

# **Transition of Local Government to the State Industrial Relations System: Resources for Parties**

THE WESTERN AUSTRALIAN  
INDUSTRIAL RELATIONS COMMISSION

*The Department of the Registrar has collated this information to provide guidance to WALGA during the transition of local governments to the State industrial relations system. The contents of this document should be used as a general guide only. This document is not intended to be used in any proceedings before the Commission.*

*This is not an official document. Precautions have been taken to ensure that the information is accurate, but the Department of the Registrar does not guarantee, and accepts no legal liability arising from or connected to, the accuracy, reliability, currency or completeness of any material contained in this document or any external linked sites.*

## INFORMATION SHEET

### TRANSITION OF LOCAL GOVERNMENTS TO THE STATE INDUSTRIAL RELATIONS SYSTEM

#### Background

As of 1 January 2023, all local government employers and employees will be covered by the State industrial relations system.

The State and federal governments have now taken the necessary steps so that local government employers in WA are declared not to be national system employers for the purposes of the *Fair Work Act 2009* (Cth).

The effect of this is that all local government employers and employees will be within the jurisdiction of the State industrial relations system. The State industrial relations system is governed by two main bodies:

- The Western Australian Industrial Relations Commission (**the Commission**); and
- the Industrial Magistrate's Court of Western Australia (**the Court**).

Many local government employers and employees may be familiar with accessing the Fair Work Commission for assistance with, for example, employment disputes, awards or agreements. Now, local government employers and employees will access the Commission and the Court.

The nature of the dispute and/or assistance, and the relevant legislation, determines whether the Commission or the Court has the jurisdiction to deal with a matter. This information sheet sets out some common applications and provides key information to assist employers and employees who are new to the State industrial relations system.

## THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION (THE COMMISSION)

The Commission is mainly governed by the *Industrial Relations Act 1979* (WA) (*IR Act*), the *Industrial Relations Commission Regulations 2005* (WA) (*Regulations*), and the *Industrial Relations (General) Regulations 1997* (WA). The Commission also constitutes several other Tribunals under separate legislation.

### Main applications

The main applications used by parties accessing the Commission are:

- **General:** *General Application* (Form 1) – a multipurpose application form that is used, for example, for applying for registration of an industrial agreement; to vary an award; interpretation; and bargaining disputes.
- **Application for a conference:** *Application for a Conference – s 44, Industrial Relations Act 1979* (Form 1B). Applications may be made by a union or employer for a conference to deal with any industrial matter. Individual employees cannot use this application type unless it relates to a dispute for an entitlement to long service leave.
- **Unfair dismissal:** *Notice of claim of harsh, oppressive or unfair dismissal* (Form 2). Unfair dismissal claims must be lodged with the Commission within 28 days of the dismissal. There is no minimum employment period required for a former employee to be eligible to make an unfair dismissal claim. However, if the employee was employed on probation for less than three months, this must be considered by the Commission in determining an unfair dismissal claim. An application made outside of the 28 day time limit may be accepted by the Commission if the Commission considers it would be unfair not to do so.
- **Denial of contractual benefits:** *Notice of claim of entitlement to a benefit under a contract of employment* (Form 3)
- **Stop bullying or sexual harassment:** *Application for an Order to Stop Bullying or Sexual Harassment (or Both)* (Form 17)
- **Commencing bargaining:** *Notice To Initiate Bargaining* (Form GFB1)

The [Employees](#) and [Employers](#) tabs of the Commission website contain step-by-step guidance of each of these claims.

To commence proceedings in the Commission, a party must lodge their application using the relevant form on the Online Lodgement Portal ('Digital Portal') or an approved method. Each form on the Commission's Portal provides further information for parties and representatives about its use; helpful tips; filing fees and how to lodge.

### How to access the Commission

#### Lodgement of forms

The Commission prefers forms to be lodged via the Commission's online lodgement portal, known as our Digital Registry. This can be accessed by clicking 'Applications and Forms' under the 'Resources' tab, or under 'Popular links,' on the homepage of our website, and is available here: <https://portal.wairc.wa.gov.au/>.

Applications can also be made by post, fax, over the counter, or by email to [registry@wairc.wa.gov.au](mailto:registry@wairc.wa.gov.au).

Once a form is received by the Registry, Registry staff:

- check the form, and follow up as appropriate;
- if complete, stamp the form to confirm filing; and
- then return the filed form to the lodging party.

Once filed, Registry staff serve a copy of the form on the other party, or parties.

If your form is deficient, it may not be accepted for filing. If this happens, a Registry staff member will contact you to discuss what actions are required.

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***Quick tip for efficient lodgement and filing:***

Before lodging, please double check that:

- you have selected the correct form for your purposes;
  - you have completed all fields on the form;
  - all fields are correct; and,
  - you have signed the form.
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## **Practice notes, Fact Sheets and Special Procedures**

The 'Employees' and 'Employers' tabs of the Commission website outline that the Commission has three key resources that inform parties of current procedures in the Commission that may apply to their matters.

### ***Fact Sheets***

The Commission has the following Fact Sheets that provide broad guidance on the various processes in the Commission:

- Fact Sheet - Appearing at the Commission during COVID-19 - April 2022
- Fact Sheet - Conciliation Conferences
- Fact Sheet - Evidence
- Fact Sheet - Hearings
- Fact Sheet - Mediation
- Fact Sheet - Representation

### ***Practice Notes***

Practice notes provide more prescriptive detail around the specific processes in matters before the Commission. While there are several practice notes currently in force, the main ones that may apply when appearing before the Commission are:

- Practice Note 9 of 2021: Witness outlines and witness statements.
- Practice Note 10 of 2021: Evidence or submissions by telephone or video link.
- Practice Note 11 of 2021: Electronic devices in hearing rooms.

### ***Special Procedures Notes***

Occasionally, the Commission may also issue Special Procedure Notes to inform parties of changes to Commission practices. These should be read alongside the Fact Sheets and Practice Notes.

A Special Procedure Note is currently in force, advising of the Commission's policies in response to COVID-19, and is available on the home page of the Commission website. Parties should be alert to these before attending the Commission.

### **Accessing decisions of the Commission**

Where a decision is issued in a matter, the parties to that matter will be provided with a copy, usually by email. Sometimes decisions, such as of the Full Bench and the Commission in Court Session, may be handed down in court. The decisions of the Commission can be accessed through the [list of decisions](#) page on the Commission website.

The [document search](#) function on the Commission's website can be used to search the decisions of the Commission, the Industrial Magistrates Court and the Industrial Appeal Court using free text search terms and phrases (such as by party name or citation). In addition, the document search function can be used to search for Awards and Agreements of the Commission and the Western Australian Industrial Gazette.

