



Chief Commissioner's Review of the *Industrial Relations Commission Regulations 2005 (WA)*  
Chief Commissioner Pamela Scott  
C/- Chief Commissioner's Chambers  
Western Australian Industrial Relations Commission  
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**By email: [Chambers-Scott@wairc.wa.gov.au](mailto:Chambers-Scott@wairc.wa.gov.au)**

10 April 2018

Dear Chief Commissioner

**Review of the Commission's Regulations**

Thank you for your letter dated 23 March 2018 in which you outlined a number of changes to the *Industrial Relations Commission Regulations 2005 (WA)* (the **Regulations**) that are being considered.

Our response is set out below. Please let us know if you require any further information.

Yours faithfully

Rowan Kelly  
**Principal Solicitor**

Jessica Smith  
**Principal Solicitor**

**ELC's responses to changes to the Regulations, as raised in the Chief Commissioner of the WAIRC's letter dated 23 March 2018**

Item no. in 23 March letter	Nature of change	ELC's response to the change
1.	<p><b>Service of documents</b></p> <p>WAIRC Registrar to serve documents, with limited exceptions.</p>	<p><input checked="" type="checkbox"/> <b>ELC supports this change.</b></p> <p>As noted in our letter dated 16 February 2018, in other jurisdictions which are designed to be reasonably accessible for self-represented litigants, the relevant court or tribunal is responsible for service on the parties. In ELC's view, there is merit in the relevant court or tribunal serving the parties in these types of matters. In our experience, vulnerable employees (such as employees from a non-English speaking background or employees with a disability or literacy issues) sometimes struggle with the task of serving their employer and filing the statutory declaration of service.</p>
2.	<p><b>Hours for lodgement of documents</b></p> <p>Documents that are received electronically until midnight will be marked as lodged that day. Any documents received after midnight would be formally marked as lodged the next day.</p>	<p><input checked="" type="checkbox"/> <b>ELC supports this change.</b></p> <p>As noted in our letter dated 16 February 2018, we are of the view that the digitisation of the WAIRC's processes is essential in making claims processes as accessible as possible.</p> <p>As technology permits documents to be lodged online or emailed outside of the hours when the office of the Registry is open to the public for the transaction of business, the day the document is lodged online or emailed is the day the document should be marked as being lodged.</p> <p>Allowing documents to be lodged electronically until midnight on a given day would also make the WAIRC's practices consistent with the practices in the Fair Work Commission.</p>

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3.(a)	<p><b>The forms – plain English, definitions and electronic form</b></p> <p>The forms will be reviewed with a view to them being:</p> <ul style="list-style-type: none"> <li>(i) expressed in plain English, with definitions where necessary;</li> <li>(ii) more readily completed in electronic form.</li> </ul>	<p><input checked="" type="checkbox"/> <b>ELC supports this change.</b></p> <p>As noted in our letter dated 16 February 2018, we are supportive of plain English drafting generally (whether this be in the way that the Regulations are drafted or the forms provided for in the Regulations) because it makes the legal system more accessible for laypersons and for vulnerable workers especially.</p> <p>Equally, we are supportive of making it easier for documents to be lodged electronically. In ELC's experience, many employees rely heavily on technology and value the convenience of using electronic communications wherever possible. This extends to being able to lodge documents online or by email.</p>
3.(b)	<p><b>The forms – Schedules</b></p> <p>Some forms will include:</p> <ul style="list-style-type: none"> <li>(i) extra space for the provision of information; and</li> <li>(ii) further details to assist the Commission to deal with applications in a timely manner.</li> </ul>	<p><input checked="" type="checkbox"/> <b>ELC supports this change.</b></p> <p>ELC is supportive of the forms containing further details, such as the degree of urgency, contact details of each party's representatives, a brief background to the matter, and any orders sought.</p> <p>The further details sought should be designed with the self-represented litigant in mind, and the ELC notes the Commission's comments in paragraph 3(a).</p>
3. (c)	<p><b>The forms – Contractual benefits</b></p> <p>The schedule to <i>Form 3 – Notice of claim of entitlement to a benefit under a contract of employment</i> to include provision</p>	<p><input type="checkbox"/> <b>ELC suggests the following matters be considered.</b></p> <p>ELC does not oppose the schedule to Form 3 being amended to provide for additional information, subject to measures being put in place to reduce the</p>

