

**Industrial Relations Commission  
of New South Wales**

**ANNUAL REPORT 2021**

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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.

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# Letter of transmittal to the Minister

The Hon. Damien Tudehope MLC  
Minister for Finance, and Minister for  
Employee Relations  
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 2021 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

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## FOREWORD BY THE CHIEF COMMISSIONER

I am pleased to introduce the 2021 Annual Report for the Industrial Relations Commission of New South Wales.

Despite the continuing challenges of the COVID-19 pandemic in 2021, the Commission maintained its focus on performance and providing efficient, effective and independent dispute resolution for primarily Local Government and State Government employers and employees in New South Wales.

The year was busy and, as it was for the people of NSW generally, at times, challenging. There was a significant increase in demand for the Commission's services. The total number of filings increased by 26% from 858 in 2020 to 1081 in 2021. The number of industrial disputes notified increased by 6.3%, there was a 6.73% increase in the number of matters requiring arbitration; and an 8.8% increase in the number of arbitrated hearing days compared with 2020.

A broad suite of legislative and regulatory reforms designed to reduce the spread of COVID-19 and to mitigate job losses which commenced in 2020, continued in 2021. 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 the Commission's facilities.

Many of the Commission's services were provided remotely over the reporting period allowing the Commission to continue to provide efficient, accessible services during the pandemic. Due to the benefits in efficiency and access to justice, remote hearings will remain an option for the Commission in the future.

From 28 June 2021 to 29 October 2021, the public counter of the Industrial Registry was closed. During this time, the Registry staff continued to work at Parramatta, subject to specific pandemic restrictions, and the Registry accepted emailed material which the Registry staff processed manually, in addition to their regular responsibilities.

Notwithstanding: the disruption to the means by which the Commission discharged its functions throughout the pandemic; the increased number of filings; the increase in matters proceeding to arbitration; an increase in self-represented litigants; the impact on the Registry staff and the Commission of the pandemic restrictions, in particular the declaration of Local Government areas of concern; and a vacancy in the Commissioner ranks, the Commission managed its listings so as to avoid a backlog in hearings, and achieved a completion rate of 91.7%.

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*, continued to work to modernise the Commission's most common application and response forms so that these can be filed electronically. It is expected that these forms will become available to be filed on-line progressively in 2022. The Commission continues to look forward to the launch of the digital court file which will allow users to upload electronically, all documents to the Commission's file.

The Registry worked hard to publish new or varied awards on the Commission's website as soon as possible after the Commission made the relevant orders, although disappointingly the benchmark of one month between the orders being made and the awards being published has not been achieved. In 2022 the Commission is looking at new digital solutions to improve the time between making or varying awards and the publishing of these awards.

The Commission farewelled Commissioner John Stanton on 21 October 2021. Commissioner Stanton commenced his appointment with the Commission on 23 May 2005 and was a dual appointee of the Fair Work Commission and the Commission from 2009 to 2015. Commissioner Stanton will be missed by parties, particularly those in the Hunter Region, and by all at the Commission. The Commissioners and staff were disappointed that due to the pandemic we were unable to farewell Commissioner Stanton in person to express our gratitude for his camaraderie, advice, and friendship.

The Commission welcomed two new Commissioners in 2021, Commissioner Christopher Muir commenced his appointment on 30 August 2021 and Commissioner Daniel O'Sullivan commenced his appointment on 22 October 2021. This brought the total number of Commissioners to six.

The Commission also farewelled Industrial Registrar Melinda Morgan on 5 October 2021 after five years of service in the role. Irina Hodgkinson was the Acting Industrial Registrar from 1 November 2021.

I express my sincere thanks to the Industrial Registrar, the Acting Industrial Registrar, the Registry staff and the Commission's members who worked with dedication throughout 2021. The content of this Annual Report is testament to their dedication to delivering the highest levels of service to the people of NSW, and in particular the users of the Commission.

In 2022, the Commission will continue to strive to continue to innovate and adapt to meet the ongoing needs of our users. I look forward to seeing more users at our premises in Parramatta, and, as the nature of the pandemic changes, to parties being able to attend in-person hearings in Newcastle and at other regional locations.

# 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 fair and reasonable 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, 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*;
- proceedings relating to disciplinary decisions in the public sector under the Act (Ch 2, Pt 7);
- applications under the *Entertainment Industry Act 2013*; and
- various proceedings relating 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 Services 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 was appointed 23 May 2005 and retired on 21 October 2021.

Commissioner John Vincent Murphy was appointed 4 December 2015.

Commissioner Damian Sloan was appointed 30 July 2018.

Commissioner Janine Webster was appointed 3 December 2018.

Commissioner Christopher Muir was appointed 30 August 2021.

Commissioner Daniel O'Sullivan was appointed 22 October 2021.

# 1. COMMISSION PROFILE CONT.

Table 1.1 Commission Members

	2017 <sup>1</sup>	2018 <sup>2</sup>	2019 <sup>3</sup>	2020 <sup>4</sup>	2021 <sup>5</sup>
Commissioners	6	8	5.4	4.4	4.78
<b>Total Members of the Commission</b>	<b>6</b>	<b>8</b>	<b>5.4</b>	<b>4.4</b>	<b>4.78</b>

<sup>1</sup> Although there were six Commissioners in total in 2017, there was a maximum of five Commissioners at any particular time in 2017.

<sup>2</sup> Although there were eight Commissioners in total in 2018, there were only five Commissioners at any point in time.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> The 2021 year commenced with 4.4 Commissioners and ended with 6 Commissioners. Commissioner John Stanton retired on 21 October 2021. Commissioner Christopher Muir was appointed on 30 August 2021 and Commissioner Daniel O'Sullivan on 22 October 2021. The average number of members of the Commission is 4.78.

Table 1.1 above depicts the number of members, over the previous five years. The calculation of the total number of members has varied over this period as reflected in the footnotes. The average number of Commissioners in 2021 was 4.78. The total number of members of the Commission increased to six in November 2021.

Until August 2021 there were four full-time Commissioners located in Parramatta, Chief Commissioner Constant, Commissioner Murphy, Commissioner Sloan, and Commissioner Webster. Until November 2021, there was one part-time Commissioner located in Newcastle (0.4 FTE). Both Commissioner Muir and Commissioner O'Sullivan were appointed on a full-time basis and are located at Parramatta.

Since Commissioner Stanton's retirement in 2021, there are no Commissioners permanently based at the Commission's premises at 237 Wharf Road Newcastle. Members of the Commission hear matters in Newcastle when required having regard to the interests of the parties and the efficient disposition of the matter.



**Sitting from left to right:**

Commissioner O'Sullivan and Chief Commissioner Constant

**Standing from left to right:**

Commissioner Webster, Commissioner Murphy, Commissioner Sloan and Commissioner Muir

## The Industrial Registry

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

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

- issuing summonses for the purpose of dealing with a matter;
- 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 on the Commission's website 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.

# 1. COMMISSION PROFILE CONT.

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The Industrial Registry provides administrative support to the members of the Commission and supports the Industrial Registrar in carrying out the Industrial Registrar's statutory functions. The two key divisions of the Registry are the Client Services team and Commissioner Support team. As essential workers, the Registry staff continued to work at the Commission's Parramatta premises throughout the pandemic unless they were directly impacted by the Public Health Orders.

## Industrial Registrar

In October 2021, Industrial Registrar Melinda Morgan, who was appointed in October 2016, accepted an assignment to the Land and Environment Court and was later appointed Superior Courts Coordinator - Digital Reform Project. For the balance of 2021, Irina Hoskinson acted as the Industrial Registrar. The Commission is grateful for the service of former Industrial Registrar Morgan over many years, particularly her management of the Commission's move to Parramatta. The Commission is also grateful to former Acting Industrial Registrar Hoskinson for her assistance in the time she was with the Commission.

## 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. The Client Services team receives new applications, evidence and other materials filed in the Commission.

The Client Services team completes duties related to the preparation of industrial awards, enterprise agreements and other orders made by members of the Commission. The team is responsible for maintaining records concerning parties to awards and Industrial Committees and their members.

The Client Services team supports the Industrial Registrar to administer 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. 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.

The Commissioners thank the Registry team for their hard work and commitment during 2021, challenged by increasing workloads in a dynamic pandemic environment.



Pictured are the new Industrial Registrar, Elizabeth Robinson (fourth from the left), and some staff of the Registry and Commissioner Support teams.

## Regional Sitzings of the Commission and Remote Access to the Commission

In 2021, a substantial proportion of Commission matters were conducted via the Virtual Court Room ("VCR"). The increased use of teleconference and VCR facilities during the pandemic maintained, and in many cases 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 important benefits in requiring parties to industrial disputes and other proceedings to attend proceedings in-person. The Commission will consider the circumstances of each matter to determine whether the matters will be heard in person, remotely or a combination of both.

Unlike in previous years, the Commission did not sit in any other regional or rural locations in 2021 due to the pandemic. The Commission plans to resume regional sittings to the extent permitted by public health orders.

# 1. COMMISSION PROFILE *CONT.*

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## **Governance**

The Registry of the Commission operates within the Superior Courts Division of the Courts and Tribunals Services Delivery division of the NSW Department of Communities and Justice.

Commissioners are appointed by the Governor on the advice of the Minister for Finance, and Minister for Employee Relations, and, since 26 March 2021, jointly with the Attorney General.

Decisions of individual Commissioners may be appealed to a Full Bench of the Commission. Decisions of the Commission may 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 Commissioners who are judicial officers under the *Judicial Officers Act 1986*.

Corporate services, including human resources management, security, facilities and asset management, are managed by Courts and Tribunals Services Delivery. Financial and budget management is facilitated by the Industrial Registrar. The Industrial Registrar and the 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 HIGHLIGHTS 2021

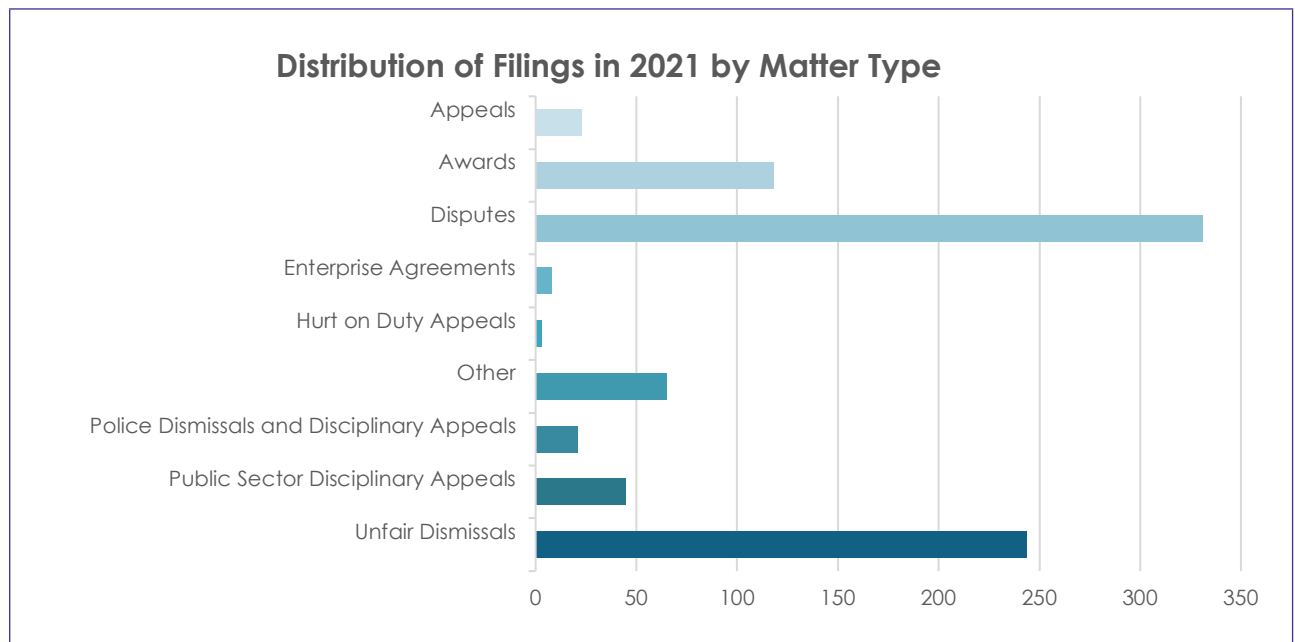


## Performance in Key Areas

- The total number of filings increased from 858 in 2020 to 1081 in 2021, a rise of 25.99%.
- In 2021 there was an average of 226 matters per Commissioner, a 15.77% increase from 195.2 in 2020.
- The number of arbitrated hearings increased from 104 in 2020 to 111 in 2021, a 6.7% increase.
- The number of arbitrated hearing days increased from 249 in 2020 to 271 in 2021, representing an 8.8% increase.
- The clearance rate of matters filed with the Commission and finalised was 91.7% in 2021. This is a significant decrease from a clearance rate of 105.4% in 2020. This clearance rate is impacted by a backlog created by the steps required to administratively close files in the Registry. The Commission will concentrate on improving this clearance rate in 2022.

