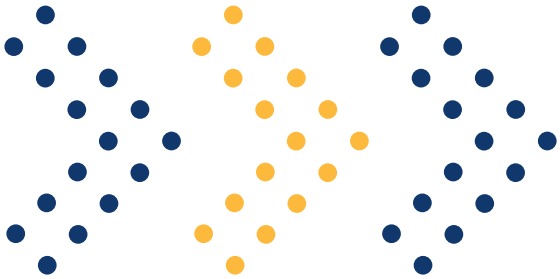
Industrial Relations Commission of New South Wales

ANNUAL REPORT 2023



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Letter of transmittal to the Minister

The Hon. Sophie Cotsis MP
Minister for Industrial Relations, and
Minister for Work Health and Safety
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 of New South Wales for the year ended 31 December 2023 for presentation to each House of Parliament in accordance with s 161 of the *Industrial Relations Act 1996*.

Yours sincerely

Nichola Constant
Chief Commissioner

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ACKNOWLEDGMENT OF COUNTRY

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.

FOREWORD

FOREWORD BY THE CHIEF COMMISSIONER

I am pleased to introduce the Annual Report for the Industrial Relations Commission of New South Wales for the year 2023.

The work of the Commission impacts the lives of many working people across NSW, with the NSW public sector employing over 400,000 employees and Local Government employing over 50,000 people.

After three increasingly busy years, the total number of applications filed in the Commission in 2023 stabilised. The total number of filings for the year was 721, a 34% reduction on the extraordinary number in 2022. Commissioners achieved a clearance rate of 113.45% in 2023. Unfair dismissals (212) and industrial disputes (245) continued to make up the majority of filings. There were an additional 522 matters filed in relation to industrial organisations including Right of Entry permits, Work Health & Safety permits, rule changes and election requests.

While State Public Health Orders ended on 30 November 2022, in 2023 the Commission worked through several unfair dismissal cases and police removal appeals under s 181E of the *Police Act 1990* relating to the implementation of vaccine mandates across the public sector. While in-person appearances returned as the default, AVL and telephone hearings were available at the Commission's discretion. The Commission continues to test new technology for conciliation hearings which I hope will further enhance experiences for users and members.

The 2023 State Wage Case decision was published on 14 December 2023. The Commission ordered increases of 5.75% consistent with the Annual Wage Review, including for public sector workers following the lapsing of the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014 ("Regulation"). The Commission also ordered increases of up to 17.83% for workers in the Aged Care industry consistent with the increases awarded by the Fair Work Commission.

During the year, the Rule Committee continued to update and modernise the Practice Notes and forms in 2023. On 22 September 2023, following extensive consultation with unions and other stakeholders including SafeWork NSW, the online application process for Right of Entry and Work Health and Safety permits was launched on the Commission's website. This digital initiative significantly improved the user experience while ensuring compliance and improving efficiency for the issuing of approximately 500 permits each year. Approval of these permits now usually happens in a matter of hours, rather than weeks.

I acknowledge the Commission User Group, made up of representatives of our key stakeholders, for their contribution and assistance, particularly in embracing online filing and acting as an important conduit for feedback and ideas.

I thank the many members of the Department of Communities and Justice who have assisted the Commission in 2023, particularly the Information Technology and Reporting Services Branch teams, whose help and support are integral to our work.

1. FOREWORD *CONT.*

On 26 May 2023, the Commissioners and the Industrial Registrar attended a Professional Education Day at the Judicial Commission of NSW. We were privileged to hear from The Hon Justice Michael Lee, Federal Court of Australia, The Hon Justice Julie Ward, President Court of Appeal, The Hon Justice James Stevenson, Supreme Court of NSW, and Una Doyle, CEO of the Judicial Commission. The Commission members are grateful to these eminent jurists and speakers for sharing their knowledge and time with us.

On 23 November 2023, the Industrial Relations Amendment Bill 2023 was introduced to the NSW Parliament by the Hon Sophie Cotsis, Minister for Industrial Relations and Minister for Work Health and Safety and received assent on 5 December 2023 ("Amending Act"). The Amending Act introduced mutual gains bargaining provisions, repealed s 146C of the *Industrial Relations Act 1996* ("Act") which (together with the repeal of the Regulation on 1 September 2023) removed the "wages cap", and re-establishes the Industrial Court of NSW.

The various sections of the Amending Act commence on proclamation. Schedule 1.1 which provides for mutual gains bargaining and Schedule 1.3 which sets out the Objects and General Functions were proclaimed on 15 December 2023.

Although this Annual Report period ended on 31 December 2023, at the time of writing, Schedule 1.2 which re-established the Industrial Court has been proclaimed to commence on 1 July 2024. The Governor has appointed Ingmar Taylor SC as the President of the Industrial Relations Commission, with David Chin SC and Jane Paingakulam appointed as Vice-President and Deputy President respectively. The President, Vice-President and Deputy President will sit as the Industrial Court and serve as judicial members of the Industrial Relations Commission. The Industrial Court is a superior court of record with equivalent status to the Supreme Court and the Land and Environment Court.

The re-introduction of the Industrial Court and the appointment of the President will see my role change. I am proud to have led the Commission for over four years. During my time in the role of Chief Commissioner I strived to modernise the Commission's practices while maintaining access to justice, managed the Commission through the challenges of 2020 and 2021, enhanced the Registry to better meet the needs of the Commission's users, worked with the Commission's Rule Committee to publish the Industrial Relations Commission Rules 2022, introduced on-line filing for the Commission's most common forms, and updated other Commission forms and Practice Notes. I am particularly proud that a gender balance was achieved among the members of the Commission during my time as Chief Commissioner. It has been an honour to serve the people of NSW in this way and I look forward to working with the new President and the other Judicial members of the Commission.

Finally, I thank the Commissioners and the Registry team for their dedication and hard work, and I acknowledge their valuable contribution to the Commission's work serving the people of NSW in 2023. I have been privileged to have received their support over my four and a half years as Chief Commissioner.

1. COMMISSION PROFILE

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

Purpose and Role of the Commission

The Commission's principal role is to resolve industrial disputes and unfair dismissal claims, fix wage rates and set terms and conditions of employment by making industrial awards and approving enterprise agreements. The Commission seeks to ensure that industrial disputes arising between public sector and local government employers, and their employees in New South Wales, and those involving contracts of bailment and contracts of carriage are resolved quickly, fairly and with the minimum of legal technicality.

The Commission has conciliation and arbitral functions in relation to a range of industrial matters. Section 3 of the Act sets out the Commission's functions as follows:

- to provide a framework for the conduct of industrial relations that is fair and just;
- to promote efficiency and productivity in the economy of the State;
- to promote participation in industrial relations by employees and employers at an enterprise or workplace level;
- to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies;
- to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments;
- to prevent and eliminate discrimination in the workplace and, in particular, to ensure equal remuneration for men and women during 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;

1. COMMISSION PROFILE *CONT.*

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

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

Membership of the Commission

Chief Commissioner

Chief Commissioner Nichola Jane Constant was appointed Chief Commissioner on 2 March 2020, and as a Commissioner on 23 July 2018

Commissioners

Commissioner Damian James Sloan was appointed 30 July 2018.
Commissioner Janine Gai Webster was appointed 3 December 2018.
Commissioner Christopher Andrew Muir was appointed 30 August 2021.
Commissioner Daniel David O'Sullivan was appointed 22 October 2021.
Commissioner Janet Clare McDonald was appointed 29 August 2022.

Table 1.1 Commission Members

	2019	2020	2021	2022	2023
Average Total Number of Members of the Commission	**5.4**	**4.4**	**4.78**	**5.9**	**6**

The Industrial Registry

The Industrial Registrar has administrative responsibility for the operation of the Commission. The Industrial Registrar reports to the Executive Director and Principal Registrar 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, and
- overseeing the election of officers of industrial organisations.

Industrial Registrar Robinson and Deputy Industrial Registrar Delgoda

Elizabeth Robinson was appointed to the role of Industrial Registrar on 22 February 2022. On 18 July 2022, Ruwinie Delgoda was appointed as the Deputy Industrial Registrar.

Registrar Robinson has been working with the CTSD Frontline Divisional Services to implement online Permit Applications. The new online application method improved response and approval times and reduced repetitive manual work in the Registry.

In addition to their statutory duties, the Registrar and Deputy Registrar worked hard in 2023 to implement other new initiatives. This involved educating and supporting parties to case manage, to engage with the Commission's Online Registry, and to order transcripts.

Registry team - Client Services and Commissioner Support

The Industrial Registry provides administrative support to the members of the Commission, supports the Industrial Registrar in carrying out her statutory functions, and provides services to its internal and external users. The Registry has two teams, Client Services and Commissioner Support.

Registry staff working in Client Services are the initial point of contact for the Commission's users. The Client Services team receives new applications, evidence and other materials filed in the Commission. These team members assist users of the Commission who seek information about the operation of the Commission and appear before the Commission. They also undertake duties related to the publication of industrial awards, enterprise agreements and other orders made by members of the Commission. The team maintains records concerning parties to awards, Industrial Committees and their members, as well as processing right of entry and Work Health and Safety permit applications, and administering provisions relating to the regulation and corporate governance of industrial organisations under Ch 5 of the Act.

1. COMMISSION PROFILE *CONT.*

The Commissioner Support team provides administrative support to the Commissioners. The team is responsible for communication with parties about case management, listing matters to be heard by members, and providing formal orders and decisions made by the Commission to parties.

Regional Sittings of the Commission and Remote Access to the Commission

The Commission maintains its premises at 237 Wharf Road, Newcastle. Commissioners continued in 2023 to make themselves available to hear matters in other regional areas. In addition to Newcastle, members of the Commission listed matters in Griffith, Ballina and Cessnock during the year.

The Commission is also in the process of testing and adapting other AVL platforms such as Webex. Webex allows for an enhanced experience for participants in Conciliations. Parties who engage in private conferences with a Commissioner by way of teleconference find themselves having to disconnect and rejoin by a specific timeframe. This often causes disruptions, and it is difficult for the member to control the conference. Webex allows the option for breakout sessions to be controlled by the member, making it a more practical choice.

Governance

Commissioners are appointed by the Governor on the joint advice of the Minister for Industrial Relations and Minister for Work and Health Safety and the Attorney General.

Decisions of Commissioners may be appealed, with leave, to a Full Bench of the Commission. The Commission is subject to the supervisory jurisdiction of the Supreme Court of NSW, exercised pursuant to s 69 of the *Supreme Court Act 1970*.

Commissioners are judicial officers under the *Judicial Officers Act 1986*. The Judicial Commission of NSW provides oversight of all judicial officers by considering and determining complaints about their conduct and/or behaviour.

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. Corporate Services, including human resources management, security, facilities, and asset management are managed by Courts and Tribunals Services Delivery in conjunction with the Registrars. 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.

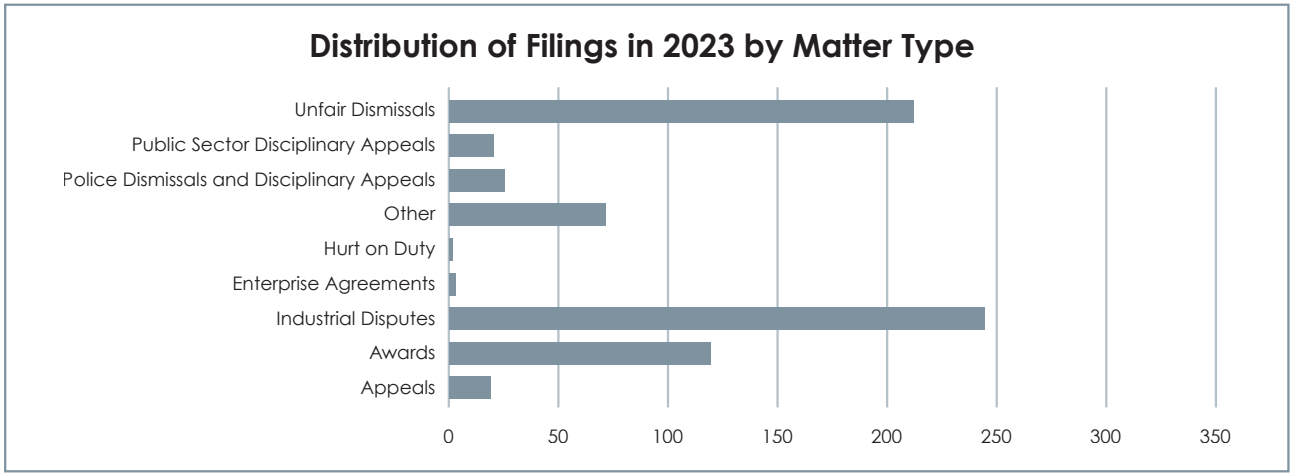
2. PERFORMANCE

Performance snapshot

- The total number of filings was 721. There were
  - An average of 120 matters per Commissioner in 2023;
  - 120 arbitrated hearings;
  - 301 arbitrated hearing days; and
  - 818 matters finalised.
- The clearance rate was 113.45%.

Filings in 2023

Figure 2.1 Distribution of filings by matter type



2. PERFORMANCE *CONT.*

Figure 2.2 Distribution of filings by matter type

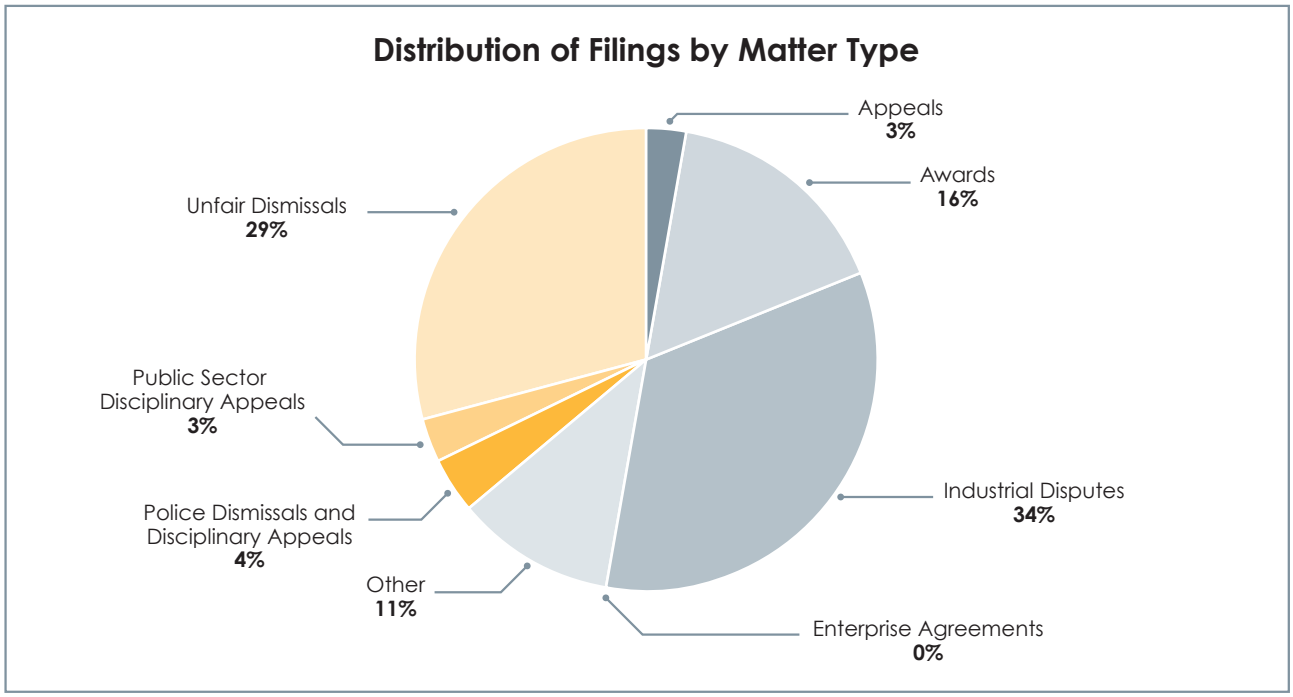
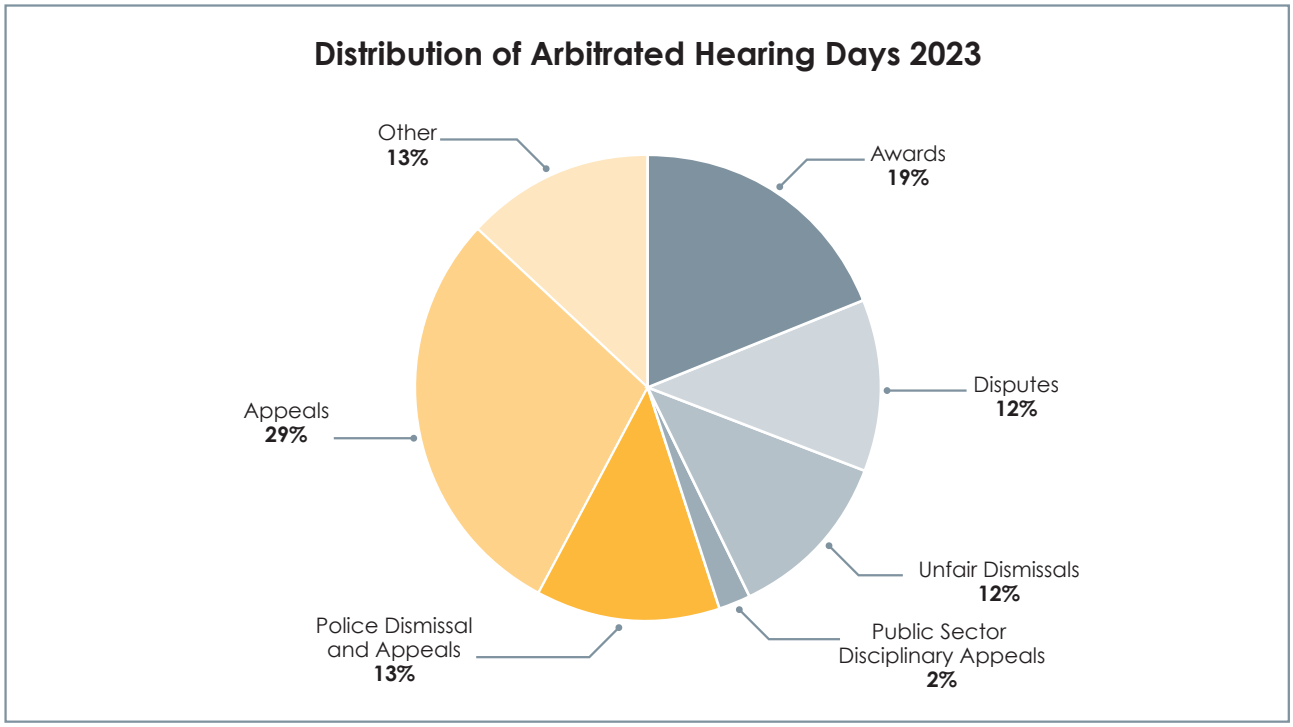


