

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)**

16 February 2018

Dear Chief Commissioner

**Review of the Commission's Regulations**

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to provide comments and suggestions to the Chief Commissioner's review into the *Industrial Relations Commission Regulations 2005 (WA)* (**Review**).

Please see our submission below. We would be happy to provide further information to the Review and participate in further consultation should there be any opportunity to do so.

Yours sincerely



Rowan Kelly  
**Principal Solicitor**

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**Principal Solicitor**

## Simplified system

1. The purpose of the Review is to determine whether changes might be made to the *Industrial Relations Commission Regulations 2005 (WA) (Regulations)* to “*improve the efficiency of the Commission’s processes and procedures.*”<sup>1</sup>
2. ELC assumes that in seeking to improve the efficiency of the Western Australian Industrial Relations Commission’s (**WAIRC**) processes and procedures, the WAIRC will examine whether, and how, the Regulations can be simplified. ELC is generally supportive of reforms which result in an efficient and simplified system of workplace relations, provided that employees do not lose existing rights and entitlements.
3. It is vital that processes and procedures be clearly set out in the Regulations in a format appropriate for laypersons to rely upon.
  - 3.1 To the extent possible, the procedures provided for in the Regulations should be flexible and informal.
  - 3.2 In ELC’s experience, procedural formality prevents vulnerable employees from accessing justice. This is because complexity can result in confusion, potentially impacting on an employee’s fundamental capacity to initiate, and then progress, legal proceedings.
  - 3.3 The Regulations should be written in plain English and be as user-friendly as possible for laypersons.
4. An example of this is that it is potentially confusing to a layperson the difference between the process of ‘lodging’, ‘filing’ and ‘sending’ a document to the WAIRC.
  - 4.1 The *Industrial Relations Act 1979 (WA) (Act)* refers to certain documents being lodged or, alternatively, filed in the Commission or Registry.
  - 4.2 The Regulations then need to address both the concept of lodging a document and filing a document.
  - 4.3 Regulation 5 then refers to documents being lodged and filed electronically, and also refers to documents sent by email. The use of the words lodging, filing and sent adds complexity to the process and has the potential to cause confusion.
  - 4.4 For a layperson, it is the act of delivery of the relevant documents to the WAIRC that is important, whether this is by a physical, postal or electronic medium.
  - 4.5 ELC is of the view that an efficient and simplified process for the delivery to, and acceptance by, the WAIRC of documents for filing would be of value. However, this requires the Act to also be amended so as not to differentiate between the different concepts of lodgement and filing of a document.

**Suggestion 1: That the Regulations be reviewed with the objective of ensuring that they are written in plain English so that they are easily understood by the layperson, and contain flexible and informal procedures.**

<sup>1</sup> WAIRC, accessed 16 February 2018, <<http://www.wairc.wa.gov.au/index.php/en/latest-news/422-review-of-the-commission-s-regulations>>.

## Nature of interaction with WAIRC

5. The majority of ELC's clients interact with the WAIRC by making an unfair dismissal claim or a denied contractual benefits claim.<sup>2</sup>
6. Typically though, ELC's clients in commencing and progressing a claim do not conduct a review of the Regulations. Rather, they rely on a combination of publically available summary guides and forms, usually provided online through the WAIRC website<sup>3</sup> and the ELC website.<sup>4</sup>