## Performance snapshot

Figure 2.1 Distribution of filings in 2021 by matter type



## 2. PERFORMANCE CONT.

### Overall Caseload

The comparative caseload statistics for the Industrial Relations Commission between 2018 and 2021 are summarised below in Table 2.2.

Table 2.2 Caseload Statistics

	2018	2019	2020	2021
<b>Appeals</b>				
Filed	12	16	23	<b>12</b>
Finalised	15	12	16	<b>10</b>
Pending	6	8	15	<b>6</b>
<b>Awards</b>				
Filed	173	162	118	<b>285</b>
Finalised	147	181	86	<b>280</b>
Pending	67	16	48	<b>56</b>
<b>Disputes</b>				
Filed	300	372	331	<b>352</b>
Finalised	373	340	356	<b>318</b>
Pending	80	108	83	<b>121</b>
<b>Enterprise Agreements</b>				
Filed	7	6	8	<b>15</b>
Finalised	7	8	8	<b>12</b>
Pending	2	0	0	<b>1</b>
<b>Unfair Dismissals</b>				
Filed	218	248	244	<b>273</b>
Finalised	250	205	257	<b>259</b>
Pending	49	91	78	<b>106</b>
<b>Public Sector Disciplinary Appeals</b>				
Filed	47	55	46	<b>30</b>
Finalised	41	50	52	<b>26</b>
Pending	14	18	14	<b>18</b>
<b>Police Dismissals and Disciplinary Appeals</b>				
Filed	43	38	20	<b>34</b>
Finalised	38	40	27	<b>26</b>
Pending	23	21	14	<b>20</b>



Table 2.2 Caseload Statistics (continued)

	2018	2019	2020	2021
<b>Hurt on Duty Appeals</b>				
Filed	1	2	3	6
Finalised	8	7	5	3
Pending	10	5	3	6
<b>Other<sup>1</sup></b>				
Filed	70	53	65	75
Finalised	109	45	68	60
Pending	20	26	23	43
<b>TOTALS<sup>2</sup></b>				
<b>Total filed for the year</b>	<b>875</b>	<b>946</b>	<b>858</b>	<b>1081</b>
<b>Total finalised for the year</b>	<b>993</b>	<b>889</b>	<b>904</b>	<b>994</b>
<b>Total pending for the year</b>	<b>267</b>	<b>324</b>	<b>278</b>	<b>377</b>

<sup>1</sup> '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*.

<sup>2</sup> The classification of proceeding type can alter before a matter is closed, impacting on the calculation of the total matters completed, finalised and pending by matter type.

Table 2.2 above shows the following trends:

- Total filings (1081) increased by 25.99% from 2020.
- The number of disputes in 2021 amounted to 32.6% of total filings, a decrease compared with 38.5% of total filings in 2020.
- Unfair dismissals constituted 25% of the Commission's total caseload in 2021, a minor decrease compared with 28.4% of total filings in 2020.

These filings do not include applications relating to industrial organisations (described in Table 2.32). Applications relating to industrial organisations are not, in the ordinary course, dealt with by a Commissioner. They constitute a substantial proportion of the Commission's total filings. In 2021 there were 342 applications concerning industrial organisations, which include rule changes, right of entry permits, WHS permits and special wage permits.

## 2. PERFORMANCE CONT.

### Workload of Commissioners

Figure 2.3 Number of matters filed compared with number of Commissioners

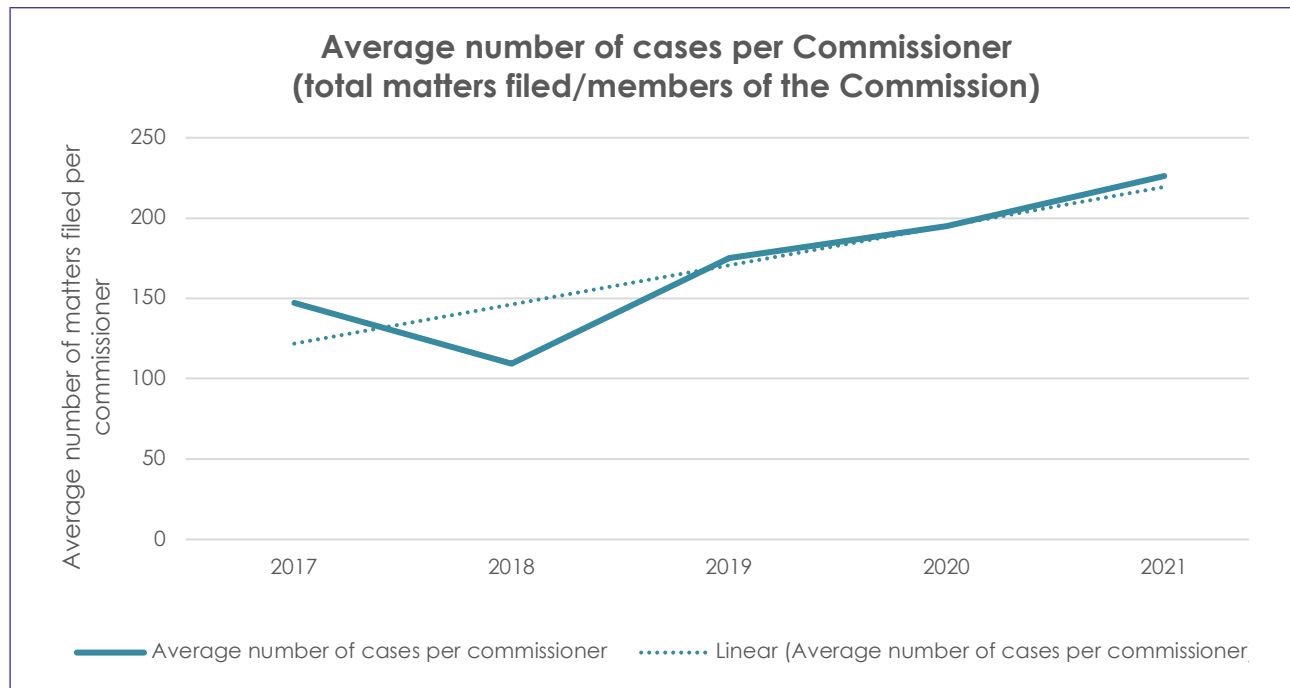


Figure 2.4 Number of arbitrated hearing days compared with number of Commissioners

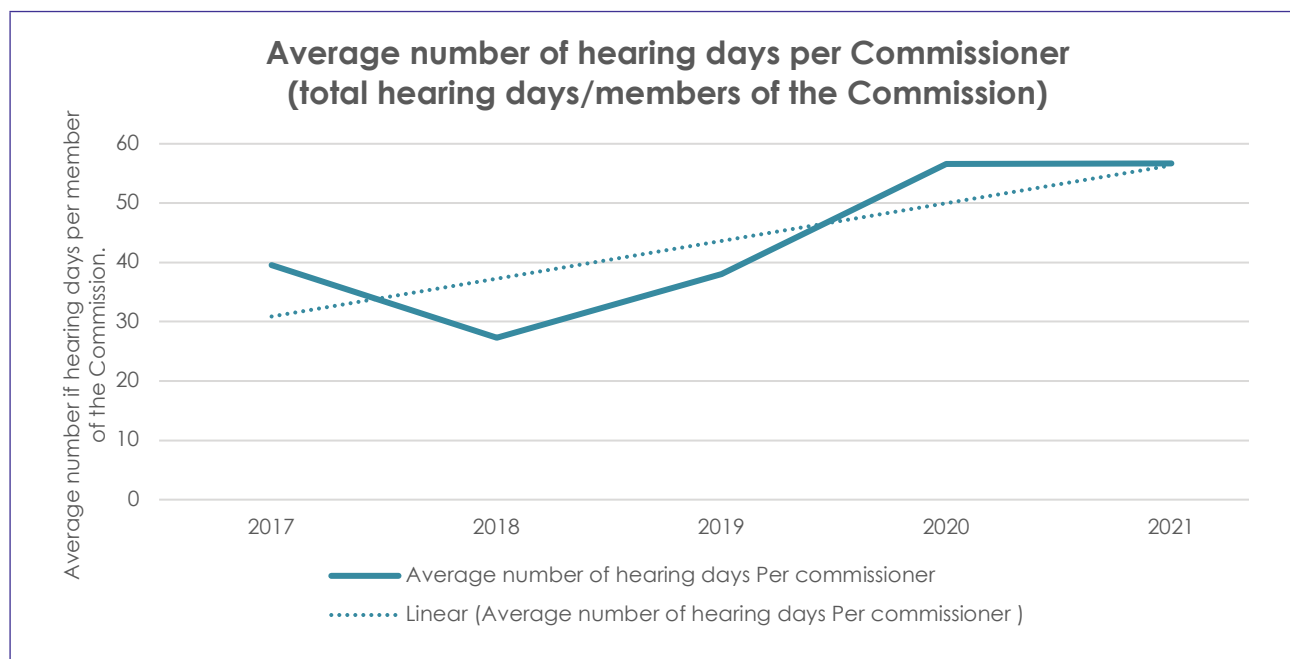


Table 2.5 Number of Cases per Commissioner

Year	Total matters filed	Total members of the Commission	Average number of cases per Commissioner	Average number of hearing days per Commissioner
2017	883	6	147.2	39.5
2018	875	81	109.4	27.3
2019	946	5.4	175.2	38.0
2020	859	4.4	195.2	56.6
2021	1081	4.78	226.15	56.69

Figure 2.3, Figure 2.4 and Table 2.5 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 resulted in a significantly higher workload for each Commissioner in 2021.

## Clearance Rates

The comparative clearance rate statistics for the Commission between 2017 and 2021 are summarised in Table 2.6.

Table 2.6 Clearance Rates: Finalised / Filed Matters

	2017	2018	2019	2020	2021
<b>Commission Clearance Rate</b>	106.1%	113.4%	94.0%	105.4%	91.7%

The clearance rate represents the number of matters finalised in the year divided by the number of matters filed in that same year.

The clearance rate dropped between 2020 and 2021. This was due to various reasons including: higher number of filings and therefore workload per Commissioner; delays as a consequence of the pandemic including vacation of hearings due to illness, parties wanting in-person hearings, and longer hearings due to technological or logistical difficulties; the increased number of matters proceeding to an arbitrated hearing and the increase in the length of hearings. However, the primary reason for this lower clearance rate is that matters completed by Commissioners have not been actioned for administrative closure. Administrative closing of files will be given a higher priority in 2022. This should reverse the negative trend in clearance rates.

## 2. PERFORMANCE CONT.

### Arbitrated Hearings

A matter will be listed for arbitration when it cannot be resolved through conciliation or compulsory conferences presided over 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 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 come to a consensus and narrow the issues in dispute where possible and are given opportunities to reach settlement prior to and during the arbitrated hearing. Consequently, arbitrated hearings (and the resulting published decisions) represent only a small proportion of all appearances before the Commission.

