December 2014	Retired.
Hourigan, Lesley[5]	19 December 2014	13 March 2015	Returned to position of Deputy Registrar Industrial Court.
Wiseman, James[6]	16 March 2015	October 2016	Returned to Local Court.
Morgan, Melinda	31 October 2016	Present	

[1] Appointed as Acting Registrar and CEO, Industrial Court (under the Industrial Relations Act 1991 ("the 1991 Act")) 19 Feb 1992, substantively appointed to that position 6 May 1993.

[2] Appointed as Acting Registrar and CEO, Industrial Court (under the Industrial Relations Act 1991 ("the 1991 Act")) 19 Feb 1992, substantively appointed to that position 6 May 1993.

[3] Acting appointment as Registrar and CEO, Industrial Court (under 1991 Act) pending recruitment

[4] Appointed as Registrar and CEO, Industrial Court (under 1991 Act)

[5] Held the position of Registrar, Industrial Relations Commission under 1991 Act – under the Act became Registrar and Principal Courts Administrator, Industrial Relations Commission and Commission in Court Session (2 September 1996).

[6] Appointed as Acting Registrar Industrial Court (under the Act)

APPENDIX 7

Brief History of the Industrial Relations Commission of New South Wales

The Court of Arbitration, established by the *Industrial Arbitration Act 1901*, was a court of record constituted by a President (a Supreme Court judge) and two members representing employers and employees respectively. The Court came about as a result of the failure of employers and unions to use a system of voluntary arbitration. The Court had jurisdiction to hear and determine any industrial dispute or matter referred to it by an industrial union or the Registrar, prescribe a minimum wage and make orders or awards pursuant to such hearing or determination. This Court and its Registry, the Industrial Arbitration Office, came under the administration of the Department of Attorney General and of Justice from 12 December 1901.

The Industrial Court, established by the *Industrial Disputes Act 1908*, was constituted by a Supreme Court or District Court judge appointed for a period of seven years. The Court did not require the existence of a dispute to ground its jurisdiction and had power to arbitrate on conditions of employment and could hear prosecutions. Together with its Registry, known during 1911 as the Industrial Registrar's Office, the Court remained under the administration of the Department of Attorney General and of Justice. The Act also established a system of Industrial Boards that consisted of representatives of employers and employees sitting under a Chairman. The Industrial Court heard appeals from the Industrial Boards.

The Court of Industrial Arbitration was established by the *Industrial Arbitration Act 1912*. It was constituted by judges, not exceeding three, with the status of judges of the District Court. The Court was vested with all the powers conferred on all industrial tribunals and the chairman thereof. The Act empowered the Minister to establish Conciliation Committees with powers of conciliation but not arbitration. Conciliation Committees fell into disuse after about 12 months and a Special Commissioner (later known as the Industrial Commissioner) was appointed on 1 July 1912. This Court and its Registry were placed under the jurisdiction of the Department of Labour and Industry, which administered the Act from 17 April 1912.

A Royal Commission on Industrial Arbitration in 1913 led to some major changes under the *Industrial Arbitration (Amendment) Act 1916*, which resulted in an increase in the membership of the Court and the transfer of powers of the Industrial Boards to the Court.

The **Board of Trade** was established by the *Industrial Arbitration (Amendment) Act 1918*. It functioned concurrently with the Court of Industrial Arbitration and was constituted by a President (a judge of the Court), a Vice-President and representatives of employers and employees. The Board's functions were to conduct a public inquiry into the cost of living and declare an adult male and female living wage each year for industry generally and for employees engaged in rural occupations. In addition, it was to investigate and report on conditions in industry and the welfare of workers. The Board was, in practice, particularly concerned with matters relating to apprenticeships.

The *Industrial Arbitration (Amendment) Act 1926* abolished the Court of Industrial Arbitration and the Board of Trade and set up an Industrial Commission constituted by a Commissioner and a Deputy Commissioner. The Commissioner or Deputy Commissioner sat with employer and employee representatives selected from a panel.

On any reference or application to it the Commission could make awards fixing rates of pay and working conditions, determine the standard hours to be worked in industries within its jurisdiction and had power to determine any "industrial matter". The Commission had authority to adjudicate in cases of illegal strikes, lockouts or unlawful dismissals and could summon persons to a compulsory conference and hear appeals from determinations of the subsidiary industrial tribunals. The former Boards, which had not exercised jurisdiction since 1918, continued in existence but as Conciliation Committees with exclusive new jurisdiction in arbitration proceedings.