Figure 2.3 Distribution of arbitrated hearing days



Overall Caseload

The comparative caseload statistics for the Industrial Relations Commission between 2019 and 2023 are summarised below in Table 2.1.

Table 2.1 Caseload Statistics

	2019	2020	2021	2022	2023
Appeals					
Filed	16	23	12	16	**20**
Finalised	12	16	10	13	**21**
Pending	8	15	6	9	**8**
Awards					
Filed	162	118	285	114	**120**
Finalised	181	86	280	222	**122**
Pending	108	83	121	13	**11**
Industrial Disputes					
Filed	372	331	352	311	**245**
Finalised	340	356	318	344	**273**
Pending	108	83	121	88	**60**
Enterprise Agreements					
Filed	6	8	15	11	**4**
Finalised	8	8	12	10	**5**
Pending	0	0	1	2	**1**
Unfair Dismissals					
Filed	248	244	273	444	**212**
Finalised	205	257	259	482	**233**
Pending	91	78	106	68	**47**
Public Sector Disciplinary Appeals					
Filed	55	46	30	41	**21**
Finalised	50	52	26	49	**26**
Pending	18	14	18	10	**5**
Police Dismissals and Disciplinary Appeals					
Filed	38	20	34	65	**26**
Finalised	40	27	26	42	**51**
Pending	21	14	20	43	**18**

2. PERFORMANCE *CONT.*

Table 2.1 Caseload Statistics (continued)

	2019	2020	2021	2022	2023
Hurt on Duty Appeals					
Filed	2	3	6	5	**1**
Finalised	7	5	3	6	**1**
Pending	5	3	6	5	**5**
Other					
Filed	53	65	75	80	**72**
Finalised	45	68	60	88	**86**
Pending	26	23	43	35	**21**
TOTALS					
Total filed for the year	946	858	1081	1087	**721**
Total finalised for the year	889	904	994	1256	**818**
Total pending for the year	324	278	377	273	**176**

Table 2.1 shows that, due to the lower number of filings in 2023, the Commission has been able to finalise a greater proportion of matters, reducing the number of matters pending at the end of the year.

These filings do not include applications relating to industrial organisations (described in Table 2.15). Applications relating to industrial organisations are not, in the ordinary course, dealt with by a Commissioner. These applications include rule changes, right of entry permits, work health and safety permits and special wage permits and constitute a substantial proportion of the Commission's total filings. In 2023 there were 522 applications concerning industrial organisations, up from 347 in 2022.

Method of Lodgment

Table 2.2 Method of Lodgment

Matter Type	Registry	Online Filing	% of Total Applications
Unfair dismissal	86	126	29.40%
Industrial Disputes	171	74	33.98%
Public Sector Disciplinary Appeals	17	9	2.35%

In May 2022 the Registry began accepting Unfair Dismissal applications for filing through the Online Registry. This was expanded in November 2022, when the Commission began accepting Online Registry filing for Industrial Disputes and Public Sector Disciplinary Appeals. Adoption of the new filing method increased during 2023, with more unfair dismissals now filed through the Online Registry than by any other means.

Clearance Rates

The comparative clearance rate statistics for the Commission between 2019 and 2023 are summarised in table 2.3.

The clearance rate represents the number of matters finalised in the year (818) divided by the number of matters filed in that same year (721).

Table 2.3 Clearance Rates: Finalised / Filed Matters

	2019	2020	2021	2022	2023
Commission Clearance Rate	94.0%	105.4%	91.7%	115.5%	113.45%

Arbitrated Hearings

A matter will be listed for arbitration when it cannot be resolved through conciliation or compulsory conferences presided over by the Commission. When a matter is set down for arbitration, parties gather evidence and prepare arguments in preparation for the arbitrated hearing, at which time their evidence will be examined and cross-examined. Parties are encouraged to work to narrow the issues in dispute to assist in resolving matters expeditiously. Parties to hearings are given the opportunity to reach settlement at any point prior to, and during, the arbitrated hearing and are encouraged by the Commission to do so. Consequently, arbitrated hearings (and the resulting published decisions) represent only a small proportion of all appearances before the Commission.

Table 2.4 Arbitrated Hearings

	2019	2020	2021	2022	2023
Total number of arbitrated hearings	94	104	111	161	120
Total number of hearing days	205	249	271	369	301
Average length of arbitrated hearing (days)	2.18	2.39	2.44	2.29	2.50

The calculation of the total number of arbitrated hearings and the total number of arbitrated hearing days in the above table excludes hearings of motions, consent hearings and other interlocutory hearings.

These figures exceed those of pre-2022 and demonstrate an increase in one area of the Commission; An arbitrated hearing usually requires a written decision, and consequently significant work beyond the arbitration. The increase in the average length of arbitrated hearings is indicative of the increased complexity in Commission matters and aligns with the rise of self-represented applicants where more time is often required.

2. PERFORMANCE *CONT.*

Workload of Commissioners

Figure 2.4 Number of matters filed compared with number of Commissioners

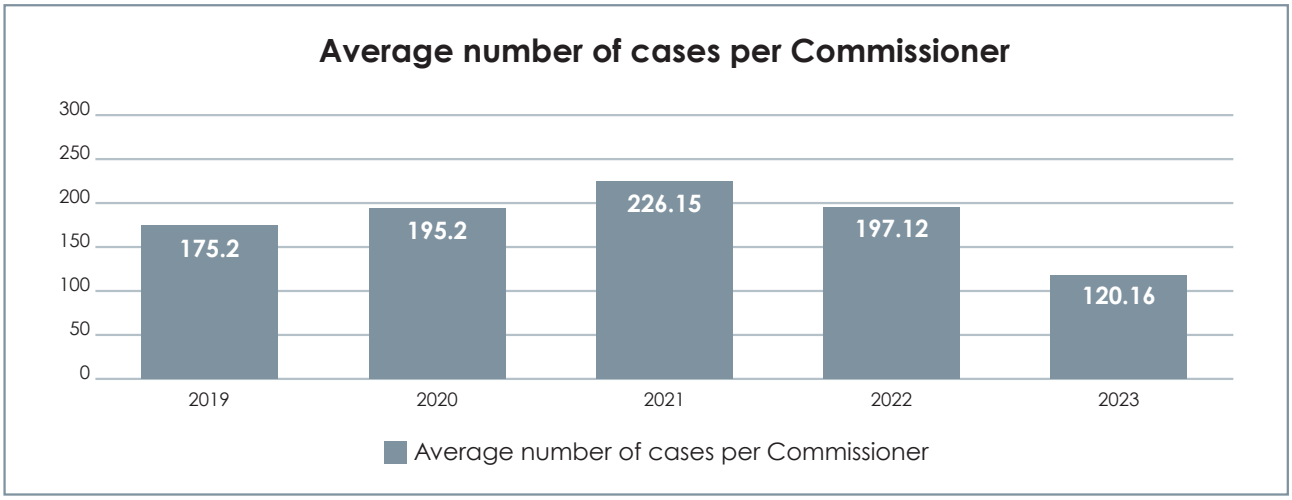


Figure 2.4 shows a reduction in the average number of cases per Commissioner. This is due to the decrease in filings and the increase in Commission numbers to six, the highest number since 2018.

Figure 2.5 Number of arbitrated hearing days compared with number of Commissioners

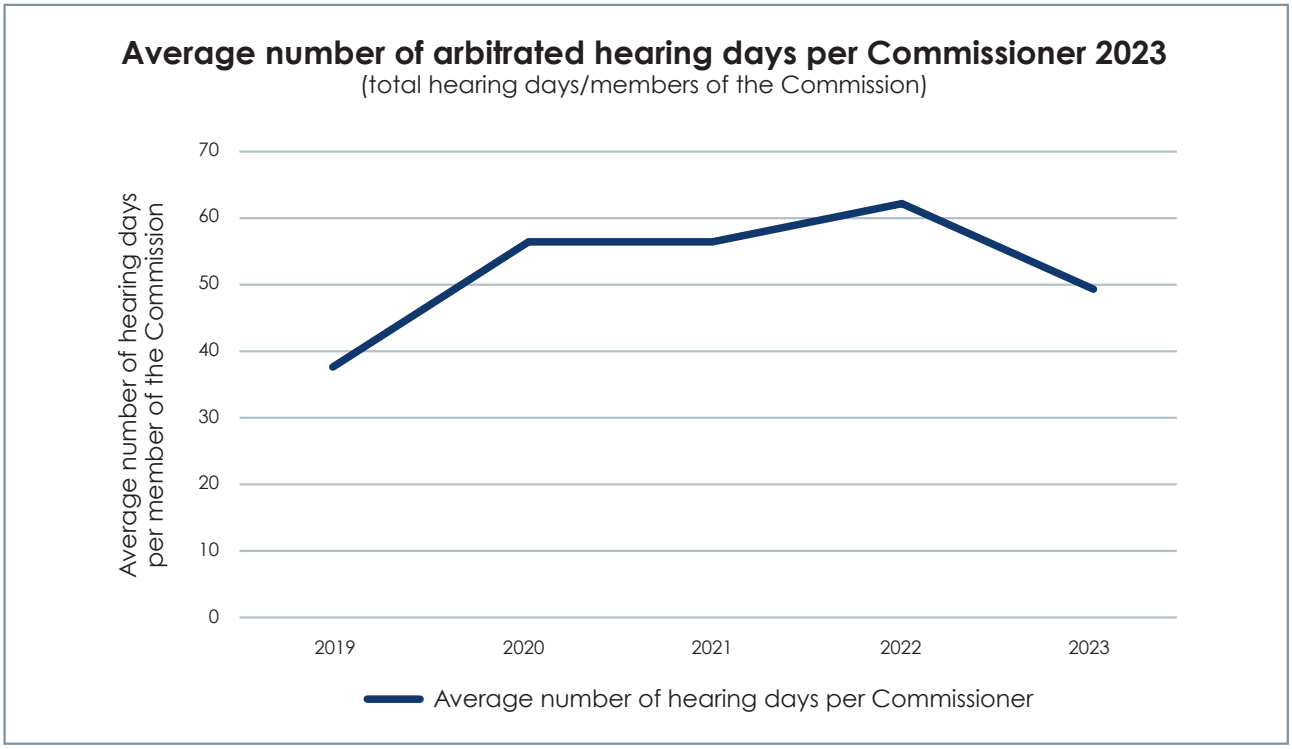


Table 2.5 Number of matters and arbitrated hearing days per Commissioner

Year	Total matters filed	Total members of the Commission	Average number of cases per Commissioner	Average number of arbitrated hearing days per Commissioner
2019	946	5.4	175.2	38
2020	859	4.4	195.2	56.6
2021	1081	4.78	226.15	56.69
2022	1087	5.9	197.12	62.54
2023	721	6	120.16	50.16

Figure 2.5 and Table 2.5 demonstrate a reduction in the number of arbitrated matters and consequently the number of arbitrated hearing days per Commissioner, which is largely attributable to the appointment of a sixth Commissioner in late 2022.

Time Standards

The Commission 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 and 2022. The 2022 standards are attached as Appendix 1.

Matters Before the Full Bench

A Full Bench may be convened for various purposes. A Full Bench of the Commission is comprised of at least three members. Parties may appeal decisions of single members of the Commission to the Full Bench of the Commission under s 187 of the Act.

Appeals to the Full Bench are by leave only, and the Full Bench will only grant leave where, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, leave should be granted (s 188). An appeal to the Full Bench from the decision of a single Commissioner is not a new hearing: instead, with limited exceptions, the appeal is to be determined based on the evidence in the decision below.

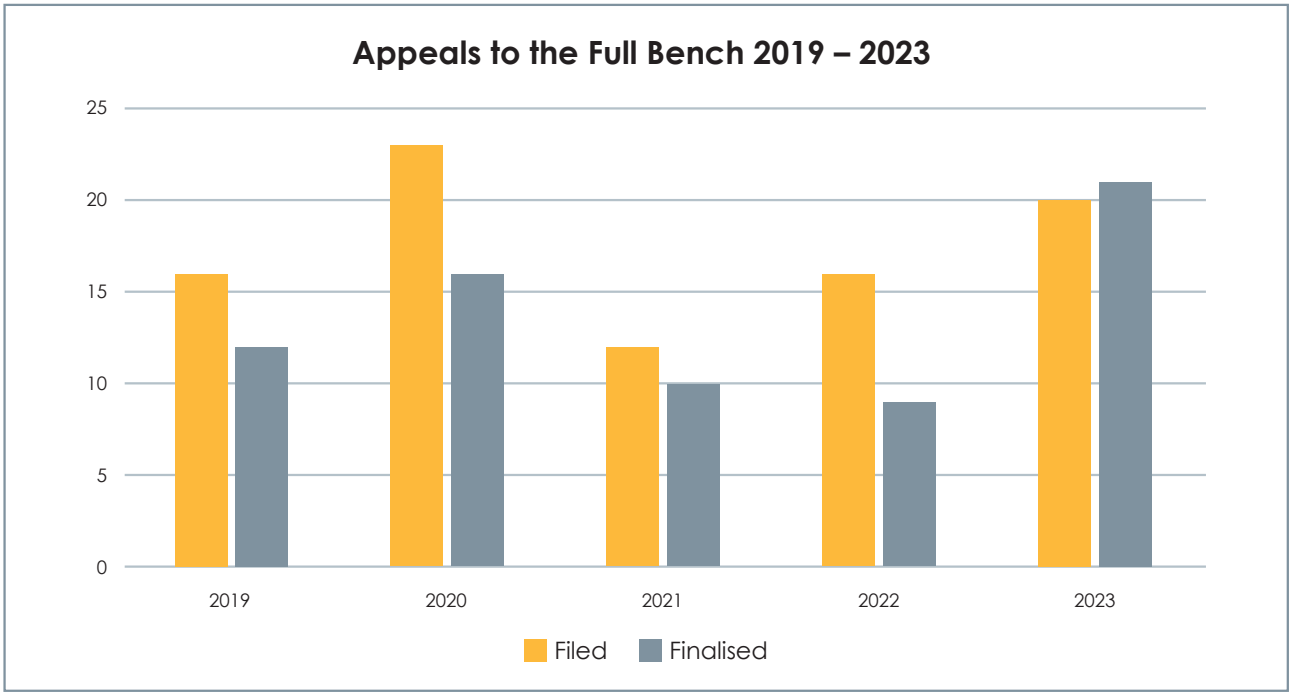
A member of the Commission may refer to the Chief Commissioner a matter or specific question for decision by the Full Bench of the Commission. The Chief Commissioner will decide whether or not the Full Bench will deal with the matter or question.