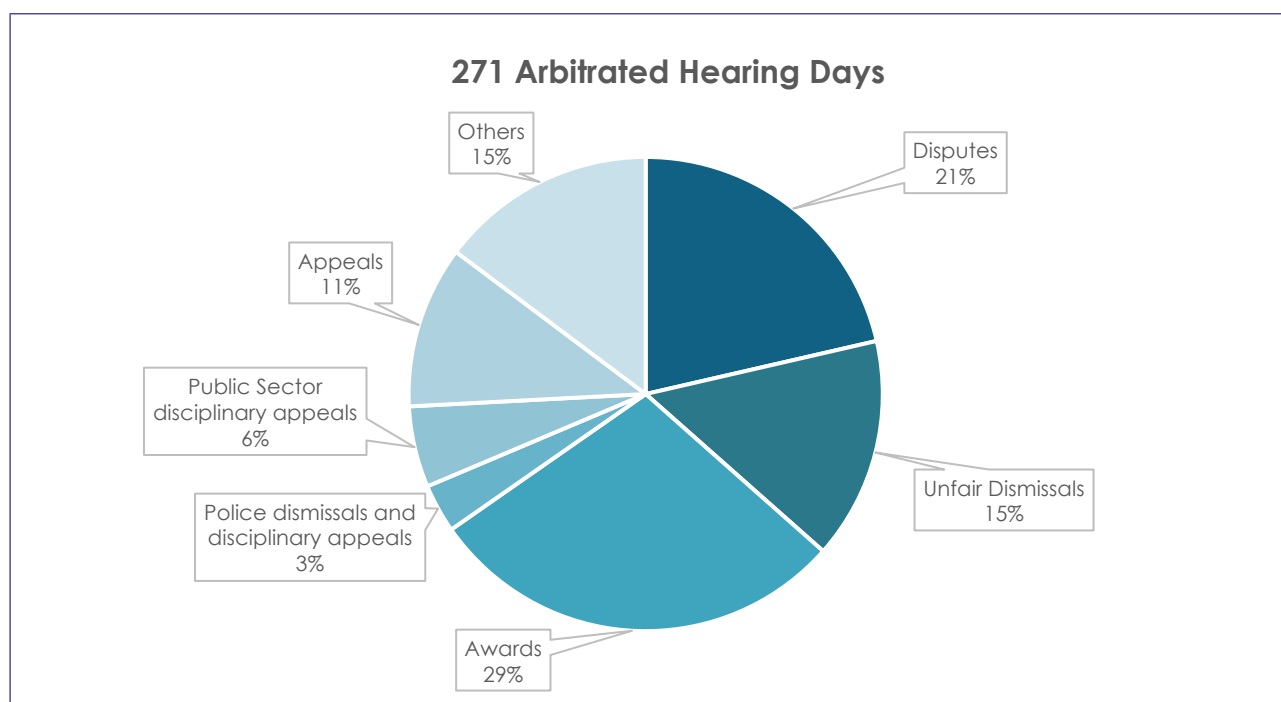
Table 2.7 Arbitrated Hearings

	2017	2018	2019	2020	2021
Total number of arbitrated hearings	104	103	94	104	111
Total number of hearing days	237	218	205	249	271
Average length of arbitrated hearing	2.28	2.12	2.18	2.39	2.44

The above table contains data for arbitrated hearings in 2021 and the previous four years.

The calculation of the total number of arbitrated hearings and the total number of arbitrated hearing days excludes hearings of motions, consent hearings and other interlocutory hearings. In 2021, there were an additional 46 hearing days for notices of motion before the Commission.

Figure 2.8 Distribution of arbitrated hearing days in 2021 by matter type



## Time Standards

The Commission first established time standards in 2004 for the time between lodgement (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. The Commission re-evaluated the time standards in 2018 as attached as Appendix 1. Since the introduction of the time standards, the number of Commissioners has reduced, and the volume of evidence submitted by parties in arbitrations has increased significantly. In the past four years the Commission's workload has increased on average 13.4% per year.

The Commission accommodates urgent disputes to reduce or prevent disruption to workplaces across NSW. Commissioners are acutely aware of the need to list matters involving industrial action on an urgent basis, outside court hours and on weekends, regardless of workload. Almost 70% of disputes were listed within five days. Many disputes were notified after closure of the Registry, including after close of business on Fridays.

The Commission's delivery against the time standards for the time to first listing is not adjusted for circumstances when parties request that their first listing be delayed either at the time of notification of the dispute or after the parties are informed of the details of the first listing. Parties also often request that arbitration listings be vacated and relisted. These matters impact the ability of the Commission to meet time standards for the listing and finalisation of matters.

As noted above, there was a substantial increase in the number of matters before the Commission in 2021. Parties regularly sought multiple compulsory conferences or conciliations for the one matter. In some instances, this was a consequence of the hearings being held via teleconference and VCR facilities. In any event, the increased number of appearances prolonged the time taken to resolve matters, contributing to the Commission's reduced compliance with time standards for the time taken between commencement and finalisation of a matter.

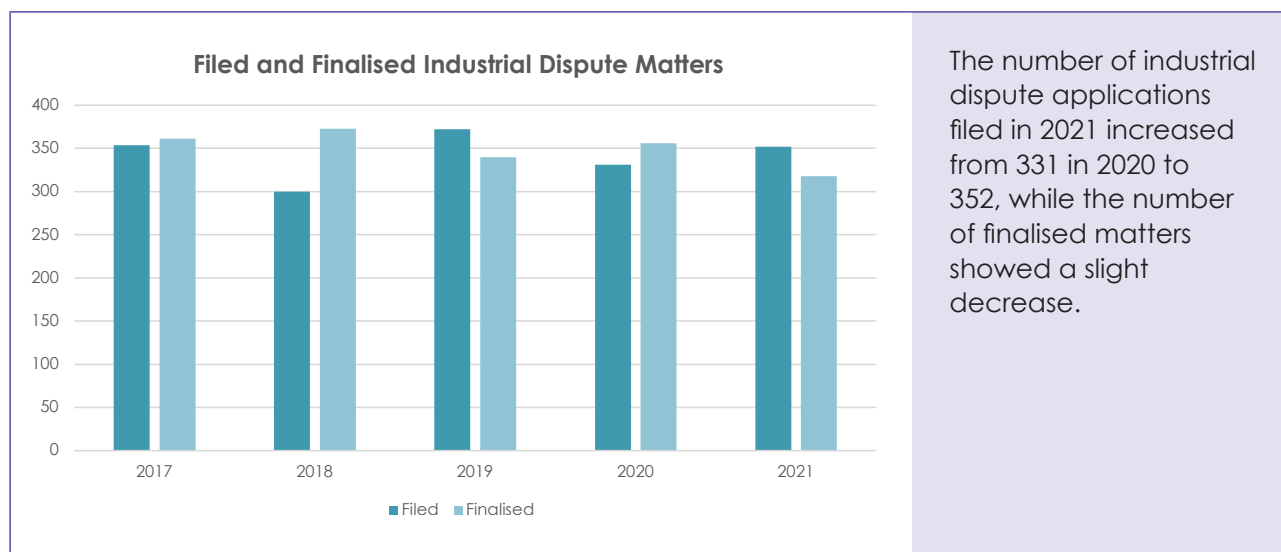
## 2. PERFORMANCE CONT.

### 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 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 and is empowered to make a range of orders that are binding on all parties.

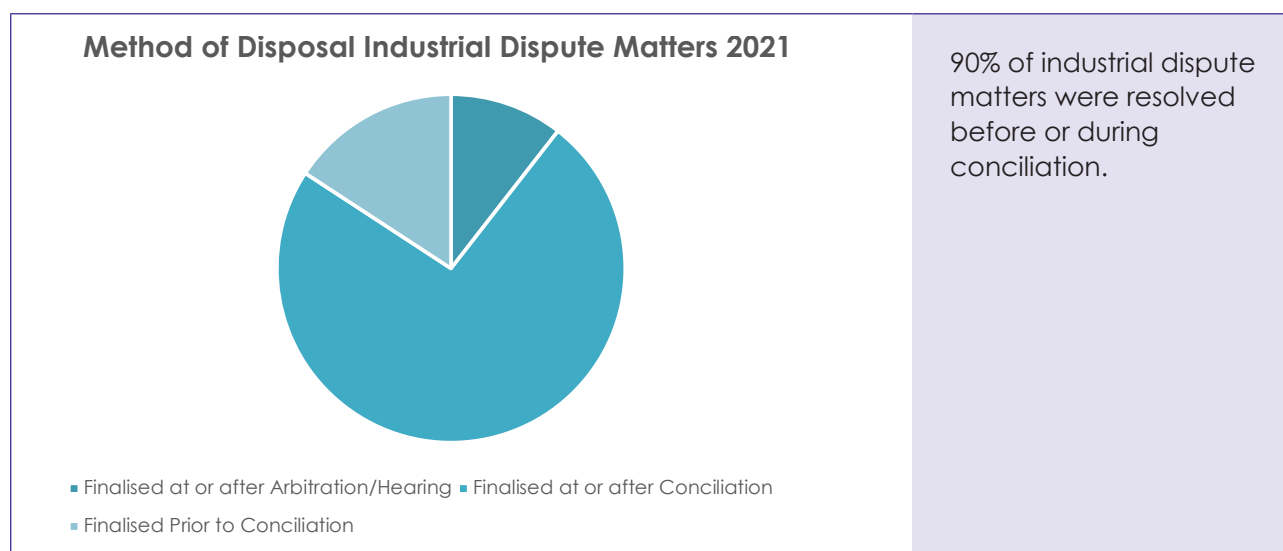
Figure 2.9 Filed and finalised dispute matters



Industrial dispute matters are the most common type of matter filed with the Commission and represented 32.56% of the total filings for the Commission during 2021, slightly down from 38.5% in 2020.

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 2021, given the disruption that the pandemic caused to workplaces across NSW these past two years 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 response by the government, employer groups and industrial organisations to the pandemic.

Figure 2.10 Method of disposal of industrial disputes



90% of industrial disputes were resolved at conciliation in 2021, compared to 80.7% in 2020.

16% of industrial disputes were resolved prior to conciliation. This was up from 11.8% of industrial dispute matters in 2020.

11% of industrial disputes were finalised at or after arbitration.

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 2.11 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)
2017	24.8%	36.7%	63.9%
2018	24.6%	38.5%	84.5%
2019	25.0%	37.0%	65.2%
2020	31.2%	44.6%	67.5%
2021	26.10%	42.45%	77.3%

## 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 2.12 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)
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%
2021	43.42%	58.88%	86.5%	93.75%

The percentage of matters finalised within two and three months of filing remained steady from 2020 to 2021 compared with 2020. However, slightly more matters were finalised within the six and nine months’ targets in 2021. 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.

There were 31 industrial disputes that proceeded to arbitration in 2021, compared to 29 in 2020, taking up 58 of the Commission’s 271 arbitrated hearing days in 2021 compared to 43 in 2020.



## Unfair Dismissals

Under Pt 6 of Ch 2 of the Act, the Commission is responsible for determining applications by Government 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 listed initially for conciliation conference (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). In deciding whether the dismissal was harsh, unjust or unreasonable, 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.

If an unfair dismissal matter proceeds to an arbitrated hearing, the Commission has jurisdiction under s 89 of the Act 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 an arbitrated decision.

### 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.

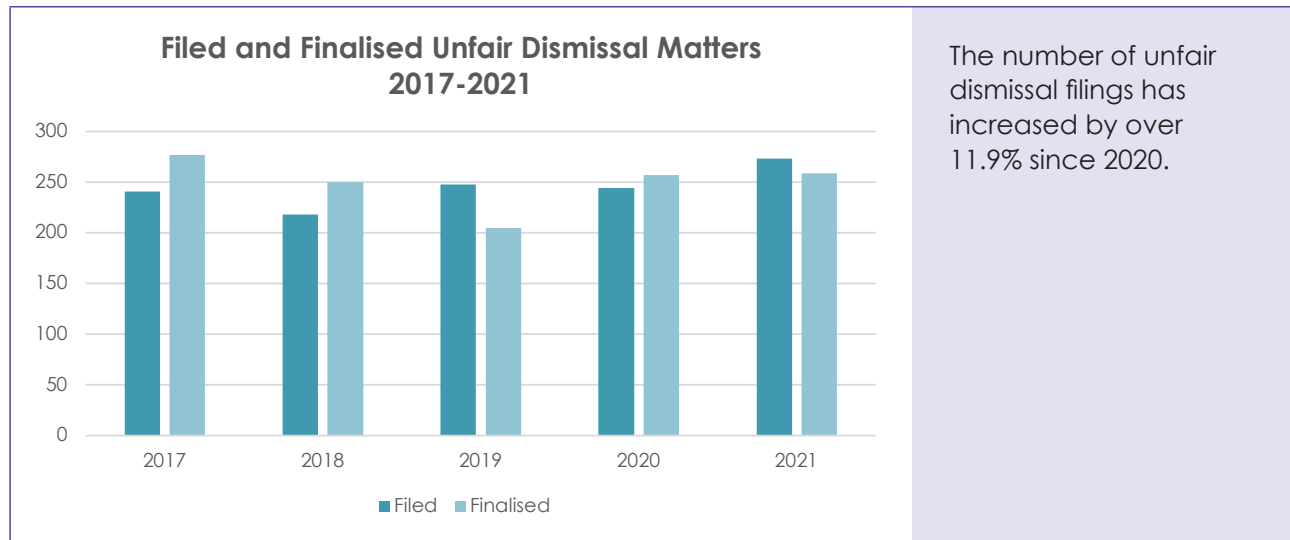
The Act requires that an application for unfair dismissal must be made within 21 days of the employee's dismissal unless the Commission determines otherwise (s 85).