A number of controversial decisions by the Industrial Commission led to the proclamation of the *Industrial Arbitration (Amendment) Act 1927*, which altered the position of Industrial Commissioner (but not Deputy Industrial Commissioner) and the constitution of the Commission to that of three members with the status of Supreme Court judges. The Committees were still the tribunals of first instance and their decisions were to be the majority of members other than the chairman, whose decision could be accepted by agreement if the members were equally divided. Otherwise the chairman had no vote and no part in the decision. Where a matter remained unresolved in committee it passed to the Commission for determination.

The *Industrial Arbitration (Amendment) Act 1932* placed the emphasis on conciliation. The offices of Deputy Industrial Commissioner and Chairman of Conciliation Committees were abolished and a Conciliation Commissioner was appointed to fill the latter position. This Act also provided for the appointment of an Apprenticeship Commissioner and for the establishment of Apprenticeship Councils. The Conciliation Commissioner could call compulsory conferences in industrial disputes to effect an agreement between the parties when sitting alone or between the members of the committee when sitting as Chairman. Any such agreement, when reduced to writing, took effect as an award but was subject to appeal to the Industrial Commission. In addition, the Conciliation Commissioner or a Conciliation Committee could not call witnesses or take evidence except as directed by the Industrial Commission. Unresolved matters were referred to the Commission.

The membership of the Commission was increased to four by the *Industrial Arbitration Act 1936*, and certain provisions regarding appeals were altered under this Act. The *Industrial Arbitration (Amendment) Living Wage Act 1937* repealed the Commission's power of determining a wage and provided for the adoption of a basic wage and fixed loadings determined by the Commonwealth Court of Conciliation and Arbitration.

In 1938 the number of members of the Commission was increased to no less than five and no more than six and the Act, the *Industrial Arbitration and Workers Compensation (Amendment) Act 1938*, introduced provisions regarding investigation of rents and certain price fixing. The Act was again amended in 1939 mainly to address the fixing of maximum prices.

The *Industrial Arbitration Act 1940* consolidated all previous Acts and refined and rationalised the procedures and operation of the Industrial Commission.

The *Industrial Arbitration Act* provided for the establishment of an Industrial Commission, Conciliation Committees, Conciliation Commissioners, Special Commissioners, Industrial Magistrates Courts and the Industrial Registrar.

5. APPENDICES *CONT.*

The *Industrial Arbitration (Amendment) Act 1943* empowered the Chairman, with the agreement of the members or by special authorisation of the Industrial Commission, to decide matters where there was division. The number of Commissioners who might be appointed was also increased to five. The *Industrial Arbitration (Amendment) Act 1948* allowed the Commissioners to decide matters upon which the members were equally divided as well as make an award where the disputing parties had been called into a compulsory conference.

In 1955, the maximum number of members of the Industrial Commission was increased to 12 and the next raft of significant changes came with the *Industrial Arbitration (Amendment) Act 1959*. These changes included defining the wage fixing powers of Industrial Committees and appeal provisions were also reformed.

In 1979, the *Industrial Arbitration Act* was again amended to make provision for the establishment of Contract Regulation Tribunals. Generally, this gave the Commission jurisdiction over contracts for the bailment of taxi cabs and private hire cars and over contracts for the transportation by motor lorry of loads other than passengers.

In 1981, and again in 1989, the Commission's powers in relation to dealing with apprentices were clarified. In 1989, the *Industrial and Commercial Training Act* was passed and apprentices were treated as other employees for all industrial purposes.

By 1989, the Industrial Commission consisted of not more than 12 members, including the President and the Vice-President. The *Industrial Arbitration Act* also provided for the appointment of "non-judicial" members who did not have to be legally qualified as well as "judicial" members. There were certain jurisdictional limitations for "non-judicial" appointees.

In 1988, the Government commissioned a comprehensive review of the State's industrial laws and procedures. The subsequent report, the Niland Report, had far reaching recommendations and became the basis for the *Industrial Relations Act 1991*. The former Commission was abolished and replaced by the Industrial Relations Commission and a separate Industrial Court. Two of the key features of the report were the introduction of enterprise bargaining outside the formal industrial relations system with agreements specifically tailored to individual workplaces or businesses and the provisions relating to unfair dismissal. Individuals could access the Commission if they believed they had been unfairly dismissed. Their remedy was reinstatement and/or compensation.