## Forms and Particulars

7. Therefore, while the Regulations necessarily determine the relevant content of the summary guides and relevant forms, ELC's clients rely on those summary guides and forms (not the Regulations) to inform, guide and assist them in their claim.
8. The two main forms our clients access are Form 2 and Form 3.<sup>5</sup> Then, attached to each of these Forms are the particulars as approved by the Chief Commissioner (**Particulars**).<sup>6</sup>
  - 8.1 Each Form is akin to a cover page in that it contains the matter number (to be initially inserted by the WAIRC) and basic details of the applicant and employer.
  - 8.2 The Particulars set out the substantive content of the application, which also includes information to be inserted regarding the applicant and the employee (similar to the information included in the Form).
  - 8.3 The Particulars are not a document whose form is prescribed by the Regulations, albeit the authority of the Chief Commissioner to approve the Particulars is set out in the Regulations.<sup>7</sup>
9. ELC is of the view that the Particulars should also be considered and reviewed as part of the Review (although the Particulars are not contained in the Regulations), as:
  - 9.1 the Particulars play an important part in the WAIRC's processes and procedures in commencing an application; and
  - 9.2 the WAIRC is best placed to determine the content of the information required in the Particulars, given the WAIRC has years of experience dealing with section 29 disputes.
10. In then reviewing the Particulars, ELC is of the view that consideration should be given to whether the Particulars could be supported by including more detailed drafting or explanatory notes supported by examples (potentially in multiple languages, if resources allowed and there seemed to be sufficient demand).
11. For example, question 24 of the Particulars provides:

*If you are seeking a remedy other than reinstatement give specific details.*

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<sup>2</sup> The Report of the Chief Commissioner of The Western Australian Industrial Relations Commission 2016-17 usefully states that section 29 applications represent 21% of all matters lodged in 2016-17: WAIRC, accessed 12 February 2018, <<http://www.wairc.wa.gov.au/images/AnnualReports/807.pdf>>.

<sup>3</sup> WAIRC, accessed 16 February 2018, <<http://www.wairc.wa.gov.au/index.php/en/>>.

<sup>4</sup> Employment Law Centre of WA (Inc), accessed 16 February 2018, <<https://elcwa.org.au/>>.

<sup>5</sup> Schedule 1 of the Regulations.

<sup>6</sup> Regulation 61 of the Regulations.

<sup>7</sup> Ibid.

12. A self-represented litigant in answering that question might not know:
  - 12.1 the nature and extent of the remedies available to them; and
  - 12.2 what remedies might not be available to them if the matter was taken through to arbitration, but could be obtained through a settled outcome.
13. An explanatory note supported by examples (also indicating what could be achieved by way of, say, conciliation) would assist the applicant in drafting their application, and also assist the former employer in understanding the nature of the relief sought.

**Suggestion 2: That the Particulars be reviewed with the objective of determining if there are any changes that could enhance their user-friendliness for the layperson.**

**Suggestion 3: That consideration be given to including greater detail in the drafting or explanatory notes to the Particulars, supported by examples (potentially in multiple languages).**

### Use of technology

14. In ELC's experience, many employees rely heavily on technology and value the convenience of using electronic communications wherever possible. This includes using technology and electronic communications to lodge and progress claims in courts and industrial tribunals.
15. Our experience is consistent with overall trends in relation to technology use amongst the general Australian population.<sup>8</sup>
16. ELC is of the view that the recognition of current tools and technology, as well as the digitisation of the WAIRC's processes, are essential in making claims processes as accessible as possible. For example, in our view:
  - 16.1 the Regulations should expressly state that documents can be lodged by email, and specify an email address for this to occur;<sup>9</sup> and
  - 16.2 the Regulations should allow, and the WAIRC website should facilitate, that the online lodgement of forms is accessible and user friendly through a variety of electronic devices (such as desktops, tablets and phones) and browsers (such as Chrome, Internet Explorer, Safari and Firefox). Currently though, the online form is essentially a 'word based' platform identical to the hard copy forms with fields to be inserted.<sup>10</sup>

**Suggestion 4: That the Regulations ensure and enhance a layperson's ability to use technology-based processes in initiating and continuing proceedings.**

**Suggestion 5: That the process for lodging documents facilitate lodgement by email.**

<sup>8</sup> The Household Use of Information Technology, Australia, 2014-15, published by the Australian Bureau of Statistics states that:

*The number of households with access to the internet at home increased, reaching 7.7 million in 2014-15, representing 86% of all households (up from 83% in 2012-13) ... Most households who accessed the internet did so through a desktop or laptop computer (94%), followed by households who accessed via mobile or smart phones (86%) and households who accessed via tablets (62%).*

<sup>9</sup> See regulation 5(2), which when read with other subregulations in regulation 5, appears to allow lodgment by email to the office of the Registrar. However, the WAIRC website appears to only allow lodgment of forms electronically online.