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	<p>for additional information, including regarding the relevant contractual terms, and the requirement to attach a copy of the written contract.</p>	<p>risk of placing an increased burden on the employee in having to provide additional information.</p> <p>Further, in ELC's experience, its clients:</p> <p><i>Written contractual terms</i></p> <p>(a) sometimes do not have, and have difficulties obtaining from the employer, a copy of their written contract of employment; and</p> <p><i>Oral and implied contractual terms</i></p> <p>(b) can more easily describe in general language the nature of the oral or implied contractual term sought to be enforced but can have difficulty in expressing that contractual term in 'legal' language/terminology.</p> <p>In ELC's view, to address these concerns:</p> <p><i>Written contractual terms</i></p> <p>(a) the Form 3 should also ask the employer to set out whether it disputes the wording of the contractual term sought to be enforced, and to also attach a copy of any written contract of employment; and</p> <p><i>Oral and implied contractual terms</i></p> <p>(b) there be a degree of flexibility in setting out the contractual term sought to be enforced – for example, setting out the general nature of the term sought to be enforced, so that inexact wording does not prejudice the employee's claim.</p>

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3. (d)	<p><b>The forms – Deletion of regulations or forms</b> Several regulations or forms may be deleted.</p>	<p><input checked="" type="checkbox"/> <b>ELC supports this change.</b> As noted in our letter dated 16 February 2018, we are supportive of the Regulations being simplified. The deletion of superfluous regulations and forms assists in reducing procedural formality and flexibility.</p>
4.	<p><b>Witness statements</b> The Commission may determine that it is appropriate for an outline of the evidence intended to be adduced, rather than a witness statement, be filed.</p>	<p><input checked="" type="checkbox"/> <b>ELC supports this change.</b> In ELC's experience, the preparation of an outline of evidence instead of a witness statement can be a simpler and less confronting process for a layperson. An outline of evidence still provides procedural fairness in putting the other party on notice of the evidence intended to be adduced that it needs to answer; and provides the Commission with the opportunity to hear each party give their evidence-in-chief orally.</p>
8.	<p><b>Dealing with matters on the papers</b> The Regulations to allow for certain matters to be dealt with on the papers.</p>	<p>~ <b>ELC suggests the following matters be considered.</b> ELC does not oppose certain matters being decided on the papers, subject to measures being put in place to ensure a layperson is not prejudiced in not being able to present their matter orally (for the reasons outlined below). While this change will still allow the parties to have a formal hearing, should they so elect – it is not clear whether <b>all</b> parties need to agree to that election or it is sufficient for <b>one</b> party to make the election.</p>

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		<p>Care needs to be taken where the ability to have a matter heard on the papers is the default position, that one party is not able to use this process to gain a tactical advantage over another party, particularly where the other party is a layperson.</p> <p>In respect of this, ELC is of the view that some laypersons may find it difficult to properly and fully put their case on the papers, so still need to have the protection to elect to have a formal hearing should they so wish, even if the other party does not agree.</p>
10.	<p><b>Amendments to the <i>Industrial Relations Act 1979</i></b></p> <p>The Chief Commissioner of the WAIRC will raise issues arising in the Regulations because of requirements of the <i>Industrial Relations Act 1979 (WA)</i> with Mark Ritter SC for consideration in the Ministerial Review of the State Industrial Relations System (<b>State IR Review</b>).</p>	<p><input checked="" type="checkbox"/> <b>ELC supports this process.</b></p> <p>As noted in ELC's letter dated 16 February 2018, we are of the view that the WAIRC should be cognisant of, but conduct its review of the Regulations independently of, the State IR Review.</p> <p>We understand from the 23 March letter that while the Chief Commissioner of the WAIRC will raise the issues raised with Mark Ritter SC for consideration in the State IR Review, that the Chief Commissioner's review of the Regulations will not rely on, or be delayed, by any speculated, or final, outcome of the State IR Review.</p>