The Full Bench hears the State Wage Case each year. In accordance with the Wage Fixing Principles most recently set out in *State Wage Case 2022* [2022] NSWIRComm 1081, any claim for increases in wages and salaries, or changes in award conditions, other than those allowed elsewhere in the Principles, will be processed as an Arbitrated Case by a Full Bench of the Commission, unless otherwise allocated by the Chief Commissioner.

In 2023, the Full Bench heard 32 matters over 144 hearing days.

2. PERFORMANCE *CONT.*

Figure 2.6 Filed and finalised appeals to the Full Bench



There were 20 appeals to the Full Bench of the Commission filed in 2023, up 25% from 16 in 2022, but still less than 2020, which saw 24 appeals that year, the highest number of appeals in the last five years.

The limited number of appeals from a single member heard by the Full Bench stems from the condition for the grant of leave to appeal under s 188, that the "matter is of such importance that, in the public interest, leave should be granted".

Table 2.6 Full Bench Appeals by matter type

Matter Type	Number of Appeals Filed
Award Appeal	0
Industrial Dispute Appeal	1
Police Disciplinary and Dismissal Appeal	4
Public Sector Disciplinary Appeal	1
Unfair Dismissal Appeal	10
Victimisation Appeal	4

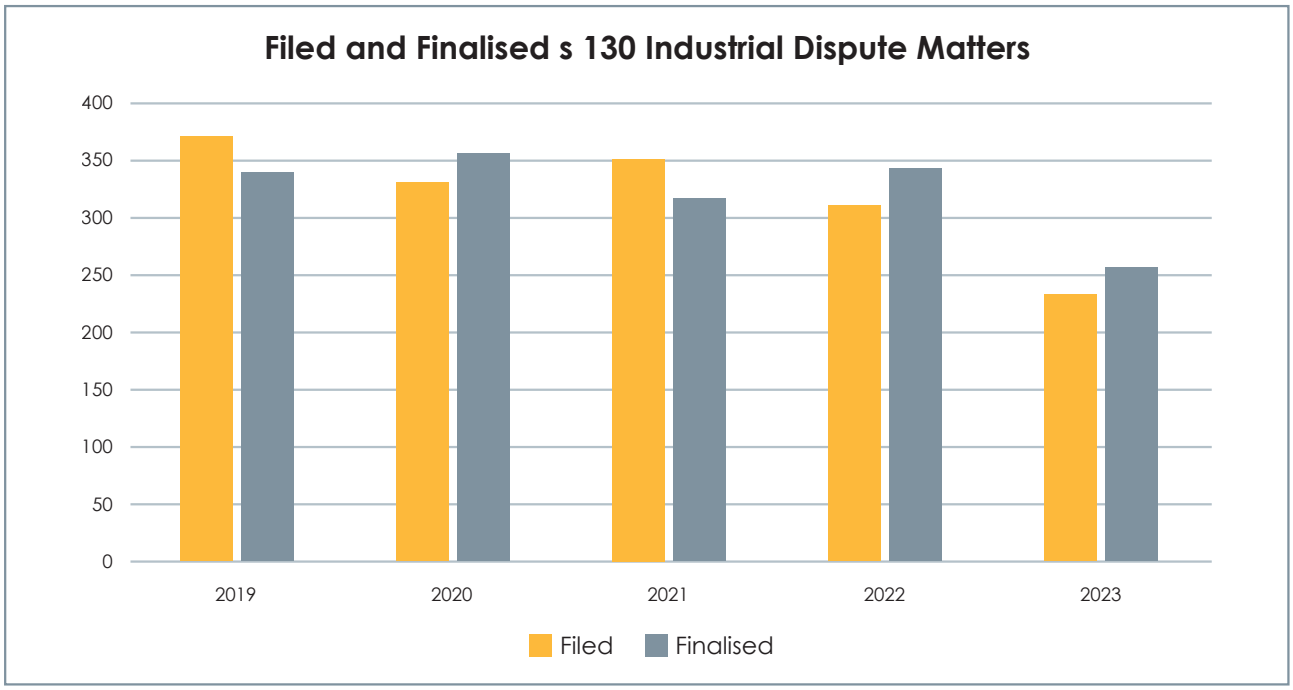
Appeals from decisions in respect of unfair dismissal claims made up half of the Full Bench appeals in 2023. This is a flow on consequence of the relatively large number of unfair dismissal claims filed the previous year in 2022.

Industrial Disputes

The Commission is responsible for the timely and efficient resolution of industrial disputes in NSW, including: 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 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. Conciliation can also occur over the course of an arbitrated hearing.

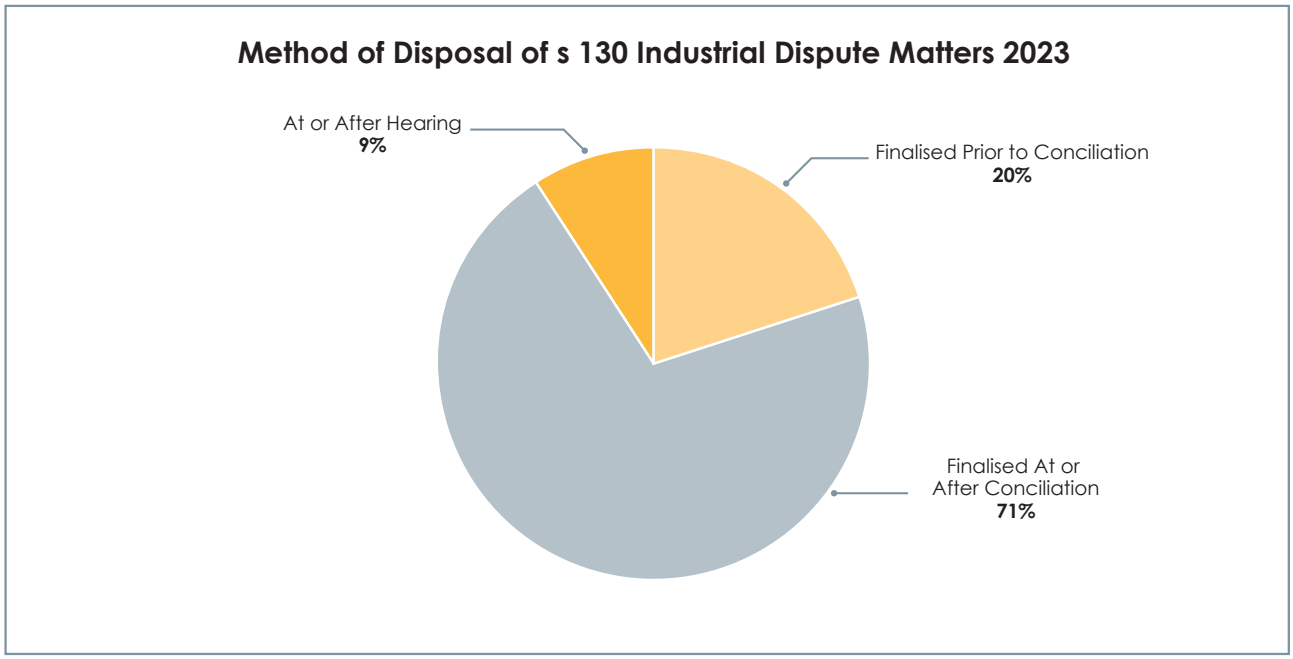
Figure 2.7 Filed and finalised industrial disputes commenced pursuant to s 130 of the Act



In 2023 industrial disputes were the most common type of matter filed with the Commission, representing 34% of the total filings for the Commission in the year. Apart from the extraordinary number of unfair dismissal applications filed in 2022, industrial disputes traditionally made up the majority of matters.

2. PERFORMANCE *CONT.*

Figure 2.8 Method of disposal of industrial disputes



The above chart shows that the vast majority of industrial dispute matters (91%) are resolved prior to arbitration. This figure is just 3% less than the previous year and is a general trend demonstrating the importance of conciliation as a dispute resolution tool and the successful role the Commission performs in resolving disputes early without the expense of arbitration.

Time Standards

The successful discharge of the Commission's statutory functions requires the Commission to attend to industrial disputes in a timely manner.

Table 2.7 Time taken for first listing of industrial dispute matters after filing

Time to first listing	72 Hours (50% Target)	5 Days (70% Target)	10 Days (100% Target)
2019	25.0%	37.0%	65.2%
2020	31.2%	44.6%	67.5%
2021	26.10%	42.45%	77.3%
2022	37.3%	50.48%	75.24%
2023	45.06%	63.94%	85.83%

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 and allowances 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.

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; or 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. If an industrial dispute is urgent, parties are able to inform the Registrar by phone of the impending dispute, with written confirmation either via email or through the Online Registry provided following the verbal notification. The Commission endeavours to hear these matters as early as practicable and if necessary, outside usual Commission sitting hours.

Table 2.8 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)
2019	44.2%	60.3%	88.5%	99%
2020	44.3%	60.4%	80.8%	90.1%
2021	44.42%	58.88%	86.5%	93.75%
2022	37.5%	54.65%	81.10%	89.83%
2023	51.95%	62.5%	81.25%	87.89%

The Commission's success in dealing with disputes at the early stage can be highlighted. The reduced number of applications the Commission in 2023 allowed the Commission to list and resolve disputes more quickly and increase the Commission's performance against the benchmarks.

Unfair Dismissals

Under Pt 6 of Ch 2 of the Act, the Commission is responsible for determining applications by NSW Government 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 a conciliation conference (s 86) to assist the parties in reaching an early settlement. If the conciliation is unsuccessful, the matter proceeds to an arbitrated hearing (often after multiple conciliations and report backs). To succeed in a claim for Unfair Dismissal, the applicant must demonstrate that the dismissal was harsh, unjust, or unreasonable. In making that determination, the Commission is able to take a wide range of factors into consideration, outlined in s 88, such as whether the employee was given an opportunity to defend their conduct, whether they were warned regarding their conduct, the facts surrounding the conduct, and the impact of the dismissal on the employee. Beyond those specific matters the Commission may consider, Commissioners may also consider any other matter that they believe may be relevant to determining the claim.

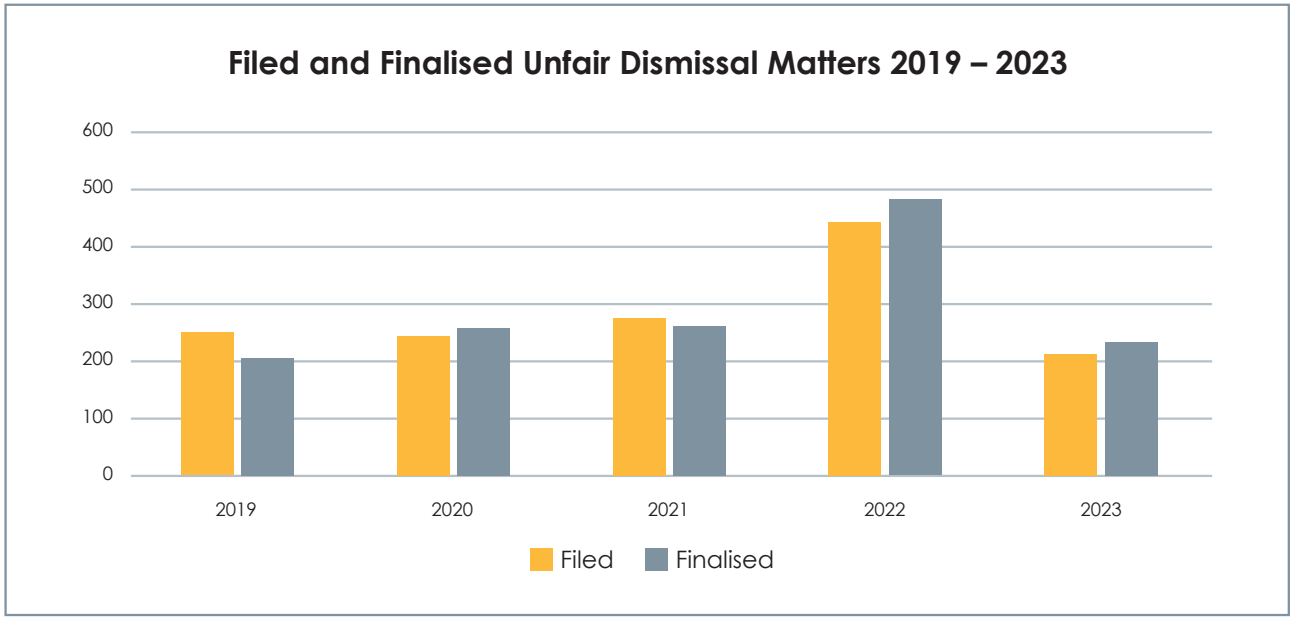
2. PERFORMANCE *CONT.*

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' pay.

Certain employees are prevented from lodging an unfair dismissal claim. These include employees serving a probation period, casual employees engaged for a short period of time, employees contracted for a specific task or period of time, and employees whose employment is governed by special arrangements that cover termination of their employment.

Applicants must lodge an unfair dismissal application within 21 days after the dismissal, with the count starting from the day after the employee was dismissed. There is a discretion vested in the Commission to hear matters filed outside of the legislated time frame where the Commission considers that "there is a sufficient reason to do so". There are a range of factors that the Commission may take into consideration in determining whether to accept an out of time application, such as the reason for and length of delay, hardship caused to the parties, and the conduct of the employer relating to the dismissal.

Figure 2.9 Filed and finalised unfair dismissal matters



2023 saw a stabilisation in the number of unfair dismissal applications following the spike in 2022. Once again, unfair dismissal claims were the second most commonly lodged applications in the Commission, after industrial disputes. The number of unfair dismissal applications in 2023 was more consistent with numbers observed pre-2022.

Figure 2.10 Disposal of Unfair Dismissal Matters in 2023

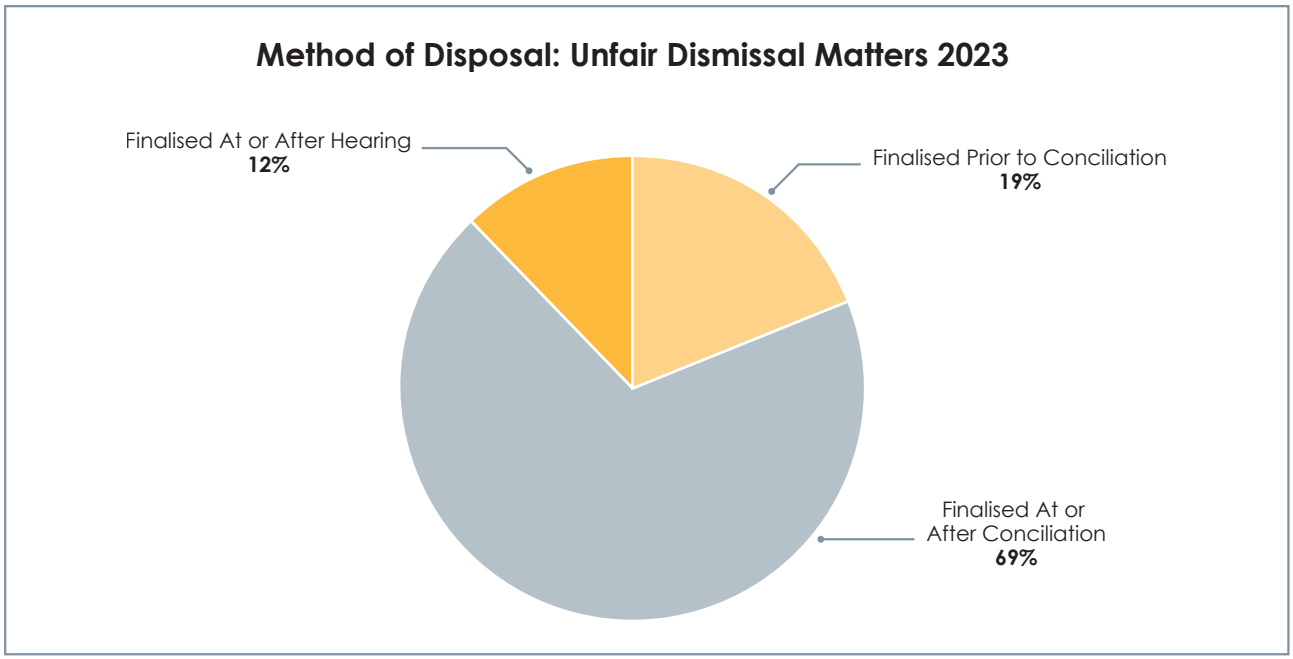


Table 2.9 Representation of applicants at time of filing of unfair dismissal claims

Application filed by:	2019	2020	2021	2022	2023
Individual (Unrepresented)	46	37	89	168	87
Legal or Industrial Organisation Representative	201	207	184	312	146
TOTAL	**247**	**244**	**273**	**480**[1]	**233**

[1] This number excludes matters that were reopened or relisted.