### **What other types of resources are available?**

The Resources section of the WAIRC's website contains helpful links to:

- Applications and Forms: This takes you to the Commission's Digital Portal, and contains all the forms that you can lodge with the Commission.
- Awards: Awards are documents that set out the terms and conditions of employment for the employers and employees specified in the award.
- Agreements: The Commission registers industrial agreements between unions and employers.
- Decisions: Decisions of the Commission and its constituent authorities.
- Fact Sheets: A range of fact sheets that provide procedural information.
- General orders: General orders are orders regarding employment conditions that apply to all employees covered by the State industrial relations system.
- Notices: The *IR Act* obliges the Commission to give notice of certain applications or matters. Publication of such notices is made in the WA Industrial Gazette and/or on the Commission's website.
- Practice notes: Practice notes provide information to parties on the Commission's procedures and legislative provisions.
- Publications: The publications of the Commission include annual reports, transcripts, due diligence, and relevant legislation.
- State wage case: Each year, the Commission sets the minimum wage to apply to employers and employees covered by the State industrial relations system.

### **Contact details**

Website: <https://www.wairc.wa.gov.au/>

Phone: (08) 9420 4444 (8:30am to 4:30pm, weekdays except public holidays)

Email: [registry@wairc.wa.gov.au](mailto:registry@wairc.wa.gov.au)

Address: Level 17, 111 St Georges Terrace PERTH WA 6000

The Commission's Registry is the primary point of contact for general queries, and the filing of documents.

Once a matter is on foot and allocated to a Commissioner, the Commissioner's Associate will contact the parties to discuss further processes.

## REGISTERED ORGANISATIONS

### What is a registered organisation?

A registered organisation is a State:

- organisation of employees, associated for the purpose of protecting or furthering the industrial interests of those employees;
- organisation of employers, associated for the purpose of protecting or furthering the industrial interests of those employers; or,
- industrial association, a council or other body formed by and for the purpose of representing two or more organisations of employees with common industrial interests,

that has been registered in accordance with the *IR Act*.

An organisation is incorporated on registration, which means they become a body corporate with perpetual succession, able to sue and be sued, and able to deal with property.

A registered organisation is regulated by the *IR Act* and subsidiary legislation such as the *Regulations*.

Further information about registered organisations can be found on our website: <https://www.wairc.wa.gov.au/registered-organisations/>.

### Transitional arrangements for registered organisations

State registered organisations who have been issued a section 71 certificate by the Registrar of the Commission will replace their federal counterpart body as the relevant organisation for the purposes of new State instruments that have transitioned to the State system under Part 2AA, Division 2 of the *IR Act*.

For a transitional period limited to while a new State instrument is operational, if a federal organisation is not a federal counterpart of a State registered organisation, they are taken to be a State registered organisation representing the employees of an employer that has been declared not to be a national system employer in proceedings or other matters under the *IR Act*.

New State instruments are defined by section 80BB of the *IR Act*.

## **THE INDUSTRIAL MAGISTRATE'S COURT OF WESTERN AUSTRALIA (THE COURT)**

You may already be familiar with the Court, as the Court has the power to hear certain matters for employees and employers in both the State and federal industrial relations systems. This includes claims by an employee for breach of an agreement or failure by an employer to pay a minimum entitlement.

The Court is mainly governed by the *IR Act, Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA), and the *Industrial Relations (General) Regulations 1997* (WA).

Recent amendments to State industrial relations laws now also provide increased protection of employee rights under Part 6B of the *IR Act*. These protections enable employees to make claims, for example, alleging their employer took 'damaging action' against them because of an employment-related inquiry or complaint, or alleging sham contracting, and to seek relief through the Court. This is similar to the general protections scheme provided by the *Fair Work Act 2009* (Cth).

### **Common applications**

The common applications that are made to the Court are claims by employees for:

- payment for unpaid wages or an underpayment (such as under an award or an agreement); and
- payment for unpaid minimum entitlements (such as under the *Minimum Conditions of Employment Act 1993* (WA), the *Fair Work Act 2009* (Cth) or the *Long Service Leave Act 1958* (WA)).

An application can also be made to the Court for alleged breach of an industrial award or agreement.

### ***New protection of employee rights applications***

A State system employee is also now protected by prohibitions on an employer taking 'damaging action' against them because they are able to make an inquiry or complaint into their employment.

The ability to make an inquiry or complaint must be based on an entitlement or right that exists within an employee's:

- contract;
- award, agreement, or court or tribunal order; or
- legislation

that applies to their employment.

'Damaging action' includes actual or threatened:

- dismissal;
- alteration of an employee's position to their disadvantage;
- refusal to promote or transfer an employee;
- injury to an employee's employment (with the employer or another person); and



- refusal to employ a prospective employee, or discrimination against a prospective employee in the proposed terms and conditions of employment.

Remedies may include reinstatement; an order to employ the employee; or compensation for any loss or injury suffered because of the damaging action.

In addition, an employee may also apply for penalties to be imposed. Penalties may be ordered at the discretion of the Court, up to:

- \$65,000 for a body corporate or \$13,000 for an individual; and
- for a serious contravention, up to \$650,000 for a body corporate or \$130,000 for an individual.

### **How to access the Court**

To make a claim, a party (usually, an employee) must lodge an:

- Originating Claim (Court Copy) (Form 1.1)
- Originating Claim (Claimant's Copy) (Form 1.2); and
- Originating Claim (Respondent's Copy) (Form 1.3).

The originating claims must be identical, lodged and served together with a:

- blank Response (Form 2);
- statement of claim; and
- calculations (where claim is for an underpayment or unpaid entitlement).

### **Lodgement of forms**

The Court prefers applications, submissions and other documents to be lodged electronically, by attaching an electronic version of the relevant documents to an email and sending the email to [electroniclodgementIMC@wairc.wa.gov.au](mailto:electroniclodgementIMC@wairc.wa.gov.au).

Documents can also be lodged by post, fax, or in person at level 17, 111 St Georges Terrace, Perth WA.

Once an application is received by the Registry, Registry staff:

- check the forms and documents, and follow up as appropriate;
- if all required forms and documents are complete, stamp the forms to confirm filing; and
- then return the filed forms (Form 1.2 and Form 1.3) to the lodging party.

Once filed, the filing party has the responsibility to serve (i.e., deliver) a copy of the form on the other party or parties in the required time, which is usually 30 days.

Procedural information about service by claimants and affidavits of service can be found in the following guides by external bodies:

- Circle Green Community Legal's Information Kit 'Making a Claim for Unpaid Minimum Entitlements', available here: <https://circlegreen.org.au/wp-content/uploads/2022/02/Making-a-claim-for-unpaid-minimum-entitlements.pdf> (see pages 7 to 8); and
- Department of Mines, Industry Regulation and Safety's guide 'Taking a claim to the Industrial Magistrates Court', available here:

<https://www.commerce.wa.gov.au/publications/taking-claim-industrial-magistrates-court> (see pages 12 to 14).