Until recently, the generally accepted view was that police officers who are dismissed may only seek recourse under s 181D of the *Police Act* and cannot invoke 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 who was 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 reversed this and 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).

Whilst not in the reporting period, on 16 March 2022, the question was finally resolved by the High Court, which had granted special leave to appeal to the Commissioner of Police on 12 April 2021. The High Court dismissed with costs the appeal by the Commissioner of the NSW Police Force. The plurality (Kiefel CJ, Keane, Gordon and Steward JJ) held that the Commission did have jurisdiction to hear and determine Mr Cottle's application pursuant to s 84(1) of the *Industrial Relations Act 1996*.

## 2. PERFORMANCE CONT.

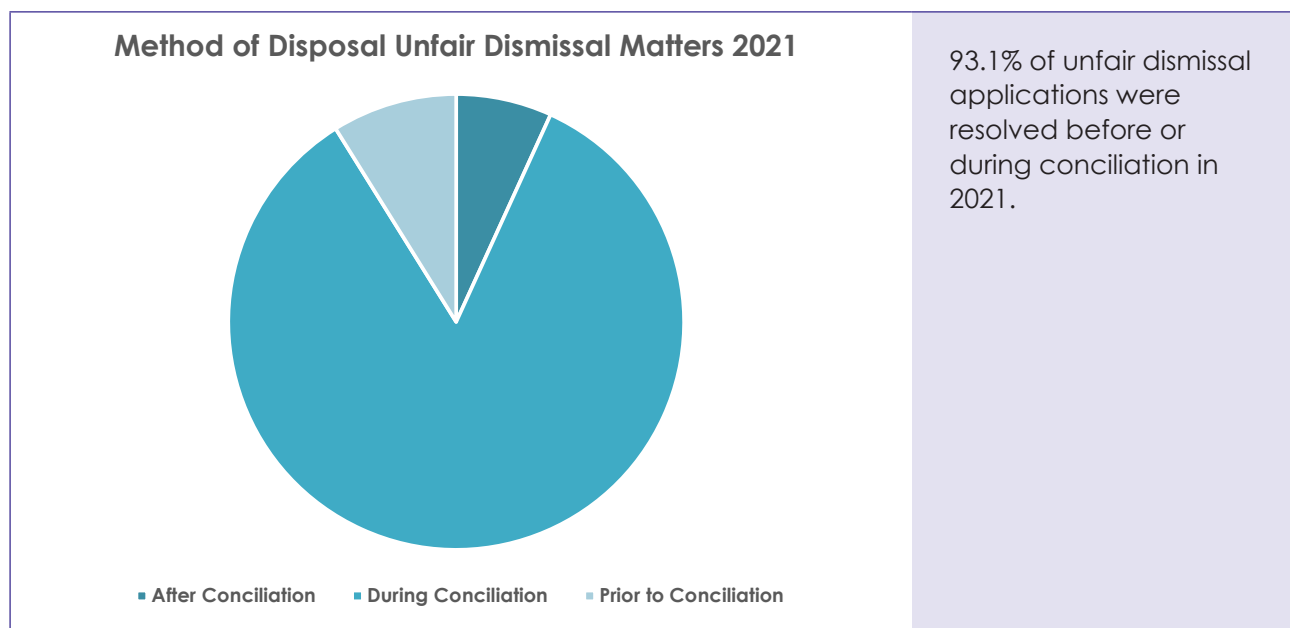
Figure 2.13 Filed and finalised unfair dismissal matter



	2017	2018	2019	2020	2021
Filed	241	218	248	244	273
Finalised	277	250	205	257	259

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 2021 was 273, representing 25.2% of the Commission's total filings, an 11.9% increase from the 244 matters filed in 2020.

Figure 2.14 Disposal of Unfair Dismissal Matters in 2021



In 2021, 8.87% unfair dismissal matters were resolved before conciliation, very similar to 9% in 2020. This indicates a willingness of parties, even after filing an unfair dismissal application, to consider resolution without the formal assistance of the Commission.

Table 2.15 Filing of unfair dismissal claims

	2017	2018	2019	2020	2021
<b>Application filed by:</b>					
Individual (Unrepresented)	63	61	46	37	89
Legal Representative	56	53	32	22	58
Organisation Representative	121	104	169	185	126
<b>TOTAL</b>	<b>240</b>	<b>218</b>	<b>247</b>	<b>244</b>	<b>273</b>

In 2021 there was a significant increase in unfair dismissal claims initiated by applicants representing themselves. There were less applications commenced by industrial organisations compared with previous years, but an increase in filing of unfair dismissal applications by legal representatives in 2021.

## Time Standards

There are two sets of time standards relating to unfair dismissals:

1. an application for unfair dismissal should be listed for its first conciliation hearing within 28 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 2.16 Time taken to first listing of unfair dismissal matters after filing

Listed within	7 Days	14 Days	21 Days	28 Days
<b>2019</b>	6.4%	19.7%	45.4%	72.9%
<b>2020</b>	9.4%	26.9%	51.4%	70.3%
<b>2021</b>	6.74%	24.71%	60.31%	76.78%

The number of applications for unfair dismissal listed within 21 days of filing has improved in 2021, with a 17.33% increase compared with 2020. However, 23.22% of applications were not listed within 28 days of filing in 2021, being a slight decrease from 2020 where it was 29.7%.

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. Additionally, Commissioner Stanton worked two days a week in Newcastle, which saw a delay in listing some of the Newcastle and Hunter region matters.

## 2. PERFORMANCE CONT.

It should also be noted that unfair dismissal applications are accepted for filing at local courts and then posted to the Commission. The day that the application is received at the local court is the date recorded as the date filed. On many occasions these applications are not received by the Commission at Parramatta for periods up to three weeks after the filing date and in some instances, longer. This has resulted in matters being listed after 28 days. After an application for unfair dismissal is filed with the Commission, the employer is given seven 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 seven days of being filed.

Table 2.17 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)
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%
2021	33.69%	55.55%	85.30%	92.47%

More matters satisfied the finalisation benchmarks in 2021 compared with the previous year.

In 2021 the Commission spent 249 days in conciliation of unfair dismissal matters (52.09 days per Commissioner on average) and 43 days in a total of 17 (down from 29 in 2020) 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.

## Awards and Enterprise Agreements

### Award and Enterprise Agreement Jurisdiction

One of the 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:

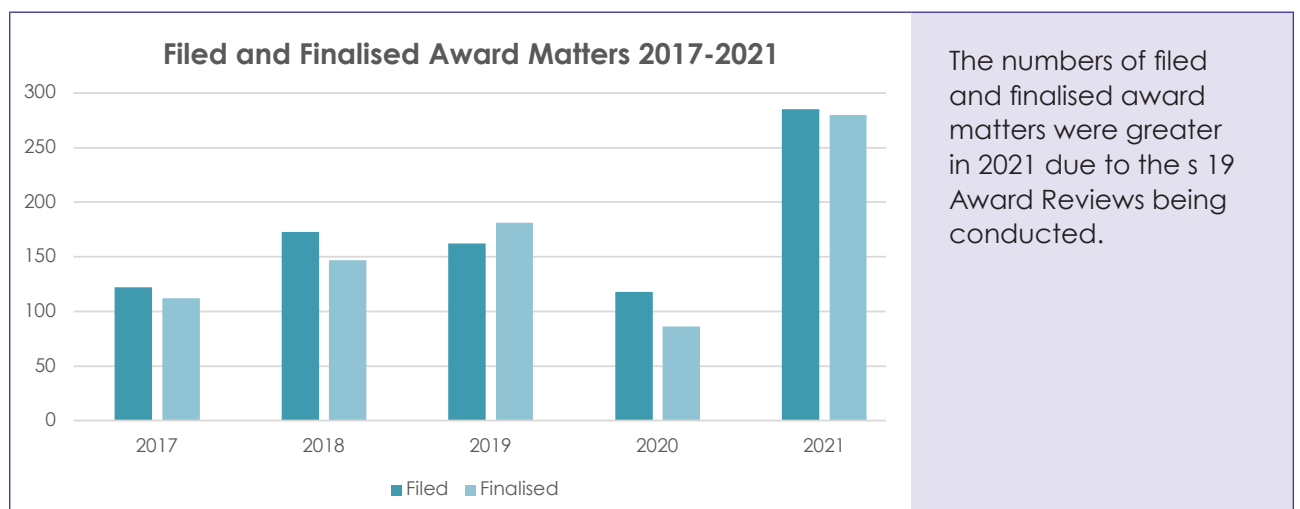
- make or vary awards (s 10 and s 17 respectively);
- approve enterprise agreements and variations of enterprise agreements (s 35 and s 43);
- review awards triennially (s 19); and
- consider the adoption of National decisions for the purpose of awards and other matters under the Act (s 50) (for example, 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 2.18 Filed and finalised award matters



Filings of award matters increased from 118 in 2020 to 285 in 2021, being 26.3% of total filings for the Commission in 2021 as opposed to 13.75% in 2020.

## 2. PERFORMANCE CONT.

Table 2.19 Award applications and award reviews between 2017-2021

	2017	2018	2019	2020	2021
<b>Filing of Awards</b>					
Application to make Award	82	78	82	41	81
Application to vary Award	37	12	26	72	42
<b>Review of Awards pursuant to s 19</b>					
Notice of Review issued	0	62	50	0	98
Awards reviewed	0	28	58	2	64
Awards rescinded	3	5	0	0	11
Declaration of Non-Operative Awards	0	0	0	0	0

The significantly higher numbers of filings of award matters in 2021 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 2021 for approximately half of the Commission's awards.

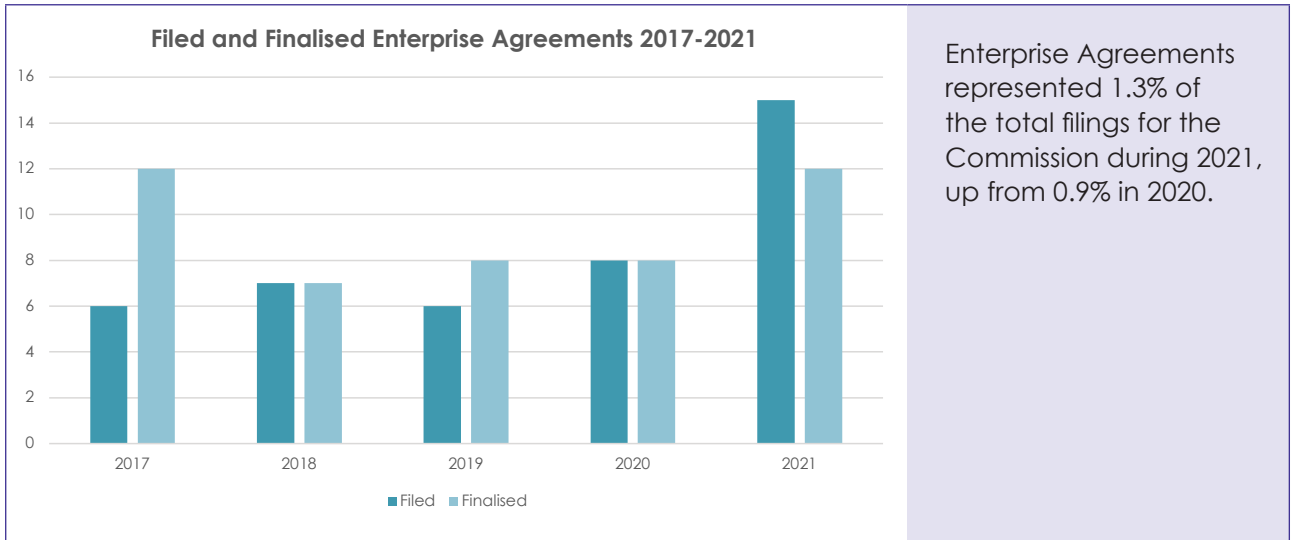
The number of applications to make new awards almost doubled from 2020 to 2021 from 41 to 81.