In 2023, the proportion of unfair dismissal applicants filing their own applications stabilised following the significant rise in unrepresented litigants in 2022.

Time Standards

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

1. An application for unfair dismissal should be listed for conciliation hearing within 28 days of 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.

2. PERFORMANCE *CONT.*

Table 2.10 Time taken to first listing of unfair dismissal matters after filing

Listed within	7 Days	14 Days	21 Days	28 Days
2019	6.4%	19.7%	45.4%	72.9%
2020	9.4%	26.9%	51.4%	70.3%
2021	6.74%	24.71%	60.31%	76.78%
2022	8.56%	33.78%	63.29%	81.08%
2023	**38.67%**	**62.26%**	**81.60%**	**87.26%**

The number of unfair dismissal matters being listed within each of the benchmarks periods rose significantly in 2023.

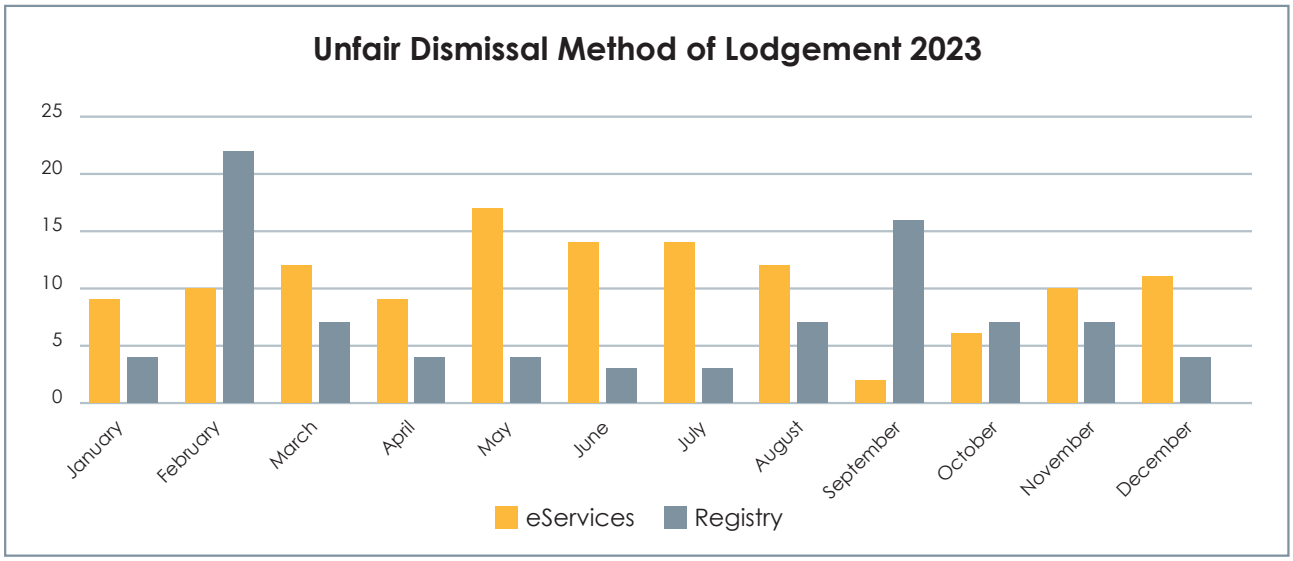
A significant reason for matters not being listed within the time standards is that applicants and/or their representatives request that their matters be listed on a date convenient to their circumstances.

Another reason for delays in listing is the time taken between when an unfair dismissal application is accepted for filing at a Local Court and when it is received at the Commission. The day that the application is received at the Local Court is the date recorded as the date filed. There have been occasions when applications have not been received by the Commission at Parramatta for periods of 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 must file a notice in reply at least 48 hours before the commencement of the conciliation proceedings, or such other time as directed by the Commission. Depending on the urgency of the matter, the Commission will usually provide some time to the respondent to prepare the notice in reply. It is therefore unlikely that the matter will be listed within seven days of the unfair dismissal application being filed.

With the commencement of online filing for unfair dismissal applications and employer's responses, the average time between the filing of applications and the first listing reduced.

Figure 2.11 Online compared with manual filing of unfair dismissal applications



Online filing commenced in May 2022. In 2023,this expanded to three of the initiating forms which may be lodged through the online registry. These are the Unfair Dismissal Application (Form 7A), Notification of an Industrial Dispute (Form 4), and Application for Public Sector Disciplinary Appeal (Form 4A).

In 2022, noting that the online filing was only available for half of the reporting year, online filings amounted to 5.88% of the total filings. In 2023, this has increased to 28.98% and will likely continue to increase as more forms become available and users become more familiar with online filing.

Table 2.11 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)
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%
2022	21.77%	37.17%	81.31%	95.07%
2023	39.62%	62.26%	83.49%	87.26%

The number of unfair dismissal matters meeting finalisation benchmarks at the two, three, and six month marks has increased by a substantial amount. This was a result of the decrease in the number of overall applications filed in 2023.

2. PERFORMANCE *CONT.*

Awards and Enterprise Agreements

Object 3(e) of the Act is to facilitate the appropriate regulation of employment through awards, enterprise agreements, public sector industrial agreements and other industrial instruments such as contract determinations and contract agreements.

Effective from 15 December 2023, new object 3(i) commenced to encourage strategies to attract and retain skilled staff where there are skill shortages so as to ensure effective and efficient service delivery.

A further change was included in the Commission's general functions at s 146(2)(c) for the Commission to have regard to the fiscal position and outlook of the Government and the likely effect of the exercise of the Commission's function on the position and outlook.

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 2.12 Filed and Finalised Award matters

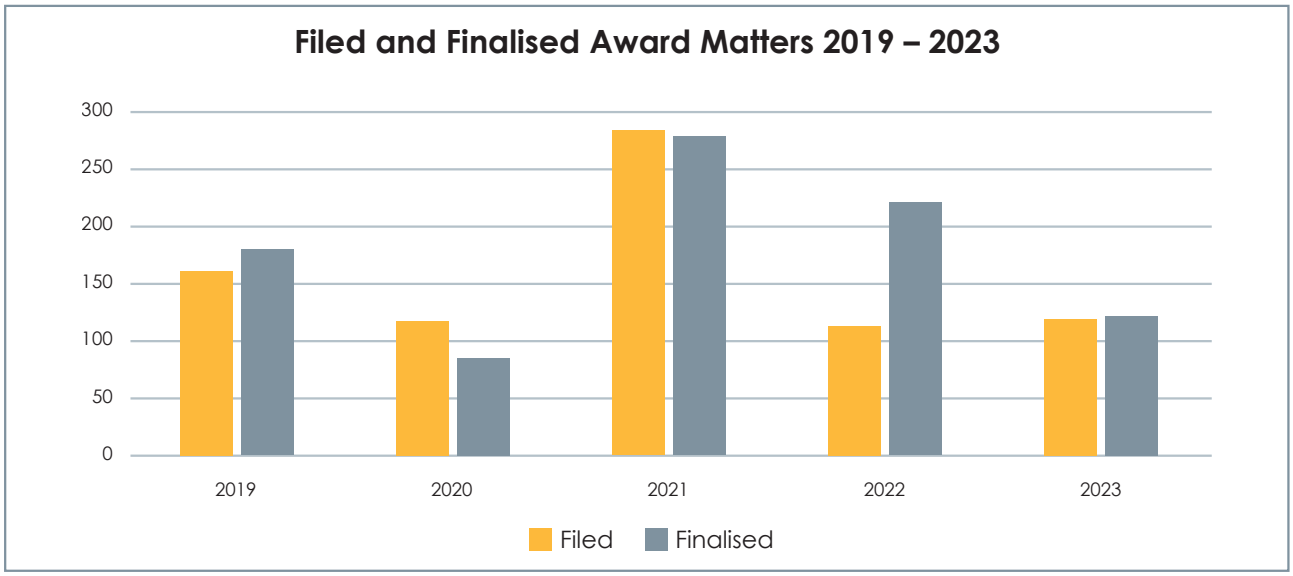


Table 2.12 Award Applications and Award Reviews between 2019 – 2023[2]

	2019	2020	2021	2022	2023
Award Applications filed by parties					
Application to make Award (s 10)	82	41	81	82	58
Application to vary Award (s 17)	26	72	42	20	52
Review of Awards Pursuant to s 19					
Notice of Review issued	50	0	98	0	0
Awards Reviewed	58	2	64	19	2
Awards Rescinded	0	0	11	0	3
Declaration of Non-Operative Awards	0	0	0	0	0

[2] These figures exclude Awards varied pursuant to the State Wage Case.

This decrease in the total number of award matters filed was due to the large number of awards that were subject to triennial review under s 19 of the Act in 2021 and there being no s 19 matters commenced in 2023.

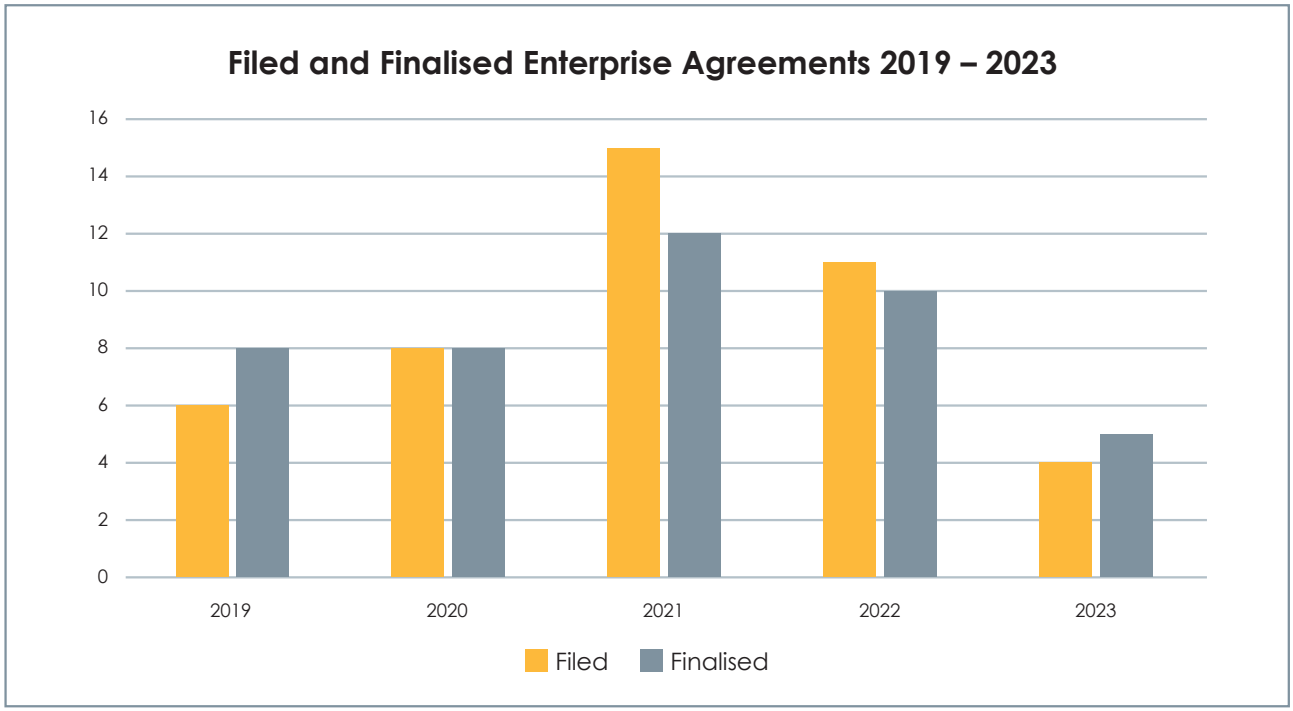
The combined number of applications to make or vary awards in 2023 was largely consistent with previous years.

2. PERFORMANCE *CONT.*

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 or employers with employees directly. 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 interest and the objects of the Act (s 33). These principles were last reviewed in 2021 and published on 23 February 2022 in *Review of the Principles for Approval of Enterprise Agreements 2021/2022* [2022] NSWIRComm 1005, and they were recently considered in *New South Wales Institute of Sport Enterprise Agreement 2023-2024* [2023] NSWIRComm 1030.

Figure 2.13 Filed and finalised Enterprise Agreement matters



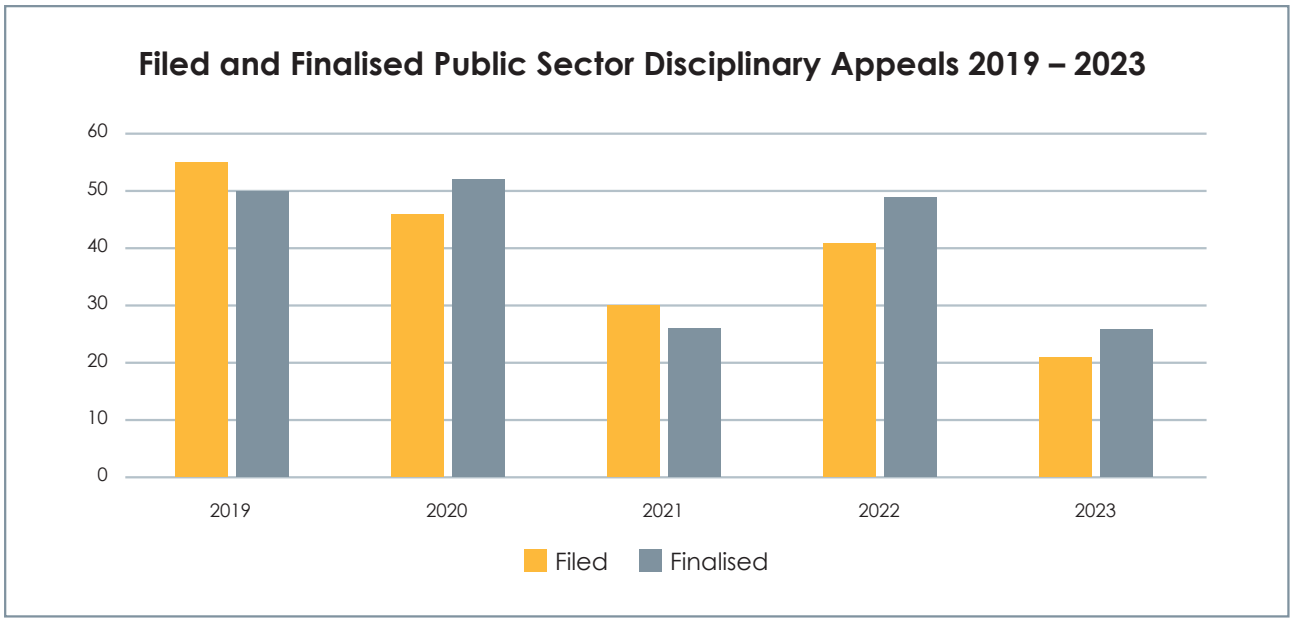
There were four applications for approval of an enterprise agreement filed with the Commission in 2023.