If your form is deficient, it may not be accepted for filing. If this happens, a Registry staff member will contact you to discuss what actions are required.

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***Quick tip for efficient lodgement and filing:***

Before lodging, please double check that:

- you have selected the correct form for your purposes;
  - you have completed all fields on the form;
  - all fields are correct; and,
  - you have signed the form.
- 

**Practice Directions**

There are two active practice directions, and a COVID-19 procedure note, for the Court:

- Practice Direction No. 1 of 2017 (covers general practice and procedure in the Court).
- Practice Direction No 1. of 2022: Representation by industrial agents.
- COVID-19 Special Procedures Note – 29 April 2022.

**What other types of resources are available?**

We're in the process of developing further resources for the Court.

The Department of Mines, Industry Regulation and Safety has a detailed employee guide for claims in the Court called 'Taking a claim to the Industrial Magistrates Court' available on their website. This guide may also provide helpful information for employers or industrial organisations. It can be accessed using this link: <https://www.commerce.wa.gov.au/publications/taking-claim-industrial-magistrates-court>.

Circle Green Community Legal's Information Kit 'Making a Claim for Unpaid Minimum Entitlements' may also be helpful for employees: <https://circlegreen.org.au/wp-content/uploads/2022/02/Making-a-claim-for-unpaid-minimum-entitlements.pdf>

**Contact details**

The Court can be contacted by:

Website: <http://www.imc.wa.gov.au/>

Phone: (08) 9420 4467 (8:30am to 4:30pm, weekdays except public holidays)

Electronic lodgement: [electroniclodgementIMC@wairc.wa.gov.au](mailto:electroniclodgementIMC@wairc.wa.gov.au)

General email queries: [registry@wairc.wa.gov.au](mailto:registry@wairc.wa.gov.au)

Lodgement by pre-paid post: Industrial Magistrates Court Registry, Locked Bag 1, Cloisters Square, Perth WA 6850 (payment of filing fee by credit card or cheque)

Address: Level 17, 111 St Georges Terrace PERTH WA 6000

## **FURTHER INFORMATION – EXTERNAL BODIES**

### **Circle Green Community Legal**

*Free workplace law advice and assistance for eligible WA workers. Their website also publicly available resources on common workplace claims and matters.*

Phone: (08) 6148 3636

Website: [www.circlegreen.org.au](http://www.circlegreen.org.au)

Request assistance: <https://circlegreen.org.au/get-help/>

### **Department of Mines, Industry Regulation and Safety – Wageline WA**

*Assists private sector employers and employees in the State industrial relations system. Their website has publicly available resources on State system employment laws including recent legislative amendments.*

Phone: 1300 655 266

Website: <https://www.commerce.wa.gov.au/labour-relations>

Email: [wageline@dmirs.wa.gov.au](mailto:wageline@dmirs.wa.gov.au)

### **Law Society of Western Australia**

*The State professional association for WA lawyers. Their website provides a 'Find a lawyer' service with contact details for members of the Law Society.*

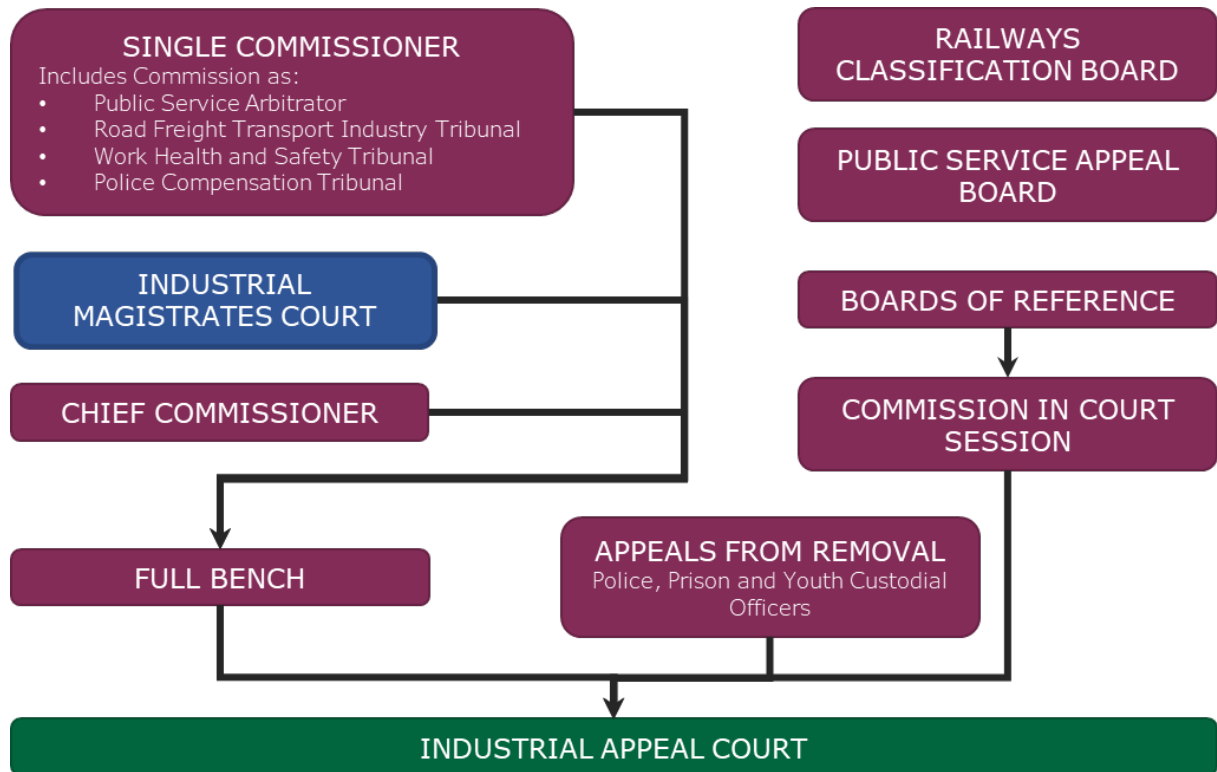
Phone: (08) 9324 8600

Address: Level 4, 160 St Georges Terrace PERTH WA 6000

Website: <https://www.lawsocietywa.asn.au/>

Email: [info@lawsocietywa.asn.au](mailto:info@lawsocietywa.asn.au)

## STRUCTURE OF THE COMMISSION





# Conciliation Conferences

## Information for Parties and Representatives

### Critical information

- The purpose of a conciliation conference is not to decide who is right and who is wrong, but to explore whether the parties can reach an agreement.
- Conciliation conferences usually run for 1.5 to 2 hours. Please arrive at the Commission at least 10 minutes before the start of the conference.
- If you have any accessibility or language needs, advise the Commissioner's Associate well before the conference so that arrangements can be made in advance to address your needs, such as booking an interpreter. These services are provided at no cost to you.
- If you cannot attend a conciliation conference in person, you can ask to attend by telephone or video-link. You must provide good reasons why you cannot physically attend. All requests are considered on a case by case basis.