Once an award is made by the Commission (either by consent or following arbitrated hearing), it must be published on the Commission's website as required by s 15 of the Act. This involves a member of the Client Services reviewing an electronic copy award from the parties and manually formatting it to ensure consistency with other awards 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 approve 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). These principles were reviewed in 2021 and the new principles were published on 23 February 2022 in *Review of the Principles for Approval of Enterprise Agreements 2021/2022* [2022] NSWIRComm 1005.

Figure 2.20 Filed and finalised enterprise agreement matters



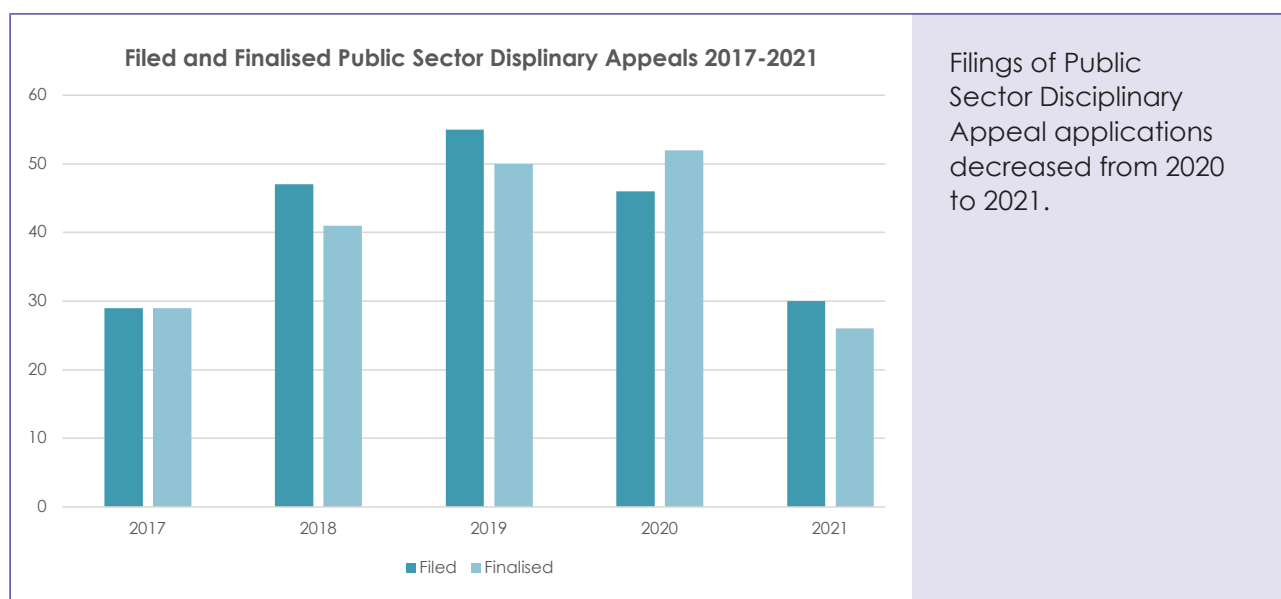
## 2. PERFORMANCE CONT.

### 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 or 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 conciliation (s 100E). Where the conciliation is unsuccessful, the matter proceeds to an arbitrated hearing. The Commission may make a wide range of orders that must be given effect by the employer.

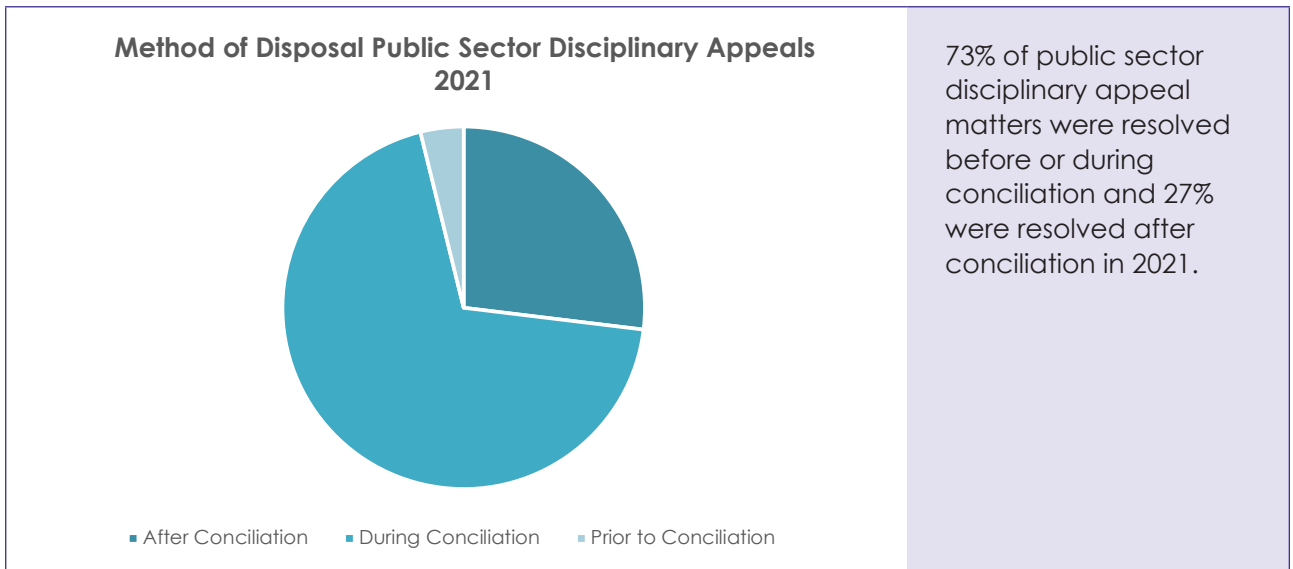
Figure 2.21 Filed and finalised public sector disciplinary appeal matters



There were 30 public sector disciplinary appeals filed in 2021, down from 46 in 2020. Public sector disciplinary appeals decreased to 2.77% of the total filings for the Commission in 2021, down from 5.2% in 2020. Public sector disciplinary appeals took up 13 (down from 25 in 2020) out of the Commission's 271 total hearing days in 2021 and were the subject of 7 out of 111 arbitrations.



Figure 2.22 Disposal of public sector disciplinary appeals in 2021



In 2021 27% of matters were finalised after conciliation compared with 20% in 2020.

### Time Standards

Table 2.23 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)
2017	9.8%	63.0%	69.6%	89.1%
2018	10.3%	62.9%	70.0%	88.6%
2018	43%	55.1%	68.2%	85.0%
2020	11.1%	33.3%	44.4%	73.3%
2021	14.8%	22.2%	48.14%	66.66%

In 2021, there was an increase in meeting the 1 month and 3 months' targets and a reduction in the Commission's performance against the other targets compared with 2020.

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 resolve all public sector disciplinary appeals within six months is due to several factors including the increasing complexity of these matters, the increasing amount of evidence filed and heard in these matters, the consequent increased number of hearing days and parties seeking to delay hearings during the pandemic until they could be conducted in-person.

## 2. PERFORMANCE CONT.

### 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* entitles an officer to seek review of such a removal (a "dismissal appeal") by the Commission.

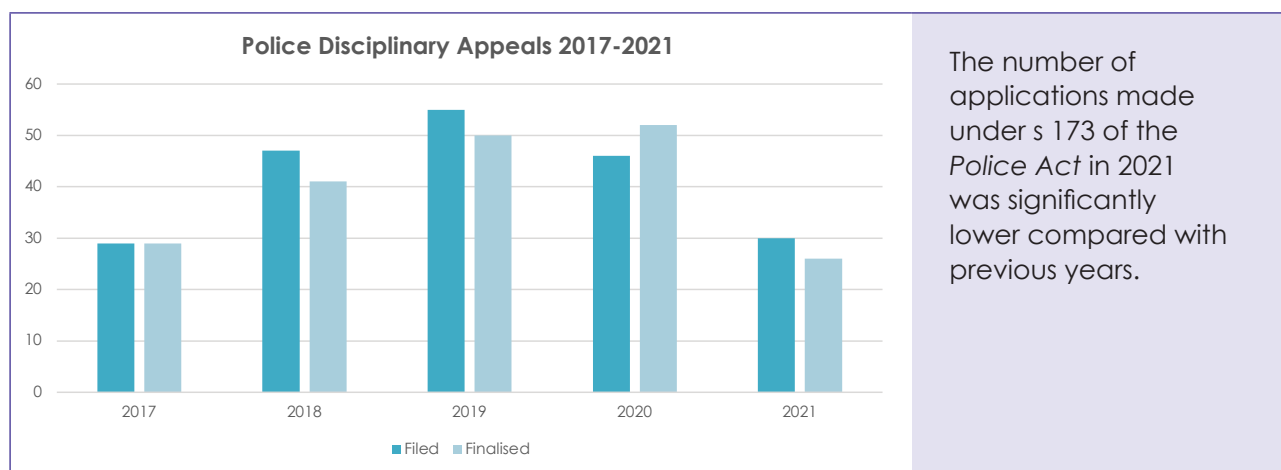
Each matter is initially listed for a conciliation conference in which the Commission will attempt to assist the parties to reach a settlement. If conciliation is unsuccessful, the matter proceeds to an arbitrated hearing where the affected officer must establish that the action taken by the Commissioner 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 2021 were Australian lawyers.

While police dismissals and disciplinary appeals represent only a small proportion of the Commission's total filings: 3.14% of filings in 2021, up from 2.33% of filings in 2020, they take up a larger proportion of hearing days compared with other matter types.

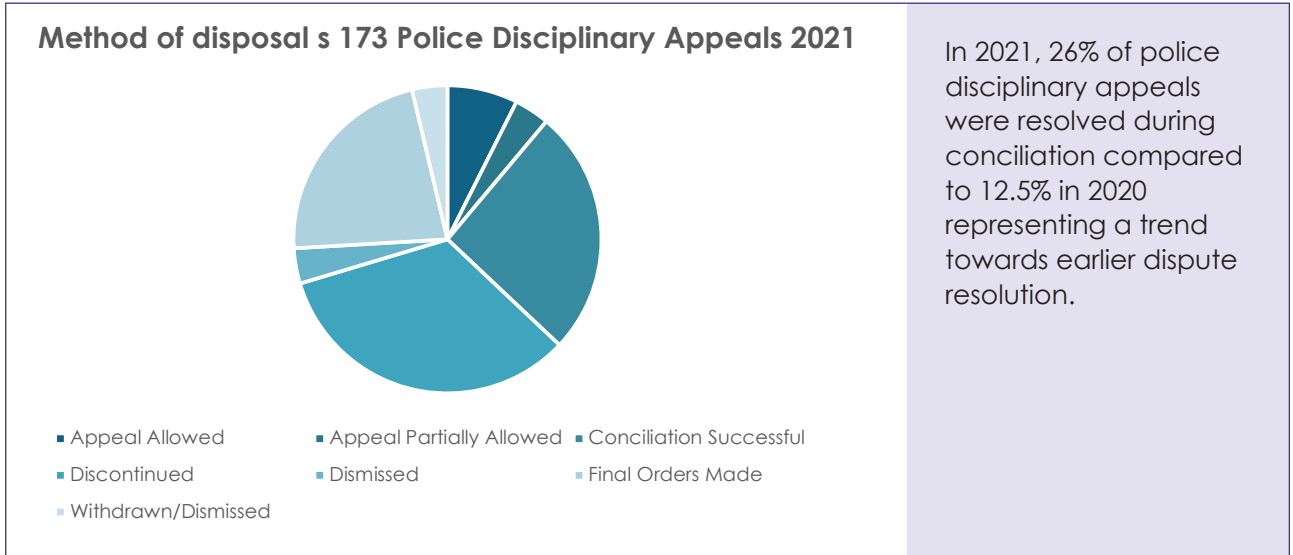
#### Section 173 Police Disciplinary Appeals