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. An employee engaged for less than six months or 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). Employees seeking review of a disciplinary decision have 28 days in which to file an appeal with the Commission. Unlike unfair dismissals, there is no discretion vested in the Commission to accept a public sector disciplinary appeal filed outside of the time frame listed in s 100B(2).

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

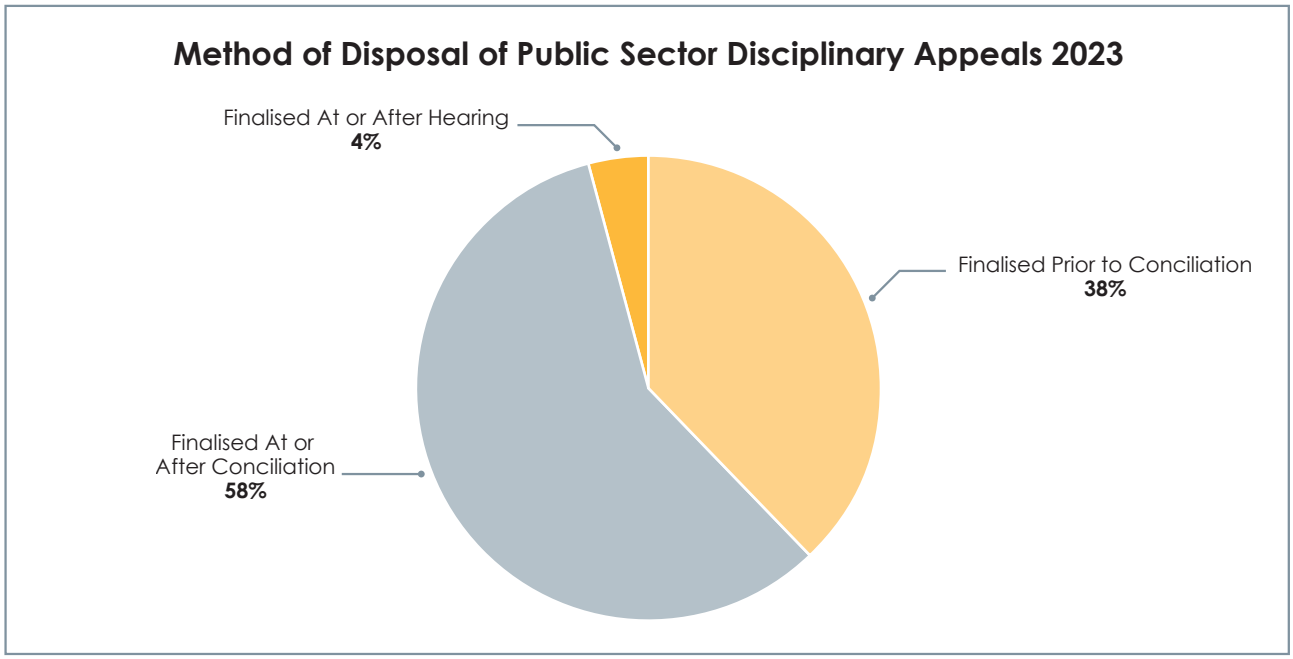
Figure 2.14 Filed and finalised Public Sector Disciplinary Appeal matters



There were 21 public sector disciplinary appeals filed in 2023, constituting 3% of all matters filed. The number of public sector disciplinary appeals filed in 2023 decreased by 48.78% from 2022, and the number remains lower than the numbers filed in previous years.

2. PERFORMANCE *CONT.*

Figure 2.15 Disposal of Public Sector Disciplinary Appeals in 2023



In 2023, 96% of public sector disciplinary appeal matters were resolved prior to a formal hearing, with the majority settling at or after conciliation. This shows the effectiveness and importance of parties engaging with the conciliation process.

Time Standards

Table 2.13 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)
2019	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%
2022	11.11%	28.89%	44.44%	77.78%
2023	19.23%	50%	53.48%	75.92%

Under the time standards set by the Commission, 90% of matters should be resolved within three months of commencement, and 100% of matters should be resolved within six months of commencement. For matters where this six month benchmark was not met, reasons included: the increasing complexity of these matters; the amount of evidence filed and heard in these matters; the increasing number of hearing days; and parties seeking adjournments.

Police Dismissals and Disciplinary Appeals and Hurt on Duty Applications

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, known as a disciplinary appeal.

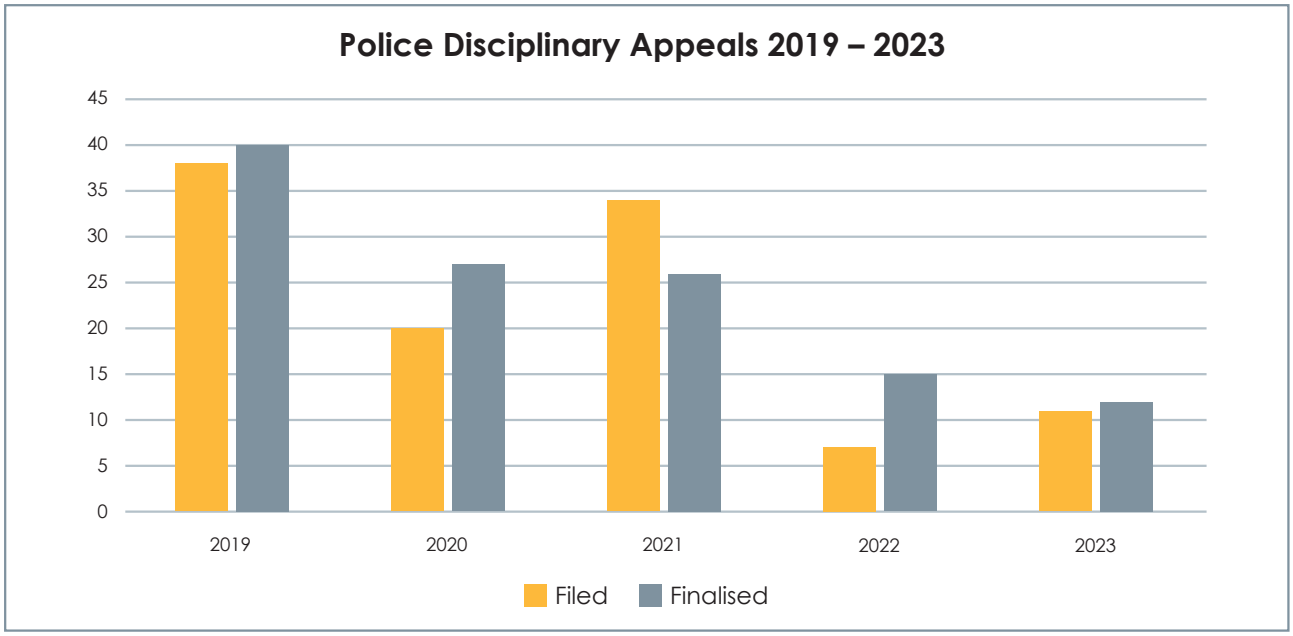
Under s 181D of the *Police Act*, the Commissioner of Police has the power to remove a NSW police officer for loss of confidence in their suitability to continue as a police officer, having regard to the officer's competence, integrity, performance, or conduct. Section 181E of the Police Act entitles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

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.

While police dismissals and disciplinary appeals represent only a small proportion of the Commission's total filings: at 3.60% of filings in 2023, they make up a larger proportion of the hearing days relative to other matter types, at 13% (as per Figure 2.3) of the Commission's total arbitrated hearing days.

Section 173 Police Disciplinary Appeals

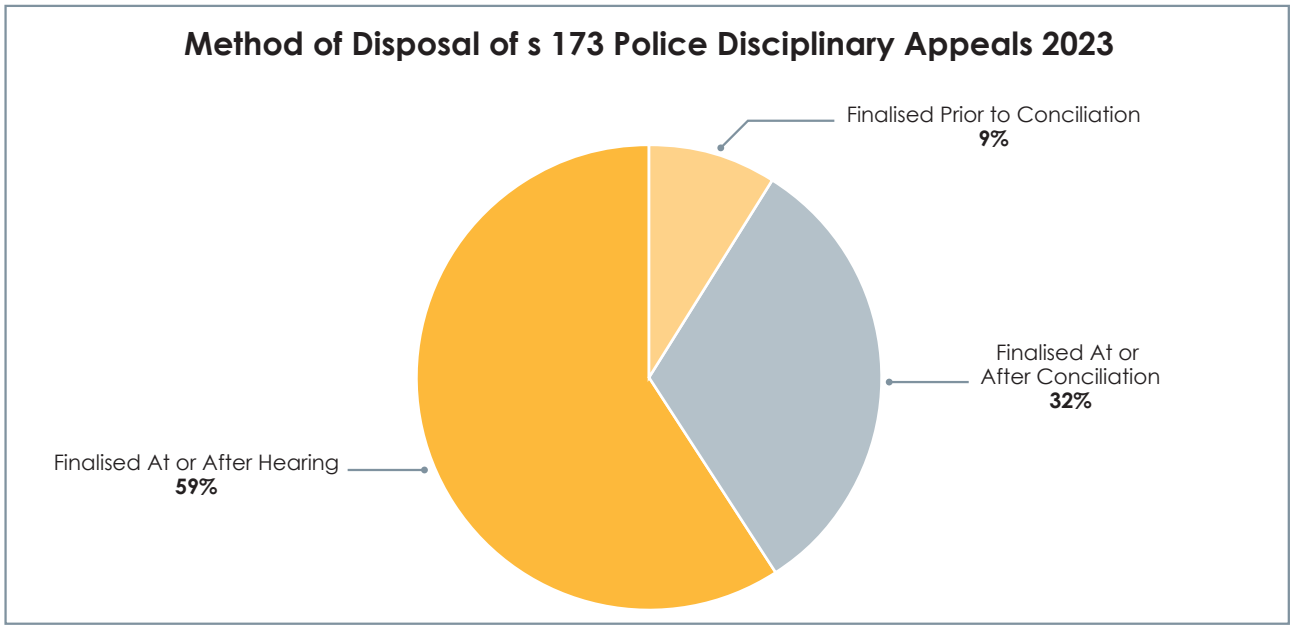
Figure 2.16 Filed and finalised Police Disciplinary Appeal matters



Police disciplinary appeals under s 173 of the *Police Act* increased from 0.64% of filings in 2022 to 1.53% in 2023 but were still not at the levels of previous years.

2. PERFORMANCE *CONT.*

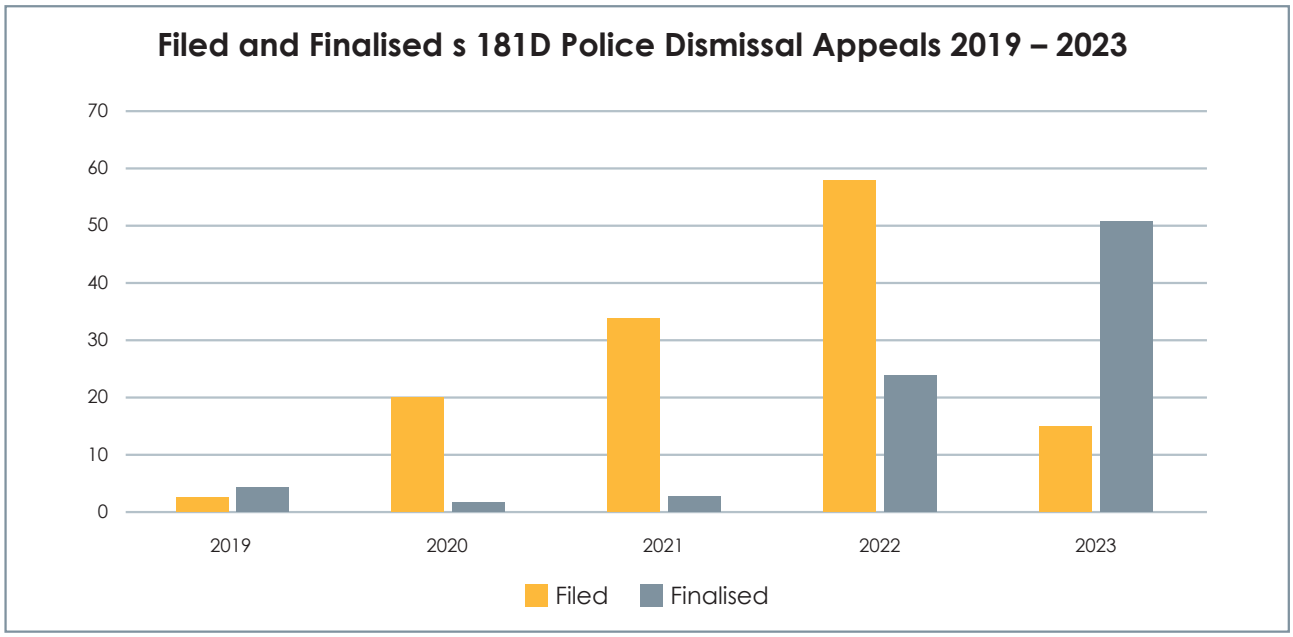
Figure 2.17 Disposal of Police Disciplinary Appeal matters in 2023



41% of police disciplinary appeals were resolved prior to an arbitrated hearing in 2023, down from 53% in 2022, with 9% resolved prior to conciliation compared with none in 2022. 59% required arbitration in 2023 compared with 47% in 2022.

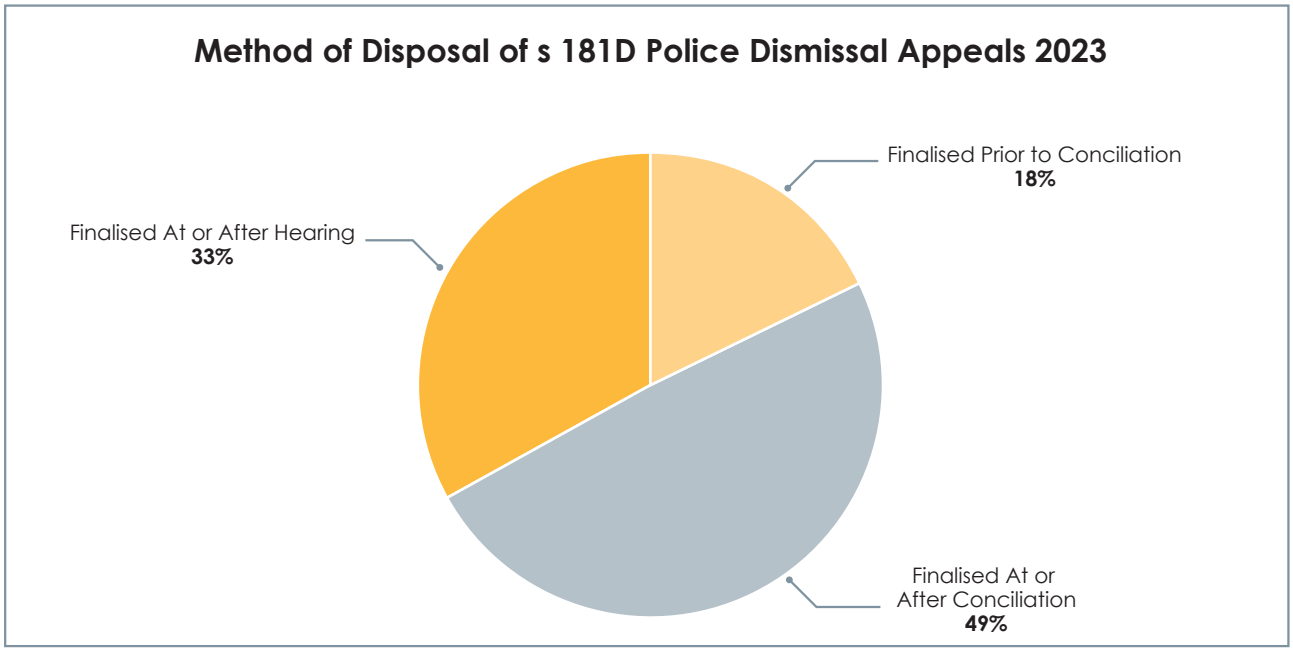
Section 181D Police Dismissal Appeals

Figure 2.18 Filed and finalised Police Dismissal Appeal matters



There were 15 police dismissal appeals filed in 2023, down from 58 in 2022, constituting 2.08% of the overall number of filings in the Commission. The 2022 increase in applications for review of police dismissal appeals was largely attributable to officers not complying with vaccine mandates implemented by the Commissioner of Police.

