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WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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Ms Sara Kane
Manager, The Employment Law Centre of WA (Inc)
PO Box 5603 St Georges Terrace
PERTH WA 6831

23 March 2018

Dear Ms Kane

RE: Review of the *Industrial Relations Commission Regulations 2005* (WA)

I write to inform you of progress on the review of the *Industrial Relations Commission Regulations 2005* (the Regulations), and to invite further comments.

Comments were received from unions, employers, government agencies, law firms and legal practitioners. I propose to make a number of changes, some of substance and others of a minor nature, taking into account those comments, as well as issues experienced by the Commission. Any further comment regarding the following issues would be welcome:

1. Service of documents

Many of those who responded to my previous invitation indicated that the requirement to file a *Form 4 – Statutory declaration of service* creates difficulties. The Commission and the Registry have also found the requirement on parties to file a Statutory declaration of service to be problematic as we spend a considerable amount of time following up the filing of this form. Also, the failure of parties to file the form causes delays.

In these circumstances, I am considering removing entirely the obligation on a party to serve documents at all. Instead, the Registrar would take this responsibility. There would be some limited exceptions such as in respect of service of a *Form 17 – Summons to witness*, where in accordance with reg 41(5) and reg 41(6), the party concerned needs to serve the summons

personally on the person named in the summons, and to provide sufficient money to enable the witness to travel to the hearing.

2. Hours for lodgement of documents

Currently, the Registry's hours for receiving documents are 8.30 am until 4.30 pm.

Given the capacity for documents to be received in the Registry electronically, I am considering providing for documents to be received electronically until midnight and marked as lodged that day. Any documents received after midnight would be formally lodged the next day.

3. The forms

(a) Generally, as part of the review of the Regulations and as the Commission is in the process of reviewing and updating its website, the forms contained within the Regulations will be reviewed with a view to them being:

- (i) expressed in plain English, or where a technical or legal term such as 'Commission in Chambers' is used, to provide definitions; and
- (ii) more readily completed in electronic form, including containing links to information on the website such as frequently asked questions, and having drop-boxes to provide a range of pre-set answers.

(b) Schedules

Some forms do not have space for sufficient information. *Form 1 – Notice of application (general)* requires only the parties' details, the jurisdiction to which the application relates and a few lines for a statement of the grounds on which the application is made. The form does not currently provide for a schedule to be attached, although some applicants attach a schedule with further information.

There are some details that would be helpful to the Commission in dealing with applications in a timely way without the need to make enquiries of the applicant, such as the degree of urgency, for example, whether a conference is requested within 24 hours, or up to two weeks. It would also be helpful for the applicant to provide the contact details of each parties' representatives, a brief background to the matter, and any orders sought.

(c) Contractual benefits

The schedule to *Form 3 – Notice of claim of entitlement to a benefit under a contract of employment* might include provision for the

applicant to identify the contractual term sought to be enforced and whether the contract and/or the term relied upon is in writing or oral or both, as well as the requirement to attach a copy of any written contact. The schedule might also require a description of what occurred regarding the employee not being allowed that benefit.

(d) Deletion of regulations or forms

In reviewing the forms, I am examining the use that has been made of forms in recent years, particularly in light of the Commission's case management processes. In those circumstances, a number of regulations and forms might be deleted. For example, reg 32 provides for any party to apply to the Registrar in writing for a hearing to be set once 'all necessary procedure has been completed'. The Commission's case management system would appear to obviate the need for this provision because all matters are allocated to a member of the Commission at an early stage. Further, parties may write to the Commission making such a request, without the need for a particular regulation.

4. Witness statements

Regulation 43 - Witness statements currently provides for the Commission to give directions regarding the filing and serving of witness statements of the oral evidence that a party intends to adduce in chief. There are circumstances where the Commission determines that it may be appropriate for an outline of the evidence intended to be adduced, rather than a witness statement, to be filed. This may be provided for.

5. Standing warrants

A number of those who responded have commented on the lack of a provision for a standing warrant. I am pleased to inform you that since I invited comments regarding the Regulations, the Regulations have been amended with effect from 12 January 2018 by the insertion in *reg 63 - Appointment of agent*, of subs (3A) and subs (3B). This amendment enables a warrant for a person specified in the warrant, or a member of a class of person specified in the warrant, and for the warrant to apply in respect of the proceeding specified in the warrant, or all proceedings before the Commission.

6. Coal Industry Tribunal

The *Coal Industry Tribunal of Western Australia Act 1992 (WA)* was repealed effective from 29 November 2016. Therefore, *reg 104 - Review of decision of Western Australian Coal Industry Tribunal* ought to be removed.

7. Part 10 – Occupational Safety and Health Tribunal and Part 10A – Road Freight Transport Industry Tribunal

Regulation 97 and reg 99C – Application of certain regulations set out tables of those other parts of the Regulations that apply to the Occupational Safety and Health Tribunal and the Road Freight Transport Industry Tribunal, respectively. However, they do not include reference to regulations regarding witnesses, including expert witnesses – that is, those covered by *Part 4 – Witnesses and evidence*. (It is noted though that reg 99 and reg 99E provide that *Form 17 – Summons to witness* is modified to reflect that it relates to the two Tribunals.)

It may be appropriate to amend reg 97(1) and reg 99C(1) to include reference to *Part 4 – Witnesses and evidence* of the Regulations.

8. Dealing with matters on the papers

There are circumstances where matters can be, and often are, dealt with on the papers, including the registration of industrial agreements. The parties might prefer this or there might be circumstances where they wish to place matters on the record by having them recorded on transcript.

Regulation 17 and reg 18 deal with applications to amend documents filed and for joinder of parties to proceedings. These regulations refer to when a matter cannot be listed for hearing.

All of these matters might be able to be dealt with on the papers and subject to the parties having an opportunity to elect to have a formal hearing. The forms may be amended to enable this to occur.

9. Regulation 19 – Intervention

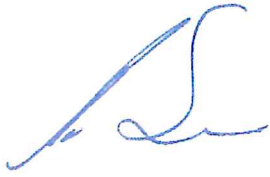
It has been suggested that instead of two days' notice of an application to intervene, five days would be preferable. It is noted that if the timeframe is not extended, a party seeking to intervene could always apply for leave to file late, however this might create a further hurdle to an application to intervene.

10. Amendments to the *Industrial Relations Act 1979*

A number of the comments made by those who responded to the invitation made reference to issues arising in the Regulations because of requirements of the *Industrial Relations Act 1979* (the Act). These include issues relating to right of entry permits which would require changes to s 49J of the Act, and other matters. It is my intention to raise any such issues with Mark Ritter SC for consideration in the Ministerial Review of the State Industrial Relations System.

Should you have any comment regarding any of the matters that I have identified, or any other matters relating to the Regulations, I would be pleased to hear from you. I would appreciate receiving your comments by Tuesday, 10 April 2018.

Yours faithfully

A handwritten signature in blue ink, appearing to be 'P. Scott', written in a cursive style.

Pamela Scott
Chief Commissioner