Figure 2.24 Filed and finalised police disciplinary appeal matters



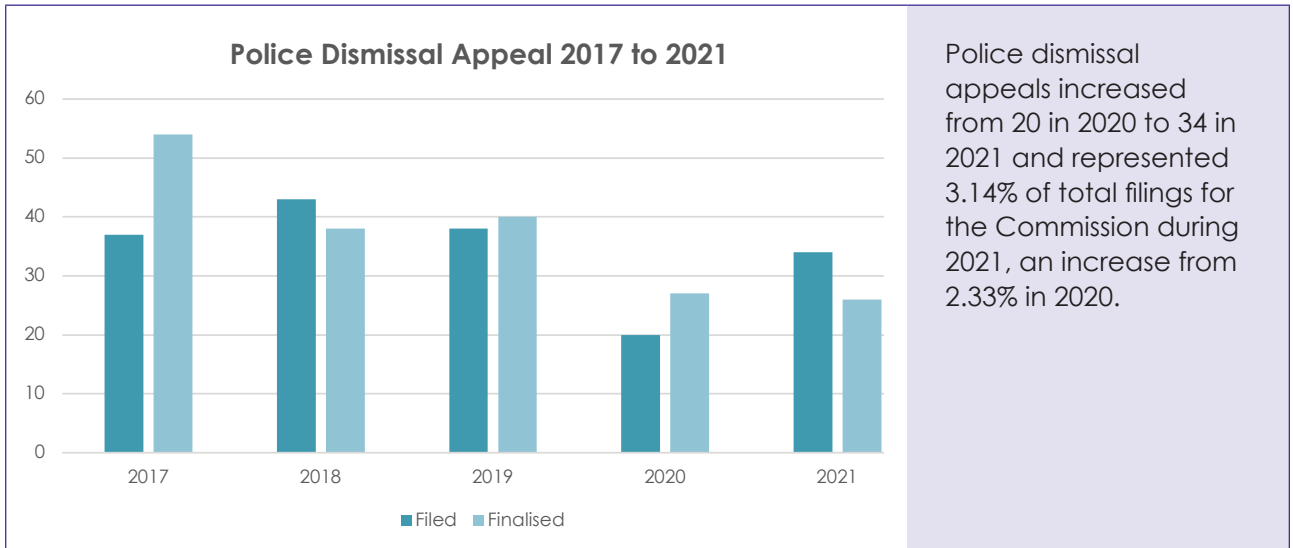
Police disciplinary appeals under s 173 of the *Police Act* represented 3.14% of the Commission's total filings in 2021 compared to 1.3% of the Commission's total filings in 2020.

Figure 2.25 Disposal of police disciplinary appeal matters in 2021



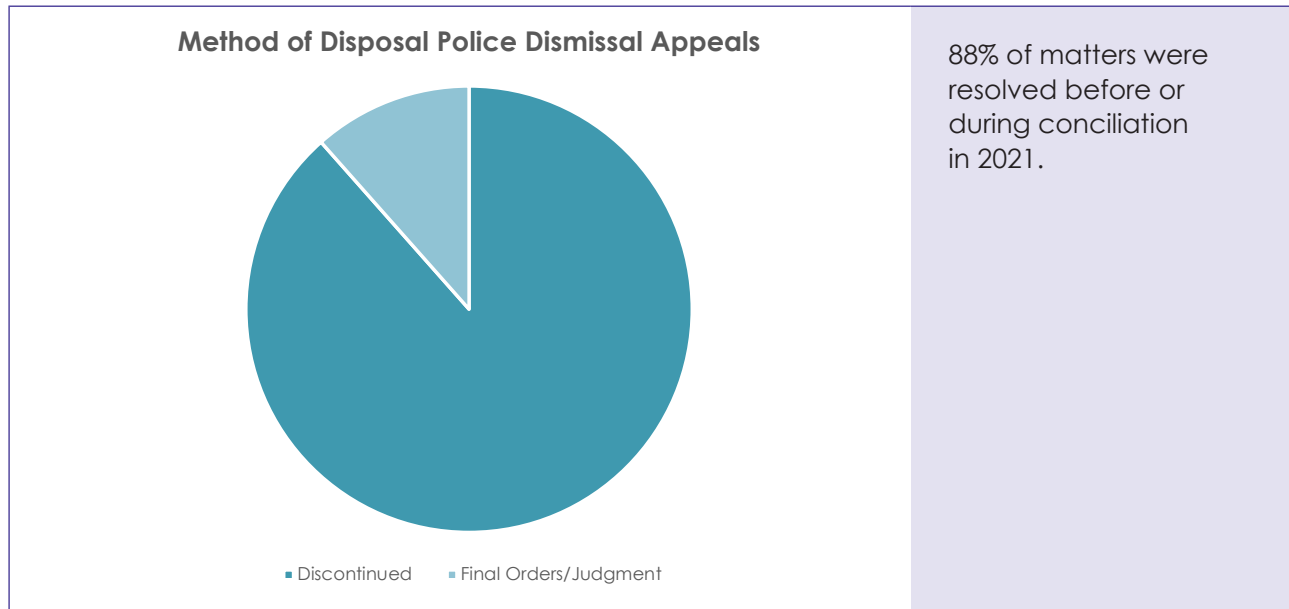
### Section 181D Police Dismissal Appeals

Figure 2.26 Filed and finalised police dismissal appeal matters



## 2. PERFORMANCE CONT.

Figure 2.27 Disposal of police dismissal appeal matters in 2021



In 2021, 88% of police dismissal appeals were resolved either before or during conciliation compared to 60% in 2020, a notable increase from previous years.

When considered together with the data concerning applications under s 173 of the Police Act, this suggests a trend towards earlier settlement. 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 2021.

### Time Standards

Table 2.28 Time taken to finalise police disciplinary and dismissal appeals after filing

	2017	2018	2019	2020	2021
<b>S 173 Police Disciplinary Appeals</b>					
Completed within 6 months	82.2%	83.3%	83.0%	53.3%	75%
Completed within 12 months	98.3%	99.3%	98.1%	73.3%	91.6%
<b>S 181 Police Dismissal Appeals</b>					
Completed within 6 months	90.5%	90.6%	93.2%	50.0%	66.6%
Completed within 12 months	100%	99.8%	98.8%	80%	83.3%

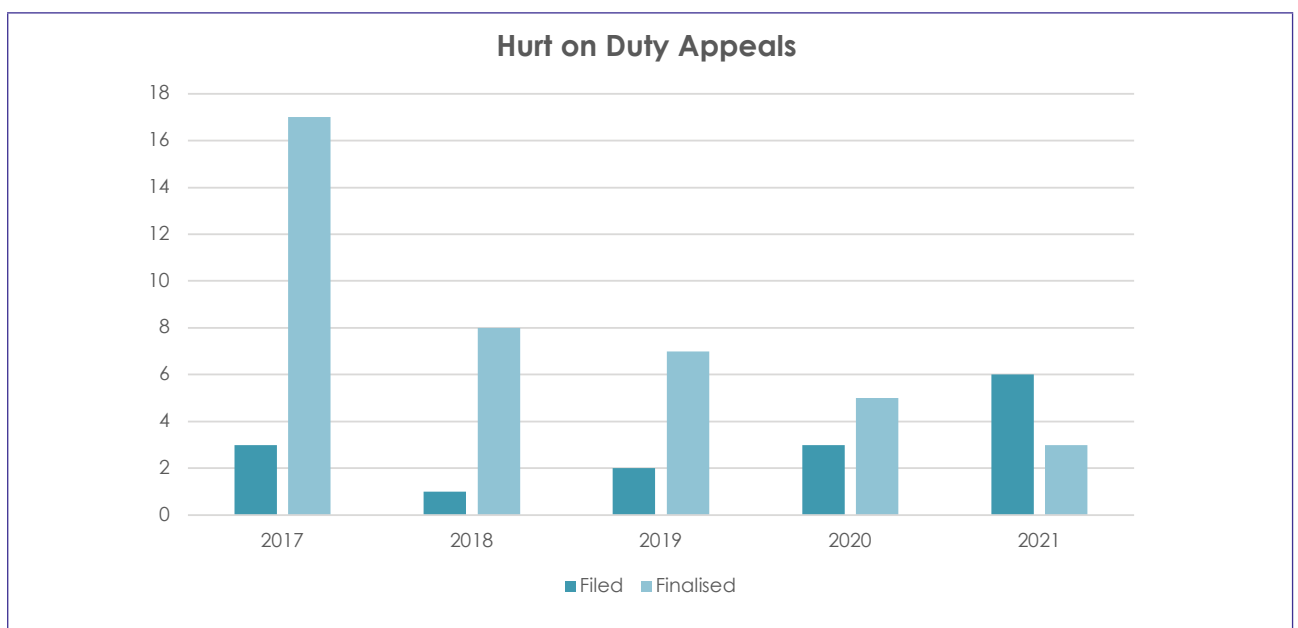
There was a significant increase in the percentages of police disciplinary and dismissal appeals being completed within six months of filing in 2021. Completion within 12 months also improved when compared to 2020.

Applications under ss 173 and 181D of the Police Act typically involve large volumes of evidence and are highly contentious, and therefore often take longer to resolve than unfair dismissal claims.

## 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 2.29 Filed and finalised hurt on duty appeals



There was an increase in filings of hurt on duty appeals made by police officers in 2021 being six applications up from only three in 2020. The finalisation has dropped from five in 2020 to three in 2021. These matters are often adjourned for significant periods awaiting the determination of matters in other jurisdictions and this impacts the time to completion of the Commission's matter.

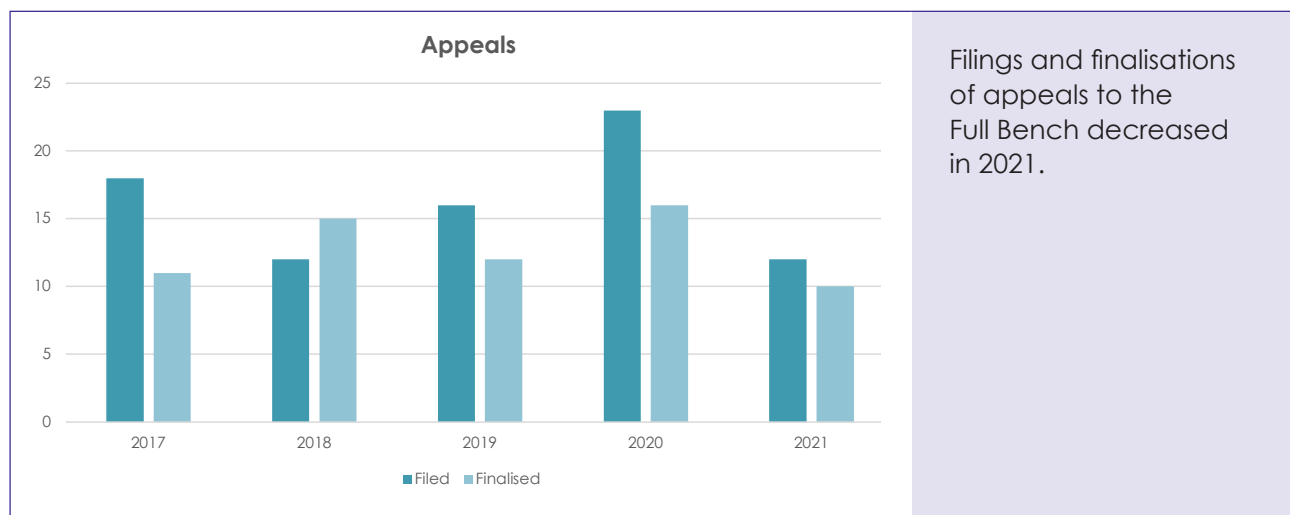
## 2. PERFORMANCE CONT.