### Preparing for a conciliation conference

Before the conciliation conference, you should review what happened and think about what result you would be happy with. If you think it would assist you, write a summary of the key events and dates to take with you. You should also bring any relevant documents to the conference, including documents such as employment contracts, correspondence or medical certificates. Please note that witnesses do not usually attend conferences and evidence is not taken.

The day before the conference, you should check the hearings and conferences list. This list is available on [the Commission's website](#) and on the screens outside the hearing and conference rooms on the day of the conference. This will tell you which room your conference will be in.

You may represent yourself or have someone represent you. Please refer to the Representation Fact Sheet for more information. You may also bring a support person with you.

### At the conference

Although proceedings before the Commission are reasonably informal, there is some formality. Make sure that you dress, act and speak in a way that helps you with your case. Wear smart clothes with proper footwear and address the Commissioner by their title.

The room where the conference is held is not a court room, the Commissioner and the parties sit together at a table. The conference is not recorded except for any notes that the parties and the Commissioner may make.

At the conference the applicant is asked to speak first. The applicant should talk about their recollection of events and, if they wish, comment on anything raised by the respondent in their answer to the application. The respondent is then asked to do the same. The Commissioner will attempt to assist the parties to reach an agreement and may divide the conference and speak separately to each party for that purpose.

## Conclusion of the conciliation conference

The Commissioner will not reach any conclusions or decide who is right or wrong at a conciliation conference and will try to assist the parties to come to an agreement. The Commission can hold several conferences if the parties need time to think about the information presented to them.

If an agreement is reached it will be on terms that are mutually agreed between the parties. The parties may choose to write down the terms of their agreement. An agreement may be reached during or after the conference. If an agreement is reached before the hearing stage, it is generally a requirement that the applicant discontinue their application before the Commission. You can discontinue an application by filing a [Form 1A – Multipurpose Form](#).

If no agreement is reached the application will usually proceed to a hearing and determination in a formal hearing room setting. This will occur at a later date. The date of the hearing may be discussed at the conclusion of the conference.

## Need more information?

Commission staff cannot give legal advice or advice on how to best make your case. However, they can give information on:

- the processes of the Commission;
- how to fill out forms; and
- other organisations that may be able to assist you.

The Commission's Registry can be contacted on 08 9420 4444 or [Registry@waipc.wa.gov.au](mailto:Registry@waipc.wa.gov.au)

[The Commission's website \(www.waipc.wa.gov.au\)](http://www.waipc.wa.gov.au) has other information that may assist you.



## Evidence

### Information for Parties and Representatives

Evidence can be oral or written and is the relevant witness' testimony and documents or objects presented by the parties. Testimony is the statement the witness gives under oath.

Courts of law are usually bound by what is known as the rules of evidence. These are complex and strict rules about what evidence can be relied on. The Commission is not bound by the rules of evidence. However, some rules of evidence are followed by the Commission as a way to provide procedural fairness, both to the parties and to witnesses.

The Commission may receive hearsay evidence but will consider how much weight it will put on that evidence. If you are trying to prove a key fact in your case, hearsay evidence will probably not be enough proof.

## Discovery

Discovery is a process where each party gives to the other party any documents that are relevant to the case. Documents are discoverable whether they support a party's case or not. Discovery helps to avoid surprise, puts parties on an equal footing, helps to highlight the issues in dispute and is intended to promote a fair hearing for both sides.

Either party can ask for discovery of documents from the other party. For example, an employer can ask for discovery from an employee, and an employee can ask for discovery from an employer. Documents discovered are not necessarily given to the Commission. The parties each choose to put to the Commission those documents which support their case or weaken the other party's case.

### Informal discovery

The Commission will often ask the parties to engage in 'informal discovery'. That means the parties will discuss which documents they are able to provide to each other. They then provide each other with copies of the documents by agreement. Once a party has received a document, it is up to them whether they use it in their case.

Parties may prefer this process because they do not have to comply with strict deadlines imposed by the Commission, and they have greater control over the types of documents they can exchange.

### Formal discovery

If the informal discovery process breaks down, a party may apply for orders to compel the other party to provide discovery of documents. This becomes 'formal discovery'. The Commission then becomes much more involved in supervising the process.

Formal discovery is where the Commission makes orders requiring the parties to provide documents within set timeframes. It is good practice to ask the other party for the documents before making a formal application. The Commission is unlikely to make orders if the party asking for discovery has not asked for the documents first.

A formal application is made by filing and serving a [\*Form 1A – Multipurpose Form\*](#), stating that discovery is sought for specific types of documents.

Applications for discovery in the Commission have three main considerations:

1. The documents sought must be relevant to a matter in question in the proceedings. Requests must be reasonable.
2. The documents must be in the 'possession, custody or control' of the other party.
  - a) Possession means that the other party owns the document.
  - b) Custody means that the party physically holds the document, even if they do not own the document; and
  - c) Control means the party is able to get the document from someone else.This means that a party cannot be required to provide discovery of a document which is not in their possession or custody or control.
3. The request must be 'just'. That is, the party applying for discovery must satisfy the Commission that the documents are necessary for the party to have a fair hearing.

If a document is 'privileged', the document does not have to be given to the other party. The party should still make the other party aware of the document's existence, by describing it in a general way, but say that it is privileged. Commonly this will include 'legal professional privilege', which is communication between lawyer and client for the purpose of obtaining legal advice.

There is more information about discovery in *Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel & Others* (1995) 75 WAIG 1801, at page 1805, under the heading 'General Discovery'.

## Submissions

Submissions are the factual and legal arguments that each party will make at hearing. The Commission may ask parties to file written submissions, which means they should file a written summary of the arguments they will make at the hearing. At the hearing, each party can make brief opening submissions. At the end of the hearing, each party will have a further opportunity to highlight or explain various aspects of the evidence.

## Witnesses

### Calling witnesses

As part of your case you may call witnesses to give evidence about a situation that they had some involvement in or saw happening. You can be your own witness. Witnesses are required to give an oath or make an affirmation before giving evidence at a formal hearing. The witness will be examined by the party that called them and may be cross examined by the opposing party to test their evidence.

If you do not call evidence from someone who knows about an important issue in dispute, and that person is available to call as a witness, it is open to the Commission to infer that person's evidence would not have helped your case.

### Outlines of evidence and documents

An outline of evidence is a summary of evidence that a witness will give at the hearing. For example, if a party calls three witnesses, there should be three separate documents explaining what evidence each of those witnesses will give. Each outline of evidence should relate to one



witness only and should be titled 'Outline of evidence for [witness name]', and it should explain what evidence that witness will give in the witness box at the hearing.