Figure 2.19 Disposal of Police Dismissal Appeal matters in 2023



The majority of police dismissal matters were resolved prior to arbitration (67%) although this was down from 78% in 2022. 33% of matters proceeded to a formal hearing.

Time Standards

Table 2.14 Time taken to finalise Police Disciplinary and Dismissal Appeals after filing

	2019	2020	2021	2022	2023
S 173 Police Disciplinary Appeals					
Completed within 6 months	83.0%	53.3%	75%	33.33%	23.07%
Completed within 12 months	98.1%	73.3%	91.6%	40%	58.97%
S 181 Police Dismissal Appeals					
Completed within 6 months	93.2%	50.0%	66.6%	66.67%	75%
Completed within 12 months	98.8%	80%	83.3%	88.89%	83.33%

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 standard unfair dismissal claims.

2. PERFORMANCE *CONT.*

Police Hurt on Duty Appeals

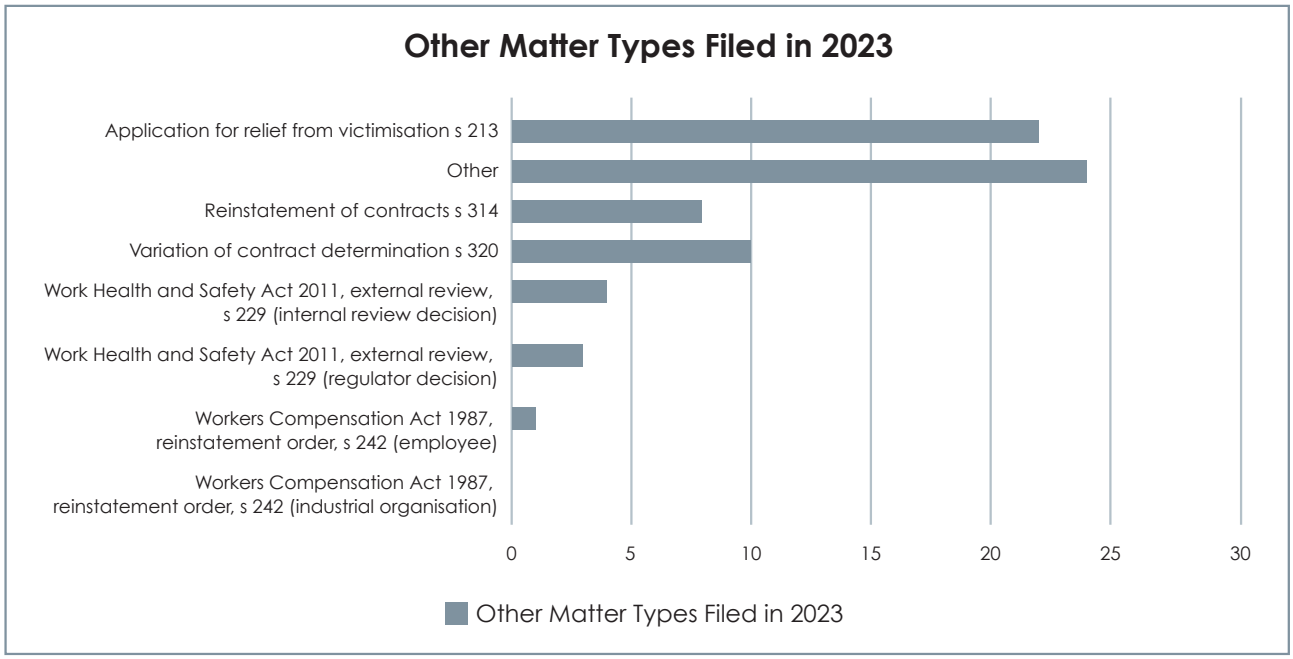
Under s 186 of the *Police Act*, the Commission is responsible for determining applications made by police officers to appeal against a decision of the Police Commissioner to grant or refuse leave of absence by a police officer as a result of being hurt on duty.

Other Matters

The Commission deals with a range of other matters including:

- Contract Carrier matters under Ch 6 of the Act including the making of contract determinations (s 316 of the Act), reinstatement of contracts (s 314 of the Act) and variation of contract determinations (s 320 of the Act);
- Applications for relief from victimisation (s 213 of the Act);
- Applications in respect of Industrial Committees (s 200(3) of the Act);
- Stand down orders (s 126 of the Act);
- Right of entry disputes (s 142 of the WHS Act);
- External reviews of decisions of Safework NSW (s 229 of the WHS Act); and
- Reinstatement of injured workers (s 242 of the *Workers Compensation Act*) ("WC Act").

Figure 2.20 Other matter types filed in 2023



Industrial Organisations

Under the Act, the 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 2.15 Matters filed in 2023 concerning industrial organisations

	2019	2020	2021	2022	2023
Work Health and Safety Permits	282	200	207	227	334
Right of Entry Permits	106	31	68	81	127
Special Wage Permits	34	36	33	20	35
Rule Changes to Registered Organisations	9	9	14	6	9
Election Requests for Registered Organisations	14	12	15	13	17
Others	2	1	5	0	0
Total Filed for the Year	**447**	**289**	**342**	**347**	**522**

These applications are not included in the data of filings set out above in Table 2.1.

3. SIGNIFICANT CASES

New South Wales v Industrial Relations Secretary of NSW on behalf of Fire and Rescue NSW (COVID-19 Vaccination Dispute) [2023] NSWIRComm 1004

This matter involved a dispute about the continuation of FRNSW's vaccination policy, introduced in December 2021. The FBEU submitted that the retention of the policy was unreasonable due to FRNSW's failure to properly consult with employees and changing circumstances regarding COVID-19 and sought an order preventing the Fire Commissioner (FC) from dismissing or disciplining employees in accordance with the policy. The FC, in deciding to maintain the policy, relied primarily on advice by the Australian Technical Advisory Group on Immunisation (ATAGI) which was in turn based on a report published by the UK Health Security Agency. Commissioner McDonald determined that s 137(1)(c) of the IR Act did not empower the Commission to make indefinite orders, and even if it did, she would not make such an order as she determined that, despite some issues with the policy, it was a reasonable directive to address the risk posed by COVID-19. Having determined that the policy was lawful and reasonable for the reasons outlined below, Commissioner McDonald dismissed the application, but recommended that the policy be reworked to address some issues that arose from the policy.

FBEU Submissions

The FBEU submitted that the retention of the vaccine mandate was rendered unlawful due to inadequate consultation, and that it was an unreasonable requirement given the way work was performed and the surrounding circumstances at the time. The circumstances the FBEU drew the Commission's attention to were that there was no general vaccination policy, firefighters had not been the subject of state or Commonwealth regulation, they had limited contact with vulnerable people, had not been the epicentre of an outbreak, there were alternative measures that could be taken to mitigate the risk of COVID-19 and there was already a high level of community vaccination.

Onus of Proof

Commissioner McDonald accepted that the evidentiary onus fell on the party that sought to establish a fact in support of its case, though it may shift where sufficient evidence was tendered requiring FRNSW to prove the reasonableness of the policy. However, the FBEU failed to meet that evidentiary burden, mainly by failing to challenge the ATAGI report that the FC relied on deciding to maintain the policy. Commissioner McDonald also determined that firefighters did have significant contact with the public, including those that were particularly at risk from COVID-19 and there was still ongoing substantial risk from COVID-19.

Power under s 137(1)(c) of the *Industrial Relations Act 1996*

Commissioner McDonald determined that the power under s 137(1)(c) could only be exercised on an interim basis pending the resolution of the matter in dispute. Further, s 138(2)(b) requires that dispute orders must state the time in which they must be complied with or are to remain in force. She stated that the Commission could make orders that employees not be dismissed in the course of a dispute, but once the matter was resolved and/or the Commission had made its decision, the employer could take whatever lawful action regarding the employment of its employees that it chose.

Adequacy of Consultation

In considering the adequacy of the consultation process undertaken by FRNSW, Commissioner McDonald noted that there had been a consultation period, as evidenced by the notes of the ELT and the decision to pause disciplinary actions towards employees pending further consultation. The requirements of consultation required an opportunity to be heard and to attempt to convince a decision-maker to take a different course of action be afforded. The right to consult is not a right to veto management decisions and there was a consultation process in place.

S 19(1) of the *Work Health and Safety Act 2011*

Commissioner McDonald noted s 19(1) of the WHS Act which imposes a primary duty on FRNSW to ensure, as far as reasonably possible, the health and safety of its workers at work. This requirement does not require that it be shown the policy was the preferable or most appropriate decision, only that it be a reasonable means open to the employer of meeting its obligation. Commissioner McDonald concluded that despite some issues with the justifications for the policy, it was not so unreasonable as to justify her substituting her view for that of the Fire Commissioner.

Conclusion

Finding that there was no basis to grant the relief sought by the FBEU, Commissioner McDonald declined to make any orders. She also declined to make the recommendations sought by FRNSW that all firefighters received a vaccination within two weeks of the recommendation and that FRNSW discontinue disciplinary proceedings against any firefighter who provided evidence of vaccination, as it was up the Fire Commissioner what steps it takes to protect its employees and whether to take action against individuals who do not comply with those policies.

Natural Resources Commission (Staff Agency) Enterprise Agreement 1 July 2022 – 30 June 2024 [2023] NSWIRComm 1007

On 31 January 2023, Commissioner McDonald delivered a decision approving an enterprise agreement in which the employee parties were not represented by a union and hence the provisions of s 36 of the Act.

The decision catalogues and explains the various provisions that must be complied with to obtain approval of an enterprise agreement, being Pt 2 of the Act, cl 6.9 of the Industrial Relation Commission Rules 2022 and the Principles for Approval of Enterprise Agreements as determined by the Full Bench in *Review of the Principles for Approval of Enterprise Agreements 2021/2022* [2022] NSWIRComm 1005 ("Principles").

The decision highlights the need to provide evidence, as opposed to assertions, of the matters required by s 35 of the Act and Pt 2 of the Principles. This is particularly important with respect to the "no net detriment" test. While each case will be different, establishing that an agreement will not, on balance, provide a net detriment to the covered employees compared with the aggregate package of conditions of employment under applicable, or comparator awards, may require some kind of a quantitative study to be done and put in evidence. While statements from employees, and/or their union representatives that there will be no net detriment to employees under the Agreement will likely give the Commission some comfort that this is the case, parties should not assume that conclusory statements to this effect alone will satisfy the requirements of the Act, the Rules, and the Principles.

3. SIGNIFICANT CASES *CONT.*

Ters v Health Secretary in respect of the South Western Sydney Local Health District [2023] NSWIRComm 1009

This matter involved an appeal to the Full Bench of the Industrial Relations Commission regarding the decision of Commissioner Webster. The original matter related to alleged victimisation of the applicant, Ms Ters, who was a nurse at Liverpool Hospital, South Western Sydney Local Health District (LHD). In January 2020, Ms Ters made a complaint in relation to a doctor's conduct, claiming it was unsafe and put both herself and the patient at risk of harm. In response, Ms Ters had allegations of misconduct made against her which the LHD found to be substantiated. The LHD issued Ms Ters with a warning from the Director of Nursing and Midwifery which was attached to her file.

At first instance Ms Ters sought orders under s 213(2) of the Act that the warning be removed from her records. The Health Secretary contended that the motion should be dismissed on two principal grounds: first, for want of jurisdiction as Ms Ters was no longer employed at the LHD, and secondly that s 213(2) was a comprehensive list of the Commission's powers in relation to victimisation claims and that the Commission had no power to order that the warning be withdrawn. Commissioner Webster rejected the lack of jurisdiction claim but accepted that s 213(2) was exhaustive and, as such, the Commission did not have the power to grant the relief sought. Subsequently, Ms Ters sought and was granted leave to appeal.

After review, the Full Bench found that three grounds of appeal were made out. This case summary focuses primarily on Ground 2, which was the key issue in the Full Bench's determination. Ground 2 asserted that the list of orders the Commission could make in s 213(2) were examples of the Commission's powers and not an exhaustive list of the types of orders the Commission was empowered to make.

The Commission concluded that s 213(2) was not an exhaustive list and rather was illustrative of the kind of orders the Commission could make. The Full Bench's conclusion was based on several considerations: the principles of statutory construction relating to beneficial provisions, prior decisions of the Commission, and the language and intention of s 213, with focus on the words "in particular".

Principles of Statutory Construction

The Full Bench did not reiterate the relevant principles of statutory construction as they had been correctly laid out and applied by Webster in her decision. It reiterated that remedial legislation should be construed beneficially to give the fullest relief the fair meaning of the language would allow. Such an interpretation favoured Ms Ters. Furthermore, Ms Ters submitted, and the Full Bench accepted, that accepting that s 213(2) was an exhaustive list of the Commission's powers would unduly limit the powers of the Commission contrary to the stated objects of the Act in s 3.

Language of s 213(2)

In her submissions, Ms Ters put particular emphasis on the words "in particular", submitting that the ordinary meaning of those words conveys an intention that the orders listed in s 213(2) are merely examples of the types of orders the Commission may make. The Full Bench preferred the position taken by Ms Ters, for several reasons. They concluded that the use of "in particular" in other sections of the Act such as s 213(4) and s 85(3) was not intended to be limiting but rather exemplative and this interpretation was in line with prior decisions of the Commission as outlined in paragraphs [54] and [55] of the Full Bench's decision.

In determining that the powers listed in s 213(2) were not exhaustive the Full Bench considered the predecessor to s 213, s 482 of the Industrial Relations Act 1991, and drew a series of conclusions in favour of Ms Ters' position. The primary consideration was that s 213(2), which had no equivalent in the 1991 Act, would not have been enacted with no work to do, which would have been the result of accepting the Health Secretary's submissions. Section 482 clearly delineated the orders available to the Commission which s 213(2) did not do, which was most likely to have been a conscious and intentional choice. This view was supported by the Second Reading Speech which stated the section was intended to give the Commission a "broad range of remedies". The Full Bench rejected the Health Secretary's submissions that that language showed a legislative intention to limit the Commission's powers to those enumerated in s 213(2).

Previous Decisions

In considering earlier decisions relating to the scope of s 213, Commissioner Webster relied on the decision in *Public Service Association of NSW (o/b Morawsky) v Department of Justice* [2017] NSWIRComm 1059 ("*Morawsky*"), which stated that the Commission's powers were "codified in sub-section 213(2) and they are no wider than that". Acknowledging that there were conflicting authorities on this question, the Full Bench considered several decisions addressing this issue and ultimately determined that *Morawsky* was wrongly decided and accepted and relied primarily on the recent decision of Commissioner Murphy in *Silsbury v Health Secretary in respect of Western Sydney Local Health District* [2021] NSWIRComm 1004, which rejected the idea that s 213(2) was an exhaustive list of the Commission's powers. The Full Bench acknowledged that the Commissioner would not have lightly departed from the decision of another Commissioner, but after consideration determined that the opinion expressed in *Morawsky* was incorrect.

Conclusion

Having determined that *Morawsky* was incorrectly decided, the Full Bench concluded that Commissioner Webster's reliance on that decision, in the interest of judicial comity, had led to her reaching an incorrect conclusion regarding the nature of the Commission's power outlined in s 213(2). In finding Grounds 1, 2, 3 and 5 made out, the appeal was upheld, the prior decision was quashed, and the matter was returned to Commissioner Webster for determination. Ms Ters also sought costs, but without a hearing on that specific issue no such order was made, but it was left open for Ms Ters to make an application for costs in the future if she so chose.

Transport Workers' Union of New South Wales v NSW Couriers Pty Ltd t/a Aramex (Sydney) [2023] NSWIRComm 1013

This matter arose from an industrial dispute between businesses operating within the "Aramex System", mainly Aramex Sydney Pty Ltd (Aramex Sydney) and several franchising companies referred to as Courier Franchisees (CFs) represented by the Transport Workers' Union of New South Wales (TWU). Before being able to address the main issues in contention it was necessary first for the Commission to answer the jurisdictional question of whether the CFs and Aramex Sydney were engaged in a "contract of carriage" and whether Aramex Sydney was a "principal contractor" as defined in ss 309 and 310 of the Act respectively. Having regard to the actual nature of the relationship between the parties and the documents which defined that relationship, Commissioner Webster determined that the parties were engaged in a contract of carriage and the Commission did have jurisdiction to hear the dispute filed on behalf of the CFs.