<sup>10</sup> ELC also notes the first field to be filled out by the applicant in the online application is the matter number. This is potentially confusing as the matter number is assigned by the WAIRC once the form is lodged.

## Service

17. Under the Regulations as they currently stand, an employee who makes an unfair dismissal claim or a denied contractual benefits claim is responsible for serving the respondent and filing a statutory declaration of service.<sup>11</sup>
18. In contrast, in some other jurisdictions which are designed to be reasonably accessible for self-represented litigants, the relevant court or tribunal is responsible for service on the respondent. This is the case, for instance, for unfair dismissal claims in the Fair Work Commission.
19. In ELC's view, there is merit in the relevant court or tribunal serving the respondent 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.
20. ELC recommends consideration be given to the WAIRC adopting a process where it, in effect, either:
  - 20.1 serves the application unless it otherwise directs; or
  - 20.2 permits the applicant to elect whether they or the WAIRC will serve the application.
21. If the WAIRC were to then serve the application, this process would also remove the necessity for the applicant to file a statutory declaration of service in Form 4.

**Suggestion 6: That the processes for serving an application allow the WAIRC to serve the application.**

## State IR Review

22. As the WAIRC is aware, the State Government is undertaking a Ministerial Review of the State industrial relations system (**State IR Review**). The next stage of the State IR Review is an Issues Report will be published in February 2018.
23. ELC understands that the Final Report of the State IR Review will be prepared and submitted to the Minister for Commerce and Industrial Relations at the end of April 2018.<sup>12</sup>
24. It is not yet known if, and to what extent, substantive amendments may be made to the industrial relations system in Western Australia as a result of this Review or otherwise.
25. ELC is of the view that the Chief Commissioner's Review of the Regulations should, therefore, be:
  - 25.1 **cognisant of** the State IR Review - to the extent the State IR Review identifies any inefficiencies or areas for further enhancement in the Regulations these areas should be considered by the Chief Commissioner; but
  - 25.2 **occur independently of** any speculated, or final, outcomes of the State IR Review - it is not known to what extent and when the State IR Review will result in changes to the State industrial relations system. Therefore, making this Review occur in conjunction with the State IR Review may result in delays to changes to the Regulations being made.

<sup>11</sup> Regulation 61(3) of the Regulations.

<sup>12</sup> Government of Western Australia, Department of Mines, Industry Regulation and Safety, accessed 16 February 2018, <<https://www.commerce.wa.gov.au/announcements/ministerial-review-state-industrial-relations-system-publish-issues-report-0>>.

26. Necessarily though, some efficiencies in the Regulations are reliant on amendments being made to the Act. As discussed above at paragraph 4 and repeated here for convenience, an example of this is that it is potentially confusing to a layperson the difference between the process of 'lodging', 'filing' and 'sending' a document to the WAIRC.
- 26.1 The Act refers to certain documents being lodged or, alternatively, filed in the Commission or Registry.
- 26.2 The Regulations then need to address both the concept of lodging a document and filing a document.
- 26.3 Regulation 5 then refers to documents being lodged and filed electronically, and also refers to documents sent by email. The use of the words lodging, filing and sent adds complexity to the process and has the potential to cause confusion.
- 26.4 For a layperson, it is the act of delivery of the relevant documents to the WAIRC that is important, whether this is by a physical, postal or electronic medium.
- 26.5 ELC is of the view that an efficient and simplified process for the delivery to, and acceptance by, the WAIRC of documents for filing would be of value. However, this requires the Act to also be amended so as not to differentiate between the different concepts of lodgement and filing of a document.

**Suggestion 7: That the WAIRC be cognisant of, but conduct its review of the Regulations independently of, the State IR Review.**