If there is a document that forms part of your case, it will need to be 'tendered' by a witness. This means that a witness must give evidence about the document and the document should be labelled and referred to in that witness' outline of evidence. For example, if it is your claim, and you want to give evidence, you should file an outline of evidence for yourself. This outline of evidence should set out what you will say in the witness box, and it should explain any documents that you ask the Commission to consider. Those documents should then be labelled and attached to the outline of evidence. You should file an outline of evidence for every witness you want to call.

### **Examination-in-chief**

Examination-in-chief is where the party who calls the witness has an opportunity to ask the witness questions. There are some restrictions on the questioner during examination-in-chief. Questions cannot be leading. Another restriction is that questions must not be about matters that have no relevance to the issues in dispute, other than to impeach the credibility of the witness.

### **Leading questions**

A leading question is worded in a way that suggests an answer. The opposing party may object to a leading question. If an objection is sustained by the Commission, the party may be asked to reword the question so that it is not leading.

A leading question:

"Didn't you see Claire taking money out of the till on Sunday night after the shop had closed?"

Not leading:

"What did you see Claire do on Sunday night after the shop closed?"

### **Refreshing memory from documents**

It may be difficult for some witnesses to give detailed evidence without referring to notes. A witness is allowed to refer to notes if:

1. the witness shows that they are at the limits of their memory and needs a reminder;
2. the witness has the documents with them;
3. the documents were made by the witness or can be verified by the witness;
4. the events were fresh in the witness's mind when the document was made or when they verified the document; and
5. the witness must have found the document to be accurate at the time of making it.
6. Witnesses are also allowed to refresh their memory by reviewing notes before giving evidence.

### **Cross-examination**

Cross-examination is an opportunity to test the evidence and account of events given by witnesses called by the opposing side. Only one person is allowed to cross-examine a witness.

If you are cross-examining a witness, you must put to the witness the ways your case contradicts their evidence. You must give the witness an opportunity to comment on any evidence they might have an opinion on, and the inferences to be drawn from it. If you do not put every relevant piece of evidence to the witness when you are cross-examining that witness, the Commission may conclude that you do not challenge the witness' evidence on that point.

### **Re-examination**

Re-examination is an opportunity for the party who called the witness to clarify, explain or qualify any aspects of evidence the witness gave during cross-examination.

## **Need more information?**

Commission staff cannot give legal advice or advice on how to best make your case. However, they can give information on:

- the processes of the Commission;
- how to fill out forms; and
- other organisations that may be able to assist you.

The Commission's Registry can be contacted on 08 9420 4444 or [Registry@wairc.wa.gov.au](mailto:Registry@wairc.wa.gov.au)

[The Commission's website \(www.wairc.wa.gov.au\)](http://www.wairc.wa.gov.au) has other information that may assist you.



# Hearings

## Information for Parties and Representatives

### Critical information

- You should be ready and waiting in the courtroom at least 15 minutes before the hearing.
- If you have any accessibility or language needs, advise the Commissioner's Associate well before to the hearing so that arrangements can be made in advance to address your needs, such as booking an interpreter. These services are provided at no cost to you.
- If you cannot attend a hearing in person, you can ask to attend by telephone or video-link. You must provide good reasons why you cannot physically attend. All requests are considered on a case by case basis.
- Please note that, whatever the outcome of your claim, the Commission's decisions are required to be published online and remain on the public record.
- Parties pay their own legal costs to bring or defend a claim or application. The unsuccessful party may be ordered to pay other costs including witness expenses.

### Types of hearings

Preliminary hearings are hearings deal with any issues that need to be determined by the Commission before the substance of the matter can proceed. Some common preliminary hearings are:

- Directions – this is a short hearing where orders can be made about what should happen next in a matter, or to set out how the matter will proceed.
- Jurisdiction – the Commission needs to determine whether it has jurisdiction to hear the application.
- Discovery – the Commission may make orders to set out a formal discovery process.

A substantive hearing is where the Commission will hear and determine the substance or merits of the employment or industrial issues in dispute.

### Preparing for the hearing

The day before the hearing, you should check the hearings and conferences list. This list is available on the Commission's website and on the screens outside the hearing and conference rooms on the day of the hearing. This will tell you which room your hearing will be in.

You should bring the following with you to the hearing:

- Copies of all the documents filed by you or served on you during the proceedings. These should be organised so that you can find document easily.
- Any other documents that you want to rely on. Bring at least 3 copies of each document so that each party and the Commissioner can have a copy.

- If you wish to call any witnesses, they must be present at the hearing. If they are unable to attend in person, you may request that they appear by telephone or video-link.
- Pens and paper.
- This guide, if you think that it might be helpful.

You may represent yourself or have someone represent you. Please refer to the Representation Fact Sheet for more information. As hearings are open to the public, you may bring friends and family with you for support.

## At the hearing

Although proceedings before the Commission are reasonably informal, there is some formality. Make sure that you dress, act and speak in a way that helps you with your case. Wear smart clothes with proper footwear and address the Commissioner by their title.

If you are the applicant/appellant, you will be seated on the right side of the bar table. If you are the respondent, you will be on the left side of the bar table.

Hearings generally proceed in the following manner:

- The applicant/appellant will make their case first. This can include things like an opening statement, calling witnesses and providing documents and other evidence to the Commission.
- The respondent then has their turn to state their case and respond to anything that the applicant/appellant has raised and present their evidence
- Finally the applicant/appellant has an opportunity to respond to anything that the respondent has raised.

## Helpful tips

- Stand up when you are speaking to a Commissioner or when a Commissioner is speaking to you.
- If you want to show something to the Commission, say so and hold it out for the Associate to take to the Commissioner.
- Do not interrupt the other party or the Commissioner. If you have a proper objection or query you should stand and wait for the Commissioner to recognise you.

## Conclusion of the hearing

The Commissioner may give their decision or make orders at the conclusion of the hearing. The Commission may also reserve their decision, you will be contacted by the Commissioner's Associate when a date for the decision has been set.

## Need more information?

Commission staff cannot give legal advice or advice on how to best make your case. However, they can give information on:

- the processes of the Commission;
- how to fill out forms; and
- other organisations that may be able to assist you.

The Commission's Registry can be contacted on 08 9420 4444 or [Registry@wairc.wa.gov.au](mailto:Registry@wairc.wa.gov.au)

[The Commission's website \(www.wairc.wa.gov.au\)](http://www.wairc.wa.gov.au) has other information that may assist you.



# Mediation

## Information for Parties and Representatives

### Critical information

- The purpose of mediation is not to decide who is right and who is wrong, but to provide an opportunity for parties to reach mutual resolution of the matter without the need to participate in formal proceedings.
- Mediation is entirely voluntary. It is intended to encourage participants to discuss issues to see if they are able to resolve them and reach an agreement. You are not compelled or required to reach an agreement and whether you will be able to is entirely up to you.
- There is no set time limit for the mediation, but parties should allow about two hours. Please arrive at the Commission at least 10 minutes before the start of the mediation.
- If you have any accessibility or language needs, advise the Commissioner's Associate before the mediation so that arrangements can be made in advance to address your needs, such as booking an interpreter. These services are provided at no cost to you.
- If you cannot attend a mediation in person, you can ask to attend by telephone or video-link. All requests are considered on a case by case basis.