### Appeals to a Full Bench of the Commission

Pursuant to s 187 of the Act, an appeal to the Full Bench of the Commission may be filed against a decision of a single Commission member. A Full Bench must be made up of at least three Commissioners (s 156(1) of the Act). 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 notice of the likely listing of appeals by setting aside a week each quarter in March, June, September and November 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 2.30 Filed and finalised appeals to the Full Bench



There were 12 filings of appeals to the Full Bench of the Commission in 2021, down from 23 in 2020. These matters concerned industrial disputes, unfair dismissals, awards, external review of a decision of a Safework inspector, and police disciplinary appeals.

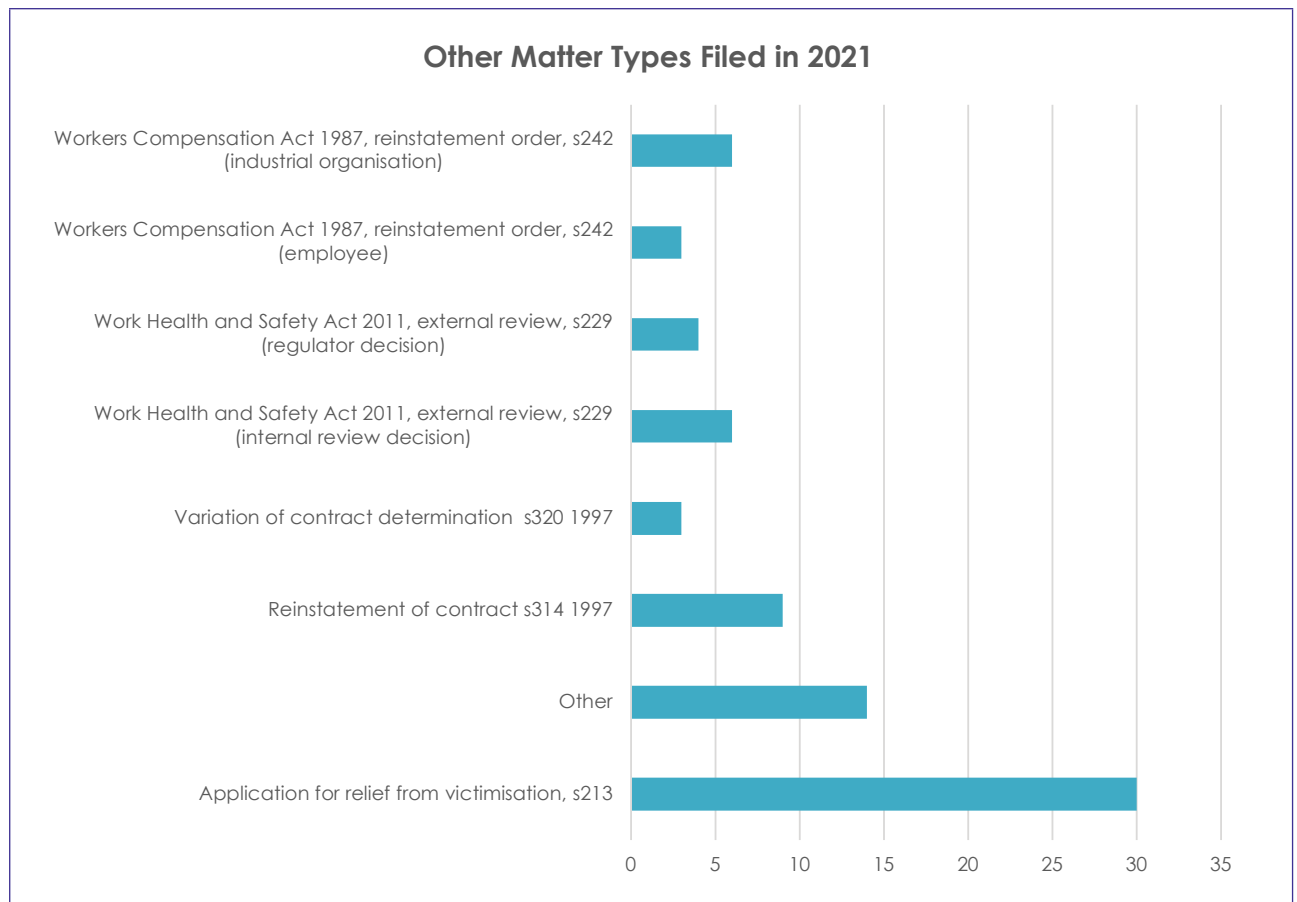
Appeals comprised 11% of the Commission's arbitrated hearing days in 2021.

## Other Matters

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

- Agreements concerning contract conditions (subs 322(2) of the Act)
- Applications for relief from victimisation (s 213 of the Act)
- Applications in respect of Industrial Committee (s 200(3) of the Act)
- Making of contract determination (s 316 of the Act)
- Reinstatement of contracts (s 314 of the Act)
- Stand down orders (s 126 of the Act)
- Variation of contract determinations (s 320 of the Act)
- Work Health and Safety Act right of entry disputes (s 142 of the *Work Health and Safety Act 2011* ("the WHS Act"))
- Work Health and Safety Act external reviews (s 229 of the WHS Act)
- Workers Compensation Act reinstatement orders (s 242 of the *Workers Compensation Act 1987*)

Figure 2.31 Matters filed in 2021 falling into the 'Other' category



## 2. PERFORMANCE CONT.

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Applications for relief from victimisation comprised 30 of the Commission's total filings in 2021, almost double the 16 filed 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 of carriage or bailment 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. There were 12 such applications in 2021.

In 2021 there were 10 applications under s 229 of the WHS Act for external review of reviewable decisions made by the relevant regulator (SafeWork NSW) and/or decisions made on internal review, amounting to 0.9% 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 2.32** Matters filed in 2021 concerning industrial organisations

	2017	2018	2019	2020	2021
Work Health and Safety Permits	162	150	282	200	207
Right of Entry Permits	108	72	106	31	68
Special Wage Permits	25	25	34	36	33
Conscientious Objection Certificates	1	0	0	0	0
Rule Changes to Registered Organisations	10	10	9	9	14
Election Requests for Registered Organisations	19	10	14	12	15
Others	5	1	2	1	5
<b>Total Filed for the Year</b>	<b>330</b>	<b>268</b>	<b>447</b>	<b>289</b>	<b>342</b>

These applications are not included in the data of filings set out above in Table 2.2. They account for an additional 15% of applications to the Commission in 2021.

# 3. SIGNIFICANT CASES AND LEGISLATIVE CHANGES



## Significant cases

### Public Sector Award Matters

In 2021, most awards applying to employees in the NSW Government Sector were varied by consent to include awarding a 2.5% increase in salary and allowances inclusive of compulsory superannuation contributions from 1 July 2021, or new awards were made which included this increase.

Two exceptions were the awards applying to permanent and retained firefighters. On 24 August 2021, the Full Bench of the Commission handed down its decision in *Fire and Rescue NSW Firefighting Staff Awards 2021* [2021] NSWIRComm 1062 making two new awards which were titled “Crown Employees (Fire and Rescue NSW Retained Firefighting Staff) Award 2021”, and “Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2021”, pursuant to s 10 of the Act, and rescinding the existing awards. In making the new awards the Commission applied the same percentage increase (0.3%) to the rates of pay and allowances as that contained in *Crown Employees (Public Sector Salaries 2020) Award and Other Matters (No 2)* [2020] NSWIRComm 1066.”

### State Wage Cases and Wage Fixing Principles

On 18 October 2021, after consideration of the parties’ positions regarding the Wage Fixing Principles which had followed from the *State Wage Case 2020*, the Full Bench published its decision *State Wage Case 2020 (No 2)* [2021] NSWIRComm 1079. In that case the Full Bench promulgated new Wage Fixing Principles to apply on and from 18 October 2021.

On 11 March 2022, the Full Bench published its decision, *State Wage Case 2021* [2022] NSWIRComm 1014 (“State Wage Case 2021”). In the State Wage Case, the Full Bench had made orders by consent on various dates adopting the Annual Wage Review 2020-2021 [2021] FWCFB 3500 as a National decision as provided under s 50 of the Act and increasing rates of pay and work-related allowances by various amounts pursuant to s 52 of the Act. The relevant orders being:

- On 21 October 2021, the Full Bench increased by 2.5% salaries and allowances effective from the first full pay period (“ffpp”) on or after 8 October 2021 in the following awards:
  - Local Government (Electricians) (State) Award;
  - Nursing Homes, &c., Nurses’ (State) Award;
  - Entertainment and Broadcasting Industry - Live Theatre and Concert (State) Award;
  - Local Government, Aged, Disability and Home Care (State) Award; and
  - Nurses’ (Private Sector) Training Wage (State) Award.
- On 3 November 2021, the Full Bench made orders increasing by 2.5% salaries and allowances in the Marine Charter Vessels (State) Award. This was effective from the ffpp on or after 8 October 2021.

- On 15 December 2021, the Full Bench made orders, effective from the ffpp on or after 16 December 2021:
  - that the salaries and allowances in the Miscellaneous Workers Home Care Industry (State) Award be increased by 2.5%; and
  - that the salaries and allowances in the Clerical and Administrative Employees (State) Award be increased by 2.04%
- On 22 December 2021, the Full Bench made orders that the salaries and allowances in the Security Industry (State) Award and the Miscellaneous Workers' – Kindergarten and Child Care Centres, &c. (State) Award be increased by 2.04%, effective from the ffpp on or after the 16 December 2021.
- On 27 January 2022, the Full Bench made orders that the salaries and allowances in the Health Fitness and Indoor Sports Centres (State) Award be increased by 2.04% effective from the ffpp on or after 16 December 2021.
- On 3 March 2022, the Full Bench made orders that the salaries and allowances in the Transport Industry (State) Award be increased by 2.04%, effective from the ffpp on or after 1 April 2022.

The State Wage Case 2021 also updated the Wage Fixing Principles pursuant to s 51 (1) of the *Industrial Relations Act 1996*, effective from 11 March 2022.

# 3. SIGNIFICANT CASES AND LEGISLATIVE CHANGES CONT.

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## Legislative Amendments

A range of amendments to legislation and regulations were introduced and/or continued in 2021 in continued response to the COVID-19 pandemic. These included the following:

- *Electronic Transactions Amendment (Remote Witnessing) Act 2021* [Assented to 29 November 2021] – An Act to amend the *Electronic Transactions Act 2000* to make permanent certain provisions about the remote witnessing of documents; to amend the *Oaths Act 1900* to expand the classes of persons before whom oaths and statutory declarations may be made; and for other purposes.
- *COVID-19 Recovery Act 2021* [Assented to 25 March 2021] – An Act to amend a number of Acts and regulations to temporarily remake or extend measures implemented as a result of the COVID-19 pandemic; and for other purposes. This includes:
  - *Annual Holidays Act 1944* – The amendment extended the operation of provisions providing for the accrual of annual holidays by workers who are stood down.
  - *Industrial Relations Act 1996* – The amendments extended the operation of provisions allowing regulations to be made that will permit an election of officers in State organisations to be postponed. The amendments also provided for the repeal of provisions that were inserted to deal with the COVID-19 pandemic to bring their repeal in line with other provisions dealing with the pandemic.
  - *Long Service Leave Act 1955* – The amendments extended the operation of provisions providing more flexibility about the taking of long service leave during the COVID-19 pandemic and the accrual of long service leave by workers who are stood down.
- *Electronic Transactions (ECM Courts) Amendment (Digital Case File Application) Order 2021* made on 16 July 2021 under the *Electronic Transactions Act 2000*. The objects of this Order are:
  - (a) to establish Digital Case File Application as an electronic case management system, and
  - (b) to authorise the use of Digital Case File Application for certain purposes in certain proceedings in the following:
    - (i) Supreme Court,
    - (ii) Land and Environment Court,
    - (iii) Industrial Relations Commission,
    - (iv) District Court,
    - (v) Local Court,
    - (vi) Children’s Court,
    - (vii) Civil and Administrative Tribunal,
    - (viii) Dust Diseases Tribunal,
    - (ix) Coroners Court.