3. SIGNIFICANT CASES *CONT.*

The terms of the agreement between Aramex Sydney and the CFs were laid out in the CF deed and the CF Manual, which Aramex Sydney may unilaterally change at any time. The deed, entitles a CF to the exclusive pickup and delivery of parcels within a defined territory purchased by the CF. The deed obliged CFs to transport goods for Aramex Sydney and empowered Aramex Sydney to arrange for alternative means of delivery where goods were not delivered on time and to discipline CFs for failing to meet timeframes. The Manual laid out further terms as to the manner in which deliveries were to be carried out by CFs.

In determining whether there was a contract of carriage, Commissioner Webster stated that the primary consideration is whether the dominant purpose of the relationship was for the transportation of goods. In making that determination, the Commission could look beyond the terms of a written contract where that contract does not reflect the true nature of the relationship between the parties. Acknowledging that the CF deed covered a range of matters beyond the transportation of goods, the dominant purpose of the relationship was the transportation of goods.

Considering the actual workings of the relationship, Commissioner Webster determined that Aramex Sydney's role in the delivery of goods was not merely facilitative, but rather Aramex Sydney played a direct, hands-on role in the delivery of goods. CFs have little or no control of the goods beyond picking up and dropping them off at the depot: all other aspects are controlled and coordinated by Aramex Sydney. Aramex Sydney also exerts significant control over the manner in which deliveries are made, controlling who is able to undertake deliveries, the quality of vehicles used and the appearance of CFs. Aramex Sydney sets the rate of remuneration for CFs, and the costs for the transport of goods, and receives monies for deliveries which it then pays to CFs after making various deductions.

Substantial reliance was put on the exclusive nature of territories granted and the control CFs had in their exclusive territories by Aramex Sydney. The CF deed empowered Aramex to arrange for alternative delivery where CFs were not meeting time standards at its discretion. Furthermore, Aramex maintained a capacity to change or reclaim territories as a result of changes in the Manual or for breach of the CF deed. Commissioner Webster held that it was irrelevant that Aramex Sydney had not changed or reclaimed territories: what was relevant was the capacity to do so.

For the reasons outlined above, Commissioner Webster determined that Aramex Sydney was a principal contractor by effect of s 310(1). The purpose of the relationship was the delivery of goods and Aramex Sydney exerted substantial control over the manner of delivery. She stated that even if she was wrong in determining that Aramex Sydney was a principal contractor it would, by acting as agent for the CFs, fall into the extended definition of principal contractor as defined in subs 310(2). Aramex Sydney's Notice of Motion that the dispute be dismissed was dismissed and the matter was listed for conciliation.

Potter v Industrial Relations Secretary (No 2) [2023] NSWIRComm 1026

The appellant sought leave to appeal and appealed against two decisions. First, a decision declining to reinstate her under s 243 of the *Workers Compensation Act 1987* (NSW), and secondly, a decision dismissing her unfair dismissal application.

The appellant suffered a psychological injury in September 2019 and became incapacitated for work. She alleged that the injury was caused by her manager's criticism and exclusion of her. The appellant's claim for workers' compensation was initially declined. In September 2020, the appellant's employment was terminated pursuant to s 47(1)(d) of the *Government Sector Employment Act 2013* as she was unable to perform her role due to her injury.

In December 2020, the Workers Compensation Commission issued a Certificate of Determination which noted that the appellant had "suffered from no incapacity as a result of the injury since 25 November 2020". She was also certified fit for normal duties by her treating doctor.

The appellant sought reinstatement pursuant to Pt 8 of the WC Act. When the reinstatement was declined in January 2021, the appellant sought orders from the Commission that she be reinstated under s 242 of the WC Act. She also contended that her dismissal had been unfair and sought reinstatement pursuant to s 88 of the Act. Both applications were dismissed by the Commission at first instance. The appellant submitted five grounds of appeal. The Full Bench heard the parties on the question of leave and on the substantive appeal together.

The Commission granted leave to appeal in respect of the first ground, which alleged that the Commission had erred in finding that its discretion under s 243 of the WC Act permitted it to consider matters unrelated to the appellant's capacity for employment and the statutory purpose underpinning Pt 8 of the WC Act. Leave was granted because the Full Bench had not previously decided the question. The Commission held that the discretion to be exercised by the Commission pursuant to s 243 of the WC Act was not constrained such that the Commissioner at first instance considered impermissible matters. The beneficial and protective purpose of Pt 8 of the WC Act did not preclude, in appropriate cases, consideration of the possible, probable, or likely conduct of an employee if reinstated. That the purpose of Pt 8 is not to provide redress for the earlier dismissal was no answer to the broad discretion given to the Commission under s 243. Consequently, the appeal was dismissed.

Secretary, Department of Education v Williams [2023] NSWIRComm 1098

The Secretary of the Department of Education sought leave to appeal, and appealed, against a public sector disciplinary appeal decision in which Ms Williams' dismissal from the teaching service was set aside, her employment was deemed to not have been broken, and her name was ordered to be removed from the list of persons not to be employed by the Department pursuant to s 7 of the *Teaching Service Act*.

The Secretary submitted five grounds of appeal. The Full Bench granted leave in respect of the first ground of appeal, which alleged that the Commissioner erred in ordering the Secretary to remove the respondent's name from the 'Do Not Employ List' where the Commission had no power to make such an order pursuant to ss 100C(2) or 100D of the Act or otherwise. The Commission granted leave as this was a significant issue that has wider implications for the jurisprudence of the Commission.

The Commission held that there is a power under s 100C(2) to order that a person's name be removed from the "Do Not Employ List" although the Commission emphasised that the power is not at large and may only be exercised in certain circumstances. Ms Williams' name was placed on the "Do Not Employ List" as a direct consequence of her dismissal and it was illogical for her name to remain there once the dismissal was set aside. There was no justification for such a blemish to remain on her record, with the Commission unable to restore her to the position she would have been in if not for the termination. The order was within power and was a consequential order to give effect to the basis on which the appeal has was allowed. The Commission distinguished such an order from orders which are not consequential in the relevant sense – such as a request to apologise to the employee, pay damages, or transfer an employee. The Commission observed that an order to remove a name from the list where the appeal was otherwise disallowed was also unlikely to properly arise. Thus, the appeal was dismissed.

3. SIGNIFICANT CASES *CONT.*

Health Secretary in respect of HealthShare NSW v Betts [2023] NSWIRComm 1104

The Health Secretary appealed a decision which arose from an application pursuant to s 242 of the WC Act filed in April 2021. Leave to appeal was granted and the Commission considered two issues on appeal.

The first grounds were related to the requirement to produce a medical certificate in s 241(3). This provision was described as a "gateway" because the medical certificate is necessary to enliven the jurisdiction of the Commission under Pt 8 of the WC Act. The Commission upheld the finding at first instance that a doctor's certificate stating that Ms Betts was fit for employment had met the requirements of s 241(3) despite being premised on a false belief that Ms Betts was abstinent from alcohol at the time it was issued.

The Commission held that the legislation did not require the certificate to be a true statement of the worker's fitness. The certificate initiates a process during which the employer is expected to make enquiries into the worker's fitness and is not penalised for refraining from immediately re-employing the worker. The proper time for determining the fitness of the worker is when relevant orders are made.

The Commission rejected submissions based upon analogies to administrative review and to contract law principles that a certificate based on a false premise is in fact no certificate of fitness. The Commission emphasised that there was no allegation that the production of the relevant certificate involved any fraud. Had the certificate been fraudulent, the gateway provision would not have been satisfied because, in effect, there would be no certificate of fitness.

The Commission upheld the appeal on the basis that the Commissioner at first instance did not have medical evidence before him that entitled him to conclude that Ms Betts was fit for the relevant employment. There were two medical opinions relevant to this enquiry, that of Dr Rastogi and that of Dr Smith. Regarding Dr Rastogi's opinion, the Commissioner found that the certificate she issued was incorrect as Dr Rastogi issued the certificate without knowing about at least one significant relapse in the consumption of alcohol.

With respect to Dr Smith, he did not find that Ms Betts was fit for employment, and the proposition was not put to him that he would have found differently had the Commissioner's factual findings regarding her abstinence been available to him. The Commissioner relied on Ms Betts's cross-examination of Dr Smith, but the evidence Dr Smith gave under cross-examination did not amount to medical evidence that Ms Betts was fit for the relevant employment. It was not open to the Commissioner to draw an inference from Dr Smith's (or Dr Rastogi's) evidence that Ms Betts was fit on account of his factual findings of her abstinence. Additionally, the Commission noted that the Commissioner was not entitled to, and did not in fact, rely upon the presentation of Ms Betts at the hearing to decide upon her fitness for the Employment.

Thus, as the Commissioner was not entitled to make a finding on the absence of medical evidence, the appeal was upheld.

State Wage Case 2023 [2023] NSWIRComm 1121

On 27 June 2023, following the publication of the decision of the Minimum Wage Panel of the Fair Work Commission ("FWC") in *Annual Wage Review 2022-23* [2023] FWCFB 3500 ("AWR 2023"), the Commission directed the Industrial Registrar to issue a Summons to Show Cause to relevant industrial parties. The Commission adopted the AWR 2023 as a National decision as provided by s 50 of the Act and awarded increases of 5.75% for most awards. The parties did not seek any substantive changes to the Wage Fixing Principles.

The State Wage Case dealt with the relevant awards in three tranches.

First, the private sector awards Commission passed on the *AWR 2023* on 21 August 2023.

Second, the Commission dealt with the awards impacted by the decisions of the FWC in *Aged Care Award 2010* [2023] FWCFB 45 and *Aged Care Award 2010* [2022] FWCFB 200 (collectively "FWC Aged Care Award Decisions"). The parties to those awards who had entered an appearance agreed that the FWC Aged Care Award Decisions are National decisions pursuant to s 48 of the Act. The parties requested conciliation in respect of these awards and subsequently filed consent applications pursuant to s 17 of the Act. For classifications that are direct care classifications in the Local Government, Aged, Disability and Home Care (State) Award, the Commission ordered an increase to rates of pay within the range from 5.75% to 16.00%. For classifications that are direct care classifications in the Nurses' (Local Government) Residential Aged Care Consolidated (State) Award 2021, the Commission ordered an increase to rates of pay within the range from 9.05% to 17.83%. For classifications that are not direct care classifications in these awards, the Commission ordered an increase to pay and pay-related allowances of 5.75%.

Third, the awards impacting employees of the Crown in the Right of the State of New South Wales who were subject to the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014, received an increase of 5.75%, consistent with the AWR 2023.

4. ENGAGEMENT, EDUCATION AND PROJECTS

Education Day 2023

On 26 May 2023, the Commissioners and Registrar were treated to a Professional Education Day where we were privileged to have such eminent jurists and speakers in a small group. This was held at the Judicial Commission of NSW.

- Court craft was discussed by The Honourable Justice Michael Lee, of the Federal Court of Australia
- Kilmuir Rules by The Honourable Justice Julie Ward, President Court of Appeal
- Ex tempore Decisions by The Honourable Justice James Stevenson, Supreme Court of NSW
- Complaints Handling at the Judicial Commission of NSW by Una Doyle, CEO, Judicial Commission of NSW

Engagement and Education

On 31 March 2023, Commissioner Webster delivered an "Update from the Commission (recent cases, preparing for conciliations and self-represented litigants)" at the NSW Industrial Relations Society Practitioners Day at the York Centre, Sydney.

On 13 May 2023, Chief Commissioner Constant spoke about the future of industrial relations legislation in NSW at the Industrial Relations Society of New South Wales annual conference at Bowral.

On 1 September 2023, Commissioner Sloan delivered a paper on "Court Craft" at the Practitioners Workshop convened by the Industrial Relations Society Newcastle Branch at New Lambton.

On 6 November 2023, Commissioner Webster delivered a Presentation titled "Tips and tricks for appearing in the Commission: the art and science of IR in the current landscape" at the NSW Health IR Practitioners Conference 2023 at Sydney Olympic Park.

5. APPENDICES

APPENDIX 1
Time Standards

Nature of Matter	Provide to Chief Commissioner or Delegate	Legislative Provision	Allocation	List for Conciliation/ Directions
Industrial Disputes	<2 hours from receipt of notification	IR Act ss 130, 332	1 – 24 hours	2 hrs – 7 days
Awards & 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 (PN 24)	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 – 7 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	<2 hours	IRC Rules r 3.3 (where Notice of Motion and Affidavit required)	<2 hours	2 hours – 7 days
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 about an election in an industrial organisation	1 – 24 hours from referral	IR Act s 254	24 – 48 hours	Directions; 7 – 14 days

5. APPENDICES *CONT.*

APPENDIX 2

List of Registered Industrial Organisations

Organisation	Org Type	Category	Reg No.
Australian Education Union New South Wales Teachers Federation Branch	Employees	Federal	EE77
Australian Institute of Marine and Power Engineers New South Wales District	Employees	State	EE56
Australian Maritime Officers' Union of New South Wales	Employees	State	EE28
Australian Nursing and Midwifery Federation New South Wales Branch	Employees	Federal	EE79
Australian Paramedics Association (NSW)	Employees	State	EE76
Australian Salaried Medical Officers' Federation (New South Wales)	Employees	State	EE60
Australian Services Union of N.S.W.	Employees	State	EE22
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, New South Wales Branch	Employees	State	EE06
Construction, Forestry and Maritime Employees Union (CFMEU)	Employees	State	EE70
Electrical Trades Union of Australia, New South Wales Branch	Employees	State	EE33
Finance Sector Union of Australia, New South Wales Branch	Employees	State	EE41
Fire Brigade Employees' Union of New South Wales	Employees	State	EE36
Health Services Union NSW	Employees	State	EE15
Independent Education Union of Australia NSW/ACT Branch	Employees	Federal	EE80
Institute of Senior Educational Administrators of New South Wales	Employees	State	EE72
Media, Entertainment and Arts Alliance New South Wales	Employees	State	EE26
Mining and Energy Union	Employees	State	EE81
New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union	Employees	State	EE05
New South Wales Nurses and Midwives' Association	Employees	State	EE23
Newcastle Trades Hall Council	Employees	State	EE71
NTEU New South Wales	Employees	State	EE69
Police Association of New South Wales	Employees	State	EE09

Organisation	Org Type	Category	Reg No.
Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales	Employees	State	EE59
Rail, Tram and Bus Union of New South Wales	Employees	State	EE47
Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern, New South Wales	Employees	State	EE11
Shop, Distributive and Allied Employees' Association, New South Wales	Employees	State	EE30
The Association of Professional Engineers, Scientists and Managers, Australia (NSW Branch)	Employees	State	EE58
The Australasian Meat Industry Employees' Union, New South Wales Branch	Employees	State	EE39
The Australasian Meat Industry Employees' Union, Newcastle and Northern Branch	Employees	State	EE50
The Australian Workers' Union, New South Wales	Employees	State	EE24
The Broken Hill Town Employees' Union	Employees	State	EE74
The Development and Environmental Professionals' Association	Employees	State	EE07
The Local Government Engineers' Association of New South Wales	Employees	State	EE35
The New South Wales Plumbers and Gasfitters Employees' Union	Employees	State	EE38
The Seamens' Union of Australia, New South Wales Branch	Employees	State	EE02
Transport Workers' Union of New South Wales	Employees	State	EE17
Unions NSW	Employees	Peak Council	EE-PEAK State Peak Council for Employees
United Workers' Union, New South Wales Branch	Employees	State	EE04

5. APPENDICES *CONT.*

Employer organisations and peak councils

Organisation	Org Type	Category	Reg No.
Aged and Community Services Australia	Employers	Federal	ER68
Association of Quality Child Care Centres of NSW Inc	Employers	Separate	ER46
Australian Federation of Employers and Industries	Employers	State	ER61-PEAK a State Peak Council for Employers
Australian Hotels Association (NSW)	Employers	State	ER38
Australian Medical Association (NSW) Limited	Employers	Separate	ER29
Australian Private Hospitals Association	Employers	Federal	ER17
Australian Retailers Association	Employers	Federal	ER58
Australian Road Transport Industrial Organization, New South Wales Branch	Employers	Federal	ER69
Bus and Coach Industrial Association of New South Wales	Employers	State	ER21
Clay Brick & Paver Association of New South Wales	Employers	State	ER10
Local Government NSW	Employers	State	ER28
Motor Traders' Association of New South Wales	Employers	Federal	ER68
New South Wales Taxi Council Limited	Employers	Separate	ER67
Newcastle Master Builders' Association	Employers	State	ER59
NSW Business Chamber Limited	Employers	Separate	ER70
NSW Farmers' (Industrial) Association	Employers	Separate	ER66
Nursery & Garden Industry NSW & ACT Limited	Employers	Separate	ER60
Roofing Industry Association of NSW Incorporated	Employers	Separate	ER64
TAB Agents' Association of New South Wales	Employers	State	ER27
The Association of Wall & Ceiling Industries of New South Wales	Employers	State	ER02
The Australian Industry Group New South Wales Branch	Employers	Federal	ER56-PEAK a State Peak Council for Employers
The Caravan Camping and Touring Industry and Manufactured Housing Industry Association of NSW Limited	Employers	Separate	ER43

Organisation	Org Type	Category	Reg No.
The Electrical Contractors' Association of New South Wales	Employers	State	ER04
The Funeral Directors' Association of New South Wales Limited	Employers	Separate	ER36
The Master Builders' Association of New South Wales	Employers	State	ER52
The Master Fish Merchants' Association of Australia	Employers	State	ER37
The Master Plumbers & Mechanical Contractors Association of New South Wales	Employers	State	ER47
The New South Wales Chamber of Fruit and Vegetable Industries Incorporated	Employers	Separate	ER33
The New South Wales Pharmacy Guild	Employers	State	ER25
The Newsagents' Association of NSW and ACT Ltd.	Employers	Separate	ER63
The Racing Guild of New South Wales	Employers	State	ER57
The Registered Clubs Association of New South Wales	Employers	State	ER16
Timber Trade Industrial Association	Employers	Federal	ER44
Waste Contractors and Recyclers Association of N.S.W.	Employers	State	ER20

APPENDIX 3

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

The position of Chief Commissioner of the Industrial Relations Commission was created with the assent of the *Industrial Relations (Industrial Court) Amendment Act 2016* on 8 December 2016 and will cease on 30 June 2024.