### Preparing for the mediation

Before the mediation, you should review what happened and think about what result you would be happy with. If you think it would assist you, write a summary of the key events and dates to take with you. You should also bring any relevant documents to the mediation, including documents such as employment contracts, correspondence or medical certificates.

The day before the mediation, you should check the hearings and conferences list. This list is available on the Commission's website and on the screens outside the hearing and conference rooms on the day of the mediation. This will tell you which room your mediation will be in.

Where the parties to the dispute are individuals, it is intended that they be present at the mediation in person. However, where a request for mediation is made by a group of employees or a group of employers, the group may be represented by a person who is appointed by the group to act on its behalf. You may also bring a support person with you, but usually you will be asked to speak for yourself.

To appoint a representative, the parties seeking to be represented must file a [Form M2 - Appointment of a Representative](#).

### At the mediation

Although proceedings before the Commission are reasonably informal, there is some formality. Make sure that you dress, act and speak in a way that helps you with your case. Wear smart clothes with proper footwear and address the Commissioner by their title.

The room where the mediation is held is not a court room. The Commissioner and the parties sit together at a table. The mediation is not recorded except for any notes that the parties and the Commissioner may make.

At the mediation, each party makes an opening statement on what the issue is, in their view. The Commissioner may ask questions if a point is not clear. Keep in mind that mediation is not a hearing and there are no right or wrong answers. The Commissioner may ask whether participants have thought about what a possible agreement is. The Commissioner will attempt to assist the parties to reach an agreement and may divide the mediation and speak separately to each party for that purpose. Either participant may request a short break if they wish to think about issues or speak to someone.

## Conclusion of the mediation

The Commissioner will not require you to reach an agreement and cannot decide what that agreement should contain but will try to assist the parties to come to an agreement. The Commission can hold several mediations if the parties need time to consider the information presented to them.

If an agreement is reached it will be on terms that are mutually agreed between the parties, the parties may choose to write down the terms of their agreement. An agreement may be reached during or after the mediation. The Commission may register the agreement as a mediation settlement agreement, which is binding on the parties and can be enforced under the [Industrial Relations Act 1979](#).

If no agreement is reached, the application may be discontinued by either participant or the participants may agree to have the Commissioner Arbitrate the matter and make a binding decision.

## Need more information?

Commission staff cannot give legal advice or advice on how to best make your case. However, they can provide information on:

- the processes of the Commission;
- how to fill out forms; and
- other organisations that may be able to assist you.

The Commission's Registry can be contacted on 08 9420 4444 or [Registry@wairc.wa.gov.au](mailto:Registry@wairc.wa.gov.au)

[The Commission's website \(www.wairc.wa.gov.au\)](http://www.wairc.wa.gov.au) has other information that may assist you.



# Out of Time Applications and Jurisdictional Objections

## Information for Parties and Representatives

### Critical information

- If you have any accessibility or language needs, advise the Commissioner's Associate well before to the hearing so that arrangements can be made in advance to address your needs, such as booking an interpreter. These services are provided at no cost to you.
- Please note that, whatever the outcome of your claim, the Commission's decisions are required to be published online and remain on the public record.
- Parties pay their own legal costs to bring or defend a claim or application. The unsuccessful party may be ordered to pay other costs including witness expenses.

### Out of time applications

Some applications must be lodged with the Commission within a certain time limit, for example an application for a claim of unfair dismissal must be made within 28 days of the employee being dismissed from their employment. If an application is made to the Commission after the time limit, the employee making the claim must convince the Commission that it would be unfair not to allow the employee to refer the claim<sup>1</sup>.

The Commission will take into account the following principles to determine whether it is unfair not to allow the employee to refer a claim:<sup>2</sup>

- Special circumstances are not necessary but the Commission must be positively satisfied that the prescribed period should be extended. The starting point is that the time limit should be complied with unless there is an acceptable explanation for the delay which makes it equitable to extend.
- Action taken by the employee to contest the termination, other than applying under the Act, will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
- Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
- The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
- The merits of the substantive application may be taken into account in a 'rough and ready way' in determining whether to grant an extension of time.

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<sup>1</sup> *Industrial Relations Act 1979 (WA)* s 29(3).

<sup>2</sup> *Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683 [26].

- Consideration of fairness as between the employee and other persons in a like position are relevant to the exercise of the Commission's discretion.

These principles are not exhaustive. The result in each case will depend on the individual facts and circumstances of that case.<sup>3</sup>

## Jurisdictional objections

Jurisdiction refers to the area in which a particular court has authority.

The Commission is only allowed to make legal decisions and judgements within its jurisdiction. In some cases, the Commission will have to determine whether an application is within the Commission's jurisdiction. This is referred to as a 'jurisdiction hearing'. Some examples of a jurisdictional issue include:

- Is the employer is a national system employee?
- Is the person making the claim an employee?
- If the employee was employed by the WA government, should the claim be dealt with by the Public Service Arbitrator or the Public Service Appeal Board?

The Commission has a special responsibility to ensure that it only deals with claims that are within its jurisdiction. If the Commission has doubts about whether it has jurisdiction, even if the parties agree to the Commission dealing with a matter, the Commission must still make sure that it has jurisdiction to deal with the matter.<sup>4</sup>

## Need more information?

Commission staff cannot give legal advice or advice on how to best make your case. However, they can give information on:

- the processes of the Commission;
- how to fill out forms; and
- other organisations that may be able to assist you.

The Commission's Registry can be contacted on 08 9420 4444 or [Registry@wairc.wa.gov.au](mailto:Registry@wairc.wa.gov.au)

[The Commission's website \(www.wairc.wa.gov.au\)](http://www.wairc.wa.gov.au) has other information that may assist you.

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<sup>3</sup> *Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683 [27].

<sup>4</sup> *Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers)* (1986) 67 WAIG 325, 327; 330.





## Representation

### Information for Parties and Representatives

#### Should you be represented?

You do not need to be represented when appearing at the Commission. If you want to be represented, there are a number of options depending on your circumstances.

These include:

- employer and employee associations and unions;
- a lawyer;
- an industrial agent; and
- a relative or friend.

The Commission does not endorse or recommend the selection of any particular type of representation for parties.

You can choose to be represented at any stage of your application. **If you choose to be represented by any person or group who is not a lawyer** you must file a [Form 11 – Notification of Representative Commencing or Ceasing to Act](#) to confirm that another person is representing you. This form should also be completed if you choose to no longer be represented.