## Commission Rules

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. The Rule Committee has instructed the Parliamentary Counsel's Office to draft new rules. It is anticipated that these rules will be made in 2022.

The Chief Commissioner may co-opt other (non-Commissioner) members to the Rule Committee pursuant to subs 186(2) of the Act. The co-opted members of the Rule Committee are:

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

The Commissioner members and the co-opted members of the Rule Committee met in 2021 to establish priorities including updating the Rules and updating key forms to be accessed and filed electronically and will continue to meet consistent with the Commission's priorities and capacity.

## Practice Note 32

Following consultation with the IRC User Group and co-opted members of the Rule Committee, the Commission issued new Practice Note 32 in 2021, effective 11 February 2021. This Practice Note provides directions as to the length, presentation and formatting of documents filed with the Commission.

The intention of the Practice Note is to facilitate the efficient determination of matters before the Commission by requiring that documentation filed in the Commission is properly presented, formatted and limited to a length commensurate with the just, quick and cheap resolution of the real issues in the proceedings.

# 4. ENGAGEMENT, EDUCATION AND PROJECTS



## Education and Engagement Programs

The User Group which includes representatives from Local Government, unions representing public sector employees, NSW Government agencies, the legal profession and the Bar met virtually in March and September 2021. The User Group forums facilitate the engagement of key stakeholders of the Commission.

Various external presentations and conferences were postponed and/or cancelled as a result of the pandemic. The Education Committee of the Commission will look at further educational courses to relevant employer and employee groups in 2022.

## Projects of the Commission

Various projects were in development for the Commission throughout 2021 and will continue in 2022. These projects include the following:

- The Commission is working to make the most common used Commission forms available through the NSW Online Registry, a portal for the filing of applications and related documents in NSW Courts. It is estimated that two forms will be available through the Online Registry in early 2022 with more forms available later in 2022.
- In September 2021, the Commission began to accept payments through a secure online portal, rather than through manual processing of invoices in order to protect the parties' details.
- It is expected that Commission parties will be able to access the NSW Courts-wide transcript portal, which allows registered users to request, pay for and access transcripts from any jurisdiction in the next year.

# 5. APPENDICES

## APPENDIX 1

### TIME STANDARDS – Industrial Relations Commission

Nature of matter	Provide to Chief Commissioner or Delegate	Legislative Provision	Allocation	List for Conciliation/ Directions
Industrial Disputes	<2 hour from receipt of notification	IR Act ss 130, 332	1 – 24 hours	2 hrs – 2 days
Award & Contract Determinations	24 – 48 hours from receipt of application	IR Act ss 10, 17, 311	24 - 72 hours	14 – 28 days
Police Review of Removal Orders	1 – 8 hours from receipt of application	Police Act s 181D	<24 hours	14 – 28 days
Police Hurt on Duty. Disciplinary Appeals (PN24)	1 – 8 hours from receipt of application	ss 173, 183A and 186	<24 hours	14 – 28 days
Unfair dismissals	1 – 8 hours from receipt of application	IR Act s 84	24 – 48 hours	14 – 28 days
Public Sector Disciplinary Appeals (PN 23)	1 – 8 hours from receipt of application	IR Act s 100A	24 – 48 hours	14 – 28 days
Police Admin Officers Appeals	1 – 8 hours from receipt of application	Police Act s 185	24 – 48 hours	14 – 28 days
Entertainment Industry Disputes	2 hours from receipt of notification	Entertainment Industry Act s 20	1 – 24 hours	2 hours – 2 days
Injured Worker Applications	1 - 8 hours from receipt of application	Workers Compensation Act s 242	24 – 48 hours	14 – 28 days
Appeals	24 – 48 hours	IR Act s 187	<72 hours	Directions; 7 – 14 days
Victimisation Applications	1 - 8 hours from receipt of notification	IR Act s 213	24 – 48 hours	14 – 28 days
Urgent Applications	<1 hour	IRC Rules r 3.3	<2 hours	< 24 hours
Applications for External Review	1 - 8 hours from receipt of application	Work Health and Safety Act s 229	24 – 48 hours	14 – 28 days
Referral of election inquiry in Industrial Organisations	1 - 24 hours from referral	IR Act s 254	24-48 hours	Directions; 7-14 days

**\*\*These Time Standards were last updated in 2018 and are reviewed from time to time.**

## 5. APPENDICES CONT.

Time from commencement to finalisation	Time Standard	Achieved in 2019	Achieved in 2020	Achieved in 2021
<b>Applications for leave to appeal and appeal</b>				
Within 6 months	50%	90.3%	75.0%	28%
Within 12 months	90%	96.8%	93.8%	78%
Within 18 months	100%	100%	100%	100%
<b>Award applications (including major industrial cases)</b>				
Within 2 months	50%	52.6%	32.4%	57.19%
Within 3 months	70%	71.8%	35.1%	65.15%
Within 6 months	80%	91.2%	36.5%	83.71%
Within 12 months	100%	99.0%	97.3%	95.83%
<b>Enterprise Agreements</b>				
Within 1 month	75%	57.0%	100%	75%
Within 2 months	85%	63.7%	100%	100%
Within 3 months	100%	72.7%	100%	100%
<b>Industrial disputes</b>				
Within 2 months	50%	44.2%	44.3%	43.42%
Within 3 months	70%	60.3%	60.4%	58.88%
Within 6 months	90%	88.5%	80.8%	86.51%
Within 9 months	100%	99.0%	90.1%	93.75%
<b>Public Sector Disciplinary Appeals</b>				
Within 1 month	30%	43.0%	11.1%	15.09%
Within 2 months	60%	55.1%	33.3%	35.84%
Within 3 months	90%	68.2%	44.4%	50.94%
Within 6 months	100%	85.0%	73.3%	67.92%



## INDUSTRIAL RELATIONS COMMISSION

<b>Time from commencement to finalisation</b>	<b>Time Standard</b>	<b>Achieved in 2019</b>	<b>Achieved in 2020</b>	<b>Achieved in 2021</b>
<b>Unfair dismissals</b>				
Within 2 months	50%	43.0%	27.4%	32.4%
Within 3 months	70%	64.7%	50.2%	57.2%
Within 6 months	90%	90.7%	78.5%	85.2%
Within 9 months	100%	98.6%	91.3%	92.4%
<b>Time from filing to first listing</b>				
<b>Industrial Disputes</b>				
Within 72 hours	50%	25.0%	31.2%	25.61%
Within 5 days	70%	37.0%	44.6%	41.46%
Within 10 days	100%	65.2%	67.5%	76.52%

# 5. APPENDICES CONT.

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## APPENDIX 2

### List of Registered Industrial Organisations

The Seamens' Union of Australia, New South Wales Branch

United Voice, New South Wales Branch

New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, New South Wales Branch

The Development and Environmental Professionals' Association

Police Association of New South Wales

Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern, New South Wales

Health Services Union NSW

Transport Workers' Union of New South Wales

New South Wales Nurses and Midwives' Association

The Australian Workers' Union, New South Wales

Media, Entertainment and Arts Alliance New South Wales

Australian Maritime Officers' Union of New South Wales

Shop, Distributive and Allied Employees' Association, New South Wales

Australian Services Union of N.S.W.

Electrical Trades Union of Australia, New South Wales Branch

The Local Government Engineers' Association of New South Wales

Fire Brigade Employees' Union of New South Wales

The New South Wales Plumbers and Gasfitters Employees' Union

The Australasian Meat Industry Employees' Union, New South Wales Branch

Finance Sector Union of Australia, New South Wales Branch

Rail, Tram and Bus Union of New South Wales.

The Australasian Meat Industry Employees' Union, Newcastle and Northern Branch

Australian Institute of Marine and Power Engineers New South Wales District

The Association of Professional Engineers, Scientists and Managers, Australia (NSW Branch)

Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales

Australian Salaried Medical Officers' Federation (New South Wales)

NTEU New South Wales

Construction, Forestry, Mining and Energy Union (New South Wales Branch)

Newcastle Trades Hall Council

Institute of Senior Educational Administrators of New South Wales

The Broken Hill Town Employees' Union

Australian Paramedics Association (NSW)

Australian Education Union New South Wales Teachers Federation Branch

Australian Nursing and Midwifery Federation New South Wales Branch

Independent Education Union of Australia NSW/ACT Branch

Unions NSW

The Association of Wall & Ceiling Industries of New South Wales

The Electrical Contractors' Association of New South Wales

Clay Brick & Paver Association of New South Wales

The Registered Clubs Association of New South Wales

Australian Private Hospitals Association

Waste Contractors and Recyclers Association of N.S.W.

Bus and Coach Industrial Association of New South Wales

The New South Wales Pharmacy Guild

TAB Agents' Association of New South Wales

Local Government NSW

Australian Medical Association (NSW) Limited

The New South Wales Chamber of Fruit and Vegetable Industries Incorporated

The Funeral Directors' Association of New South Wales Limited

The Master Fish Merchants' Association of Australia

Australian Hotels Association (NSW)

Mutual Banking Employers' Association

The Caravan Camping and Touring Industry and Manufactured Housing Industry Association of NSW Limited

Timber Trade Industrial Association

Association of Quality Child Care Centres of NSW Inc

The Master Plumbers & Mechanical Contractors Association of New South Wales

The Master Builders' Association of New South Wales

The Australian Industry Group New South Wales Branch

The Racing Guild of New South Wales

## 5. APPENDICES *CONT.*

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Australian Retailers Association

Newcastle Master Builders' Association

Nursery & Garden Industry NSW & ACT Limited

Australian Federation of Employers and Industries

The Newsagents' Association of NSW and ACT Ltd.

Roofing Industry Association of NSW Incorporated

Aged and Community Services Australia

NSW Farmers' (Industrial) Association

New South Wales Taxi Council Limited

Motor Traders' Association of New South Wales

Australian Road Transport Industrial Organization, New South Wales Branch

NSW Business Chamber Limited

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## APPENDIX 3

### The Chief Commissioners 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	
<b>Tabbaa, Innam</b>	8 December 2016	30 March 2017	Retired on 20 April 2016
<b>Kite SC, Peter</b>	3 April 2017	December 2019	Retired on 20 December 2019
<b>Constant, Nichola</b>	2 March 2020	Present	Acted as Chief Commissioner from 22 November 2019

# 5. APPENDICES CONT.

## 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. Patron of the IR Society of NSW.
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 on 8 December 2016.

## 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. Appointed Justice of the Supreme Court of NSW on 8 December 2016.

# 5. APPENDICES CONT.

## 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 Judge 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.



## INDUSTRIAL RELATIONS COMMISSION

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 <sup>1</sup>	19 February 1992	15 July 1994	Appointed as Commissioner, Water Conservation and Irrigation Commission.
Szczygielski, Cathy <sup>2</sup>	18 July 1994	4 November 1994	Returned to position of Deputy Registrar, Industrial Court.
Williams, Louise <sup>3</sup>	7 November 1994	16 August 1996	Returned to position of Deputy Registrar, Land & Environment Court.
Robertson, Gregory Keith <sup>4</sup>	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 <sup>5</sup>	19 December 2014	13 March 2015	Returned to position of Deputy Registrar Industrial Court.
Wiseman, James <sup>6</sup>	16 March 2015	October 2016	Returned to Local Court.
Morgan, Melinda	31 October 2016	October 2021	Appointed Superior Courts Coordinator – Digital Reform Project.
Hoskinson, Irina	October 2021	February 2022	Acting Industrial Registrar returned to the Bar.
Robinson, Elizabeth	February 2022	Present	

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> Acting appointment as Registrar and CEO, Industrial Court (under 1991 Act) pending recruitment

<sup>4</sup> Appointed as Registrar and CEO, Industrial Court (under 1991 Act)

<sup>5</sup> 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).

<sup>6</sup> Appointed as Acting Registrar Industrial Court (under the Act)

## 5. APPENDICES CONT.

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### 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 affect 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.

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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.

## 5. APPENDICES CONT.

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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 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.

Next year 2022, marks the 120<sup>th</sup> anniversary of the Industrial Relations Commission which will be marked with a ceremonial sitting of the Commission. This sitting will recognise that the Commission was the first tribunal established whose role involved the conciliation and arbitration of industrial disputes and will mark the 120<sup>th</sup> anniversary of conciliation and arbitration globally.