Name	Held Office		Remarks
	From	To	
Tabbaa, Inaam AM FRSN	8 December 2016	30 March 2017	Acting Chief Commissioner until the appointment of Peter Kite SC. Retired from the Commission on 20 April 2017.
Kite SC, Peter	3 April 2017	4 December 2019	Retired on 20 December 2019.
Constant, Nichola	2 March 2020	30 June 2024	Acted as Chief Commissioner from 22 November 2019.

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 April 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 August 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 20 September 1999.
Fisher, William Kenneth	18 November 1981	11 April 1998	Died 10 March 2010.
Wright, Frederick Lance	22 April 1998	22 February 2008	Retired.
Boland, Roger Patrick	9 April 2008	31 January 2014	Retired and continued as Acting Judge until January 2015.
Walton, Michael John	3 February 2014	7 December 2016	Appointed Justice of the Supreme Court of NSW 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.

Name	Held Office		Remarks
	From	To	
Cahill, John Joseph	19 February 1987	10 December 1998	Died 21 August 2006.
Walton, Michael John	18 December 1998	31 January 2014	Appointed as President 3 February 2014. Appointed Justice of the Supreme Court of NSW on 8 December 2016.

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 February 1914.
Payne, Edward John	1914	1918	Retired from the public service in 1913 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, John Albert	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.

5. APPENDICES *CONT.*

Name	Held Office		Remarks
	From	To	
Fetherston, Kevin Roy	3 June 1968	1977	Appointed Executive Assistant (Legal) Department of Labour and Industry; later appointed as Deputy Undersecretary, Department of Labour and Industry.
Coleman, Maurice Charles Edwin	29 April 1977	1984	Retired.
Buckley, Anthony Kevin	23 January 1984	30 March 1992	Appointed as Commissioner, Industrial Relations Commission 31 March 1992.
Walsh, Barry	19 February 1992	15 July 1994	Appointed as Commissioner, Water Conservation and Irrigation Commission.
Szczygielski, Cathy	18 July 1994	4 November 1994	Returned to position of Deputy Registrar, Industrial Court.
Williams, Louise	7 November 1994	16 August 1996	Returned to position of Deputy Registrar, Land & Environment Court.
Robertson, Gregory Keith	31 March 1992	26 October 1999	To private practice.
McGrath, Timothy Edward	27 October 1999	9 August 2002	Appointed Assistant Director General, Courts and Tribunal Services, Attorney General's Department 12 August 2002.
Grimson, George Michael	22 August 2002	18 December 2014	Retired.
Hourigan, Lesley	19 December 2014	13 March 2015	Returned to position of Deputy Registrar Industrial Court.
Wiseman, James	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	

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.

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. The Act also established a system of Industrial Boards consisting of representatives of employers and employees and 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 up to three judges with the status of judges of the District Court. The Court was vested with all the powers conferred on all industrial tribunals. 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.

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.

5. APPENDICES *CONT.*

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 try to bring about an agreement between the parties. Any such agreement, when reduced to writing, took effect as an award but was subject to appeal to the Industrial Commission. 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 1940* provided for the establishment of an Industrial Commission, Conciliation Committees, Conciliation Commissioners, Special Commissioners, Industrial Magistrates Courts, and the Industrial Registrar.

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 1940* was again amended to make provision for the establishment of Contract Regulation Tribunals. 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 lorries of loads other than passengers.

In 1981, and again in 1989, the Commission's powers in relation to dealing with apprentices were clarified. The *Industrial and Commercial Training Act 1989* treated apprentices 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 1940* 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.

Unlike the federal approach, the States had 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).

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 this Act established a new Industrial Relations Commission. 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(xxxvii) of the Australian Constitution and amended the *Industrial Relations Act 1996*. The effect of this Act was to transfer the residue of the private sector to the national industrial relations system, and it made clear that the Industrial Relations Commission retained jurisdiction in relation to State public sector employees and Local Government employees. Additionally, s 146B of the *Industrial Relations Act 1996* was inserted to make clear that members of the Industrial Relations Commission of New South Wales could continue to be nominated as dispute resolution providers in federal enterprise agreements.

5. APPENDICES *CONT.*

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 amended the Industrial Relations Act 1996. The major changes were that the Industrial Court may only be constituted by a single judicial member and not by a Full Bench of judicial members; 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 was 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 and appeals on a question of law in relation to a public sector promotional or disciplinary appeal was transferred to a single judge of the Industrial 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.

Amendments to other Acts around this time provided for: appeals from the Industrial Court to the Court of Criminal Appeal; for certain matters under the Police Act 1990 to be dealt with by Commission members who are Australian Lawyers; and for a judicial member of the Commission to act as a judge of the Supreme Court.

On 19 October 2016, the *Industrial Relations Amendment (Industrial Court) Act 2016* commenced. This Act made further changes to the *Industrial Relations Act 1996* allocating functions previously undertaken by judicial members of the Commission to the Supreme Court or to the Commission. Any references to the Industrial Court remaining in the *Industrial Relations Act 1996*, were to the Supreme Court. Accordingly, the role of President as Head of the Industrial Relations Commission was removed and in most respects these functions, including as Head of Jurisdiction, were to be undertaken by the newly created role of Chief Commissioner.

2023

In June 2023 the Government established the Industrial Relations Taskforce appointing the former President of the Commission, the Hon Roger Boland, and former Deputy President of the Fair Work Commission, Anna Booth, to lead consultations with stakeholders and to present a report on the powers and structure of the Commission.

The Taskforce recommended changes to the current system to include interest-based bargaining and the return of the Industrial Court.

In November 2023, the Government introduced the NSW Government Fair Pay and Bargaining Policy 2023.

On 1 December 2023, the Industrial Relations Reform Bill passed Parliament inserting Chapter 2A into the Act. The Chapter provides for mutual gains bargaining and the modernisation of good faith bargaining, and sets out applicable bargaining principles, notification requirements and new facilitation and resolution provisions.

The Bill repealed Section 146C of the Act which required the Commission to give effect to the Government's declared wages policy.

The Bill also includes a requirement for the Commission to take into account the fiscal position and outlook of the Government as a mandatory consideration for the Commission in respect of the Commission's function in determining public sector conditions of employment.

The Industrial Relations Commission in Court Session (the Industrial Court) will be re-established from 1 July 2024.

The Industrial Court will deal with judicial functions that were transferred to the Supreme Court pursuant to s 355B of the *Industrial Relations Amendment (Industrial Court) Act 2016*. These include proceedings for an offence against any industrial legislation, unfair contracts, and proceedings for declaration of right.

The Industrial Court may exercise functions of the Supreme Court in relation to the apprehension, detention, and punishment of persons guilty of contempt of the Commission.

The Bill amends s 229B of the *Work Health and Safety Act 2011* so that proceedings for offences against the Act or the regulations must again be dealt with summarily before the Local Court or the Industrial Court. This includes proceedings for category 1 offences alleged to have been committed by corporations. However, category 1 offences alleged against individuals will be prosecuted on indictment before the District Court of New South Wales.

Structure of the Commission

The Commission will consist of four distinct roles: a President, a Vice-President, Deputy Presidents, and Commissioners. The President, Vice-President and Deputy Presidents of the Commission are referred to as Presidential Members, separate to Commissioners.

The office of Chief Commissioner will be abolished, and the head of jurisdiction will be the President of the Commission.

The Governor may appoint a Presidential Member of the Commission as a member of the Industrial Court, also referred to as a judicial member of the Commission. A Full Bench of the Commission in Court Session must include only judicial members. A judicial member of the Industrial Court may also act as a conciliator or arbitrator at the Commission.

APPENDIX 8

Glossary

Applicant	The party who lodged an application with the Commission.
Arbitration	A process by which the Commission determines a dispute by imposing a binding settlement on the parties. The Commission may resolve a range of matters by arbitration, including unfair dismissal claims and industrial disputes, generally following attempted conciliation.
Award	An award is a ruling by the Commission which sets fair and reasonable conditions of employment for employees in that sector/profession. The Commission is required to review awards at least once every three years and may vary the terms of, or rescind the award.
Carrier	An individual, partnership or body corporate which supplies services under a contract of carriage.
Certificate of Attempted Conciliation	A certificate issued by the Commission in circumstances where conciliation has failed to resolve a dispute between the parties and is a prerequisite to arbitration.
Conciliation	An informal means of dispute resolution in the Commission. Conciliation is a prerequisite for arbitration in many types of matters before the Commission and the Commission has the authority to compel the attendance of persons at conciliation.
Constitutional Corporation	A corporation to which paragraph 51 (xx) of the Commonwealth Constitution applies.
Contract of Bailment	A contract under which a taxi is bailed to a person to enable the person to ply for hire or a hire vehicle that is bailed to a person to transport passengers. The Commission may make determinations regarding the conditions of employment and remuneration for bailors.
Contract of Carriage	A contract for the transportation of goods by means of a motor vehicle or bicycle in the course of a business transporting goods of that kind by motor vehicle or bicycle. The Commission may make determinations regarding remuneration and any related conditions under the contract.
Contract of Carriage Tribunal	The Contract of Carriage Tribunal is comprised of a Commissioner sitting alone or Commissioner and two part-time members nominated by the member of the Commission, one from each of the arbitration panels.
Dispute Order	Orders made by the Commission to resolve an industrial dispute, including orders to cease or refrain from taking action, cease a secondary boycott, and to reinstate or not dismiss employees involved in the dispute.
Enterprise Agreement	A legally enforceable agreement that sets out the conditions of employment between a group of employees and/or the Industrial Organisation representing those employees and their employer.
Entertainment Industry Dispute (s 20)	A dispute arising between a performer (see term below) and an entertainment industry representative or hirer. The Commission is empowered to make such orders it considers to be fair and reasonable in the circumstances.
Industrial Action	A strike by employees or a lock-out by an employer affecting the performance of work in connection with an industrial dispute. Any party to an industrial dispute may apply to the Commission for assistance in resolving the dispute.

Industrial Agent	A person other than a legal practitioner or employee or officer of an industrial organisation who represents a party in proceedings before the Commission.
Industrial Committee	A Committee established by the Commission to the whole or any part of a particular industry. An Industrial Committee may exercise the power of the Commission in relation to that industry or part thereof. Industrial Committees continue for three years unless they are dissolved sooner.
Industrial Dispute	A dispute about an industrial matter. Industrial disputes brought before the Commission must go through mandatory conciliation before proceeding to arbitration. Allowances are made for urgent filing of industrial disputes allowing them to be heard as quickly as possible and resolve matters with as little impact on the public as possible.
Industrial Instrument	An award, enterprise agreement, public sector industrial agreement, former industrial agreement, contract determination, or contract agreement.
Industrial Matter	Matters or things affecting or relating to work done or to be done in any industry, or the privileges, rights, duties or obligations of employers and employees in any industry.
Industrial Organisation	An organisation of employees or an organisation of employers registered under Chapter 5 of the Industrial Relations Act. Rules regarding Industrial Organisations are located in Chapter 5 Part 4 of the Industrial Relations Act.
Industrial Registrar	The individual in charge of the administration of the Industrial Relations Commission Registry. The Industrial Registrar has the power to make orders and decisions regarding certain matters.
National Decision	A decision of the Minimum Wage Panel or a Full Bench of Fair Work Australia that generally affects, or is likely to generally affect, the conditions of employment of employees in New South Wales who are subject to the jurisdiction of that panel.
Notifier	A party that notifies the Commission of an industrial dispute for the purpose of seeking the Commission's assistance in resolving the dispute.
Outworker	Workers in the clothing trade who work from home, a residential garage, or other place not usually considered a business, engaged in sewing, cutting, or finishing work. Outworkers are deemed to be employees of the trader or factory owner who hires them.
Party	An applicant, notifier, or respondent to a proceeding before the Commission.
Performer	Any actor, singer, dancer, acrobat, model, musician, or other performer of any kind who enters an entertainment industry agreement with a performer representative.
Police Disciplinary Appeal	Under Pt 9, Div 1A of the *Police Act 1990*, officers of the NSW Police Force may apply to the Commission for the review of certain decisions on the ground that the decision was harsh, unreasonable, or unjust.
Police Dismissal Appeal	Under Pt 9, Div 1C of the *Police Act 1990*, an officer of the NSW Police Force may seek a review of their dismissal on the grounds the dismissal was harsh, unreasonable, or unjust. Probationary officers and senior officers are excluded from the Commission's review jurisdiction.
Public Sector Disciplinary Appeal	Under s 97 of the Act, certain public sector employees outlined in s 91 may appeal certain disciplinary actions taken against them to the Commission.
Registration	The process by which unions and employer associations formally register as industrial organisations.
Respondent	A party to a matter responding to an application commenced by an applicant.

5. APPENDICES *CONT.*

Right of Entry	The legal right of an authorised industrial officer to enter business premises under certain circumstances for the purpose of holding discussions with employees or to investigate breaches of industrial relations legislation or any industrial instrument that applies.
Right of Entry Permit	A permit issued by the Commission to an authorised industrial officer under the Industrial Relations Act.
Special Wage Permit	A permit authorising an employee to work for an employer for a rate of pay less than that set by an industrial instrument, where due to some impairment, the employee believes he or she is unable to earn the minimum rate.
Summons	The means by which parties are compelled to produce documents, attend to give evidence, or both, before the Commission. Under the Uniform Civil Procedure Rules NSW, summonses have the same effect and consequences for non-compliance as subpoenas. Unrepresented litigants must seek leave of the Commission before issuing summonses.
State Peak Council	An association of industries generally established for the purpose of acting on behalf of all members when lobbying the Government or promoting the interests of its constituent members. The State Peak Council for NSW is Unions NSW.
Victimisation	Discrimination against an employee or potential employee by an employer or industrial organisation due to the fact the person does or does not belong to an industrial organisation, refused to engage in industrial action, acted as a whistle-blower, engaged in political activity etc.
Wage Fixing Principles	Those principles, reviewed and updated from time to time by the Commission, which assist the Commission in determining applications for variations of remuneration and conditions of employment.