#### Representing yourself

When you represent yourself at the Commission, you are trying to persuade the Commission that you are right. The following are guidelines for representing yourself in the Commission, including tips for acting, dressing and speaking in a way that helps you with your case.

- When appearing before the Commission dress as neatly as possible.
- How you act is as important as how you look. You must be respectful to everyone in the Commission. This includes the Commission members, staff, the other party involved in your case, witnesses and people in the hallways.
- You must advise the Commission in writing if you change your contact details, to ensure you do not miss out on important communications from the Commission or other party.
- Please let the Commission know well before the date of the hearing or conference if you require any special assistance (such as an interpreter, hearing loop or wheelchair access).
- If your matter has been listed for hearing, you will be sent a Notice of Hearing stating the date and time you must attend. You will not receive any other notice to attend the hearing.
- The Commission has a very busy schedule, so you must be on time. If you are late, your hearing might be adjourned, or the matter might be heard without you there. Make sure

you bring all the documents you need for your hearing and that you are fully prepared to present your case.

- Commissioners cannot speak to you about your case except when your case is being heard and when the other party is there. The Commission staff will help you in any way they can with questions such as date your hearing is listed or whether the Commissioner has determined your matter. Staff cannot give you legal advice or recommendations on what you should do. Always be polite to Commissioners and Commission staff and be prepared to provide any information they request.
- When you represent yourself in the Commission, you may like to obtain some legal advice ahead of time to make sure you are doing the right thing. Legal advice includes deciding which option is best for you. Some lawyers or agents provide advice on how to represent yourself and run your own matter.

## Need more information?

Commission staff cannot give legal advice or advice on how to best make your case. However, they can give information on:

- the processes of the Commission;
- how to fill out forms; and
- other organisations that may be able to assist you.

The Commission's Registry can be contacted on 08 9420 4444 or [Registry@wairc.wa.gov.au](mailto:Registry@wairc.wa.gov.au)

[The Commission's website \(www.wairc.wa.gov.au\)](http://www.wairc.wa.gov.au) has other information that may assist you.



## Appearing at the Commission: COVID-19 Information for Parties and Representatives

The Western Australian Industrial Relations Commission is closely monitoring the advice provided by the Australian Department of Health regarding COVID-19. We are committed to providing a safe environment for those persons coming to our premises, staff, and Commissioners.

Subject to any directions by a Commissioner, hearings and conciliation conferences will be conducted in person and in accordance with COVID-19 public health measures issued by the Government.

### General information

- **We ask that anyone who is feeling unwell or is at risk, according to official advice, does not attempt to attend our premises. They should follow health advice.**
- Please contact the Commission if you have any difficulty in attending in person. All requests will be considered on a case by case basis.

### Collection of details for proof of vaccination status and contact tracing purposes

All persons entering the Commission's premises for a conciliation conference or a hearing will no longer be required to provide proof of vaccination status or to sign in using the QR code or paper-based system on entry.

### Masks

Subject to the directions of a presiding Commissioner at a conciliation conference or a hearing, all persons attending the Commission's premises will no longer be required to wear masks. However, those persons who wish to continue to wear masks are free to do so.

### Exchange of documents

Subject to any directions a presiding Commissioner may make in a particular case, any documents that you may want to tender as evidence or provide to the Commission, other parties or witnesses must be electronically provided to the Commission at least 48 hours prior to appearing at the Commission. If documentation is not provided in advance, the Commission may be unable to consider it and your matter may be adjourned to another date.

During a hearing or a conciliation conference, the Commission may permit parties to use their mobile telephone, tablet, or computer to send documents to the Commissioner's Associate who will then provide it to the Commissioner. The Commission may also permit parties to use their mobile telephone, tablet, or computer to view documents sent to them by the presiding Commissioner's Associate during a hearing or a conciliation conference. If permission is granted to a party to use a mobile telephone, tablet or computer during a hearing or a

conciliation conference, please ensure it is operated in silent mode. Please also see [Practice Note 11 of 2021 Electronic devices in hearing rooms](#).

## Further information

- [Please see the Commission's website for more information.](#)



## PRACTICE NOTE 1 OF 2021

### Delivery of reserved decisions

#### Introduction

1. Practice Note 1 of 2021 is issued by The Western Australian Industrial Relations Commission (the **Commission**) for the purpose of informing parties to matters before it of the general practice around the delivery of reserved decisions.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 1 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

#### Practice of Commission

3. It is the general practice of the Commission to deliver reserved decisions as soon as practicable after the completion of the hearing.

#### Communication between the Commission and parties

4. Commissioners may indicate an approximate time frame to parties for a particular decision to be delivered, taking into account their other commitments. In some cases, it is necessary to deliver a decision as a matter of urgency. Other cases, where the issues to be determined are more complex or where there have been lengthy hearings, or hearings involving considerable reference material or evidence, a longer period of time may be required for the Commissioner to write and deliver their reasons for decision.
5. It is difficult to set specific time frames within which Commissioners will deliver their decisions. That is because there are times when Commissioners' workloads are high, meaning the time available to them for writing decisions is sometimes insufficient.
6. Parties or their legal practitioners or agents should not feel inhibited from making enquiries regarding the progress of a decision which has not been delivered within any time frame given to them at the conclusion of the hearing.
7. Where a party to proceedings wishes to enquire about the time being taken for the delivery of a reserved decision, they, or where applicable, their legal practitioner or agent, should contact the Associate to the Commissioner concerned. In the case of a Full Bench or Commission in Court Session



matter, contact should be made with the Associate to the presiding Commissioner.

8. If, after having contacted the relevant Associate, the party (or their legal practitioner or agent) wishes to pursue their enquiry further, they may raise the matter with the Chief Commissioner in writing.

## Relevant legislation

*Industrial Relations Act 1979*, ss 22B, 27, 28, 113.

*Industrial Relations Commission Regulations 2005*, reg 39.

## Useful resources

9. The Commission's website contains additional [resources](#).

**S J Kenner**  
**SENIOR COMMISSIONER**



## PRACTICE NOTE 2 OF 2021

### Inspection and search of Commission records

#### Introduction

*This Practice Note 2 of 2021 replaces Practice Note 1 of 2000, issued on 28 June 2000.*

1. Practice Note 2 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing interested persons of the process required to be undertaken when seeking to inspect or search the Commission's records.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* (**the IR Act**) and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 2 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

#### Conducting searches

3. No search of Commission files, records or documents is to be conducted by any officer of the Commission for or on behalf of any member of the public, department, organisation or body.

#### Due diligence searches

4. Searches of the Commission's due diligence database may be conducted by interested persons, with the approval of the Registrar. Due diligence searches are conducted to determine whether a company (or an individual) has been, or still is, involved in proceedings before the Commission.
5. All requests to conduct a due diligence search must be made in writing to the Commission. Requests will be accepted via email, post, or facsimile, or delivered in person to the Commission's Registry.
6. The party requesting the search is responsible for conducting the search or assigning an alternative party to conduct the search on their behalf. Any requesting party outside of Perth who cannot attend the Commission will be required to contact an agent in Perth to conduct the search for them.
7. The Commission's due diligence database contains records of the Commission and the Industrial Magistrate's Court (WA) dating back to 1999.