On 2 September 1996, the *Industrial Relations Act 1996* came into force. It repealed and replaced the 1991 Act and is an example of plain English statute law. Chapter 4 of the Act established a new Industrial Relations Commission. Unlike the federal approach, the States have not separated judicial and administrative functions in relation to the Commission's powers. The 1991 Act, for the first time, sought to adopt the federal approach and established the Industrial Relations Commission and the Industrial Relations Court (although the Judges remained members of the Commission at all times). The 1996 Act restored the traditional arrangement by merging these two bodies. When the Commission was dealing with judicial matters it was called the Industrial Relations Commission of New South Wales in Court Session and was a superior court of record of equivalent status to the Supreme Court.

On 9 December 2005 the *Industrial Relations Amendment Act 2005* was proclaimed to commence. This Act enabled the Industrial Relations Commission of New South Wales in Court Session to be called the Industrial Court of New South Wales.

On 1 January 2010 the *Industrial Relations (Commonwealth Powers) Act 2009* was proclaimed to commence. This Act referred certain matters relating to industrial relations to the Commonwealth for the purpose of s 51(37) of the Australian Constitution and to amend the Industrial Relations Act 1996. The primary role of the Act was to refer to the Commonwealth sufficient power to enable the creation of a national industrial relations system for the private sector. Essentially, this Act transferred the residue of the private sector to the national industrial relations system and made clear that the Industrial Relations Commission retained jurisdiction in relation to State public sector employees and Local Government employees. Additionally, s 146 of the *Industrial Relations Act 1996* was amended to make clear members of the Industrial Relations Commission of New South Wales could continue to be nominated as dispute resolution providers in federal enterprise agreements. This was designed to ensure that the many companies who continue to use the expertise of the Industrial Relations Commission would be able to continue those arrangements.

On 17 June 2011, the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011* commenced. This Act required the Industrial Relations Commission to give effect to aspects of government policy declared by the regulations relating to public sector conditions of employment (s 146C).

On 1 January 2012, the *Work Health and Safety Act 2011* commenced. This Act removed the jurisdiction of the Industrial Court to deal with work, health and safety prosecutions involving death or serious injury occurring in workplaces across the State. This jurisdiction was transferred to the District Court. The Industrial Court retained jurisdiction to deal with matters filed prior to 31 December 2011 under the Occupational Health and Safety legislation prior to its repeal. The Court also retained jurisdiction in relation to minor breaches of the work, health and safety legislation.

On 20 December 2013, the *Industrial Relations Amendment (Industrial Court) Act 2013* commenced and substantially amended the *Industrial Relations Act 1996*. The major changes were that the Industrial Court may only be constituted by a single judicial member (judge) and not by a Full Bench of judicial members (judges); a judge of the Supreme Court may act as a judge of the Industrial Court; the jurisdiction of a Full Bench of the Industrial Court to deal with cancellation of industrial organisations was transferred to the Industrial Relations Commission and provided that a Full Bench of the Commission for that purpose is to be constituted by a judge of the Industrial Court and two members who are Australian Lawyers; the jurisdiction of a Full Bench of the Industrial Court to deal with contempt was transferred to a single judge of the Court; the jurisdiction of a Full Bench of the Industrial Court to hear appeals from the Local Court or appeals on a question of law in relation to a public sector promotional or disciplinary appeal was transferred to a single judge of the Court; the jurisdiction of a Full Bench of the Industrial Court to hear appeals from a judge of the Industrial Court was transferred to the Supreme Court. The amendments also allowed former members of the Commission and Court to complete matters that were unfinished by them when they ceased to be members. Amendments to other Acts provided for appeals from the Industrial Court to the Court of Criminal Appeal; for certain matters under the Police Act 1990 to be dealt with by Commission members who are Australian Lawyers; and for a judicial member of the Commission to act as a judge of the Supreme Court.

On 8 December 2016 the *Industrial Relations (Industrial Court) Amendment Act 2016* commenced. This Act abolished the Industrial Court and the work of that Court was transferred to the Supreme Court. The Offices of President, Vice-President and Deputy President were also abolished. The office of Chief Commissioner was created and that office exercises all of the functions formerly exercised by the President (except for the functions relating to the former Industrial Court). The members of the Commission continue to be judicial officers for the purposes of the Judicial Officers Act 1986 and the Chief Commissioner, as head of the jurisdiction, is an official member of the Judicial Commission.