## Inspection of Commission records

8. No active Commission file is to be inspected without the consent of the Commissioner to whom the matter has been allocated. Where the matter is before a Full Bench, the consent of the presiding Chief Commissioner or Senior Commissioner must be sought, and in the case of a Commission in Court Session, the consent of the presiding Commissioner.
9. Subject to par 8 above, all applications, notices of appeal, responses, counter-proposals and transcripts of proceedings (provided that the Commission has not made an order preventing any such inspection) shall be available for inspection at the office of the Registrar during office hours.
10. All documents filed with the Registrar under s 63 and s 65 of the IR Act may be inspected at the office of the Registrar during office hours.
11. No information produced in evidence in proceedings before the Commission under s 33(5) of the IR Act will be available for production or inspection unless an order is made by the Commission permitting it.
12. Subject to this Practice Note, persons who have an interest, in the opinion of the Registrar, may inspect a decision (as defined in s 7 of the IR Act), including the reasons for decision, provided that a sufficient interest wider than idle interest or mere curiosity is established.
13. No fees or charges are applicable in relation to the inspection of the Commission's records.

## Requests for copies of Commission records

14. Copies of Commission records may be provided upon request. Such requests should be made via the Commission's Registry. Applicable fees and charges are set out in *Fees and charges* below.

## Fees and charges

15. In accordance with the Industrial Relations (General) Regulations 1997, the following fees and charges apply:

Due diligence search (per named entity)	\$20.00 each
Transcript of Commission proceedings	\$3.30 per page
Photocopy of a document	\$0.22 per page





## Relevant legislation

*Industrial Relations Act 1979*, ss 7, 27, 28, 33, 63, 65, 113.

*Industrial Relations Commission Regulations 2005*, regs 39, 80.

*Industrial Relations (General) Regulations 1997*, Sch 1, Sch 2.

## Useful resources

16. The Commission's website contains additional [resources](#).

**S J Kenner**  
**SENIOR COMMISSIONER**



## PRACTICE NOTE 5 OF 2021

### Appeals and applications before the Full Bench and the Commission in Court Session – want of prosecution

#### Introduction

*This Practice Note 5 of 2021 replaces Practice Note 1 of 2005, issued on 18 November 2005.*

1. Practice Note 5 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) and is to be applied in circumstances where appeals or applications have been filed in the Commission's Registry but not actively progressed by the appellant/applicant, their legal practitioner or agent.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* (**the IR Act**) and reg 39(3) of the *Industrial Relations Commission Regulations 2005* (**the Regulations**), Practice Note 5 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

#### Referring inactive matters to the Full Bench and the Commission in Court Session

3. The Registrar or Deputy Registrar must bring before the Full Bench an appeal or an application within the jurisdiction of the Commission in Court Session, which has not been progressed by an appellant/applicant, their legal practitioner or agent, for a period of more than six months from the date of the previous action having been taken with respect to that matter.
4. In accordance with par 3 above, before referring the matter to the Chief Commissioner or Senior Commissioner on behalf of the Full Bench, or the presiding Commissioner of the Commission in Court Session, the Registrar must first have served, in accordance with the Regulations, a Form 17 – Notice of Hearing upon all relevant and/or interested parties to the matter.
5. On the date of the hearing, the Full Bench, or the Commission in Court Session as the case may be, will allow parties, interveners, objectors, or s 72A(5) IR Act participants an opportunity to be heard in relation to:
  - (a) any interlocutory orders or directions that ought to be made;
  - (b) whether the appeal or application, or any part of it, should be dismissed or otherwise dealt with in accordance with s 27 of the IR Act; and



(c) whether any, and if so what, other orders or directions should be made.

### **Relevant legislation**

*Industrial Relations Act 1979*, ss 27, 28, 49, 55, 66, 67, 72, 72A, 73, 82, 84, 84A, 113.

*Industrial Relations Commission Regulations 2005*, regs 39, 59, 60, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 102, 103

### **Useful resources**

6. The Commission's website contains additional [resources](#).

**S J Kenner**  
**SENIOR COMMISSIONER**



## PRACTICE NOTE 6 OF 2021

### Interlocutory proceedings before the Full Bench and its presiding Commissioner, the Commission in Court Session or the Chief Commissioner sitting alone

#### Introduction

*This Practice Note 6 of 2021 replaces Practice Note 2 of 2001, issued on 23 May 2001.*

1. Practice Note 6 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**). This Practice Note only has application in proceedings before the Commission which are constituted by a Full Bench and its presiding Commissioner, the Commission in Court Session or the Chief Commissioner sitting alone, where the parties are represented by legal practitioners or agents.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* (**the IR Act**) and reg 39(3) of the *Industrial Relations Commission Regulations 2005* (**the Regulations**), Practice Note 6 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

#### Interlocutory applications

3. In all interlocutory matters, the parties will file a written outline of submissions, to which their respective arguments will be confined.
4. The applicant must file their outline of submissions at the time of filing their application unless the Commission otherwise directs.
5. The respondent must file its response to the applicant's application within three calendar days.
6. The applicant may file any additional submissions in reply to the respondent's response within a further three calendar days.
7. The Commission, at its discretion, may fix alternative time limits to those set out in pars 4, 5 and 6 above where circumstances require that to occur.
8. The Commission may also, at its discretion, limit oral arguments, conduct interlocutory proceedings by telephone or video-link, or decline to hear oral submissions in cases where written submissions have been filed.



9. In accordance with reg 32A of the Regulations, the Commission may decide in a particular case that it is appropriate for interlocutory proceedings to be determined by conducting a hearing on the papers.

### **Applications to stay the operation of a Commission order**

10. This Practice Note, with any required modifications, also applies to any interlocutory proceedings before the presiding Commissioner of a Full Bench in an application made to stay the operation of a Commission order, pursuant to s 49(11) of the IR Act.

### **Relevant legislation**

*Industrial Relations Act 1979*, ss 27, 28, 49, 55, 66, 67, 71, 71A, 72, 73, 84A, 113.

*Industrial Relations Commission Regulations 2005*, regs 20, 21, 22, 23, 24, 27, 32A, 35, 36, 39.

### **Useful resources**

11. The Commission's website contains additional [resources](#).

**S J Kenner**  
**SENIOR COMMISSIONER**



## PRACTICE NOTE 7 OF 2021

### Public Service Arbitrator Reclassification Applications

#### Introduction

*This Practice Note 7 of 2021 replaces Practice Note 1 of 2018, issued on 23 May 2018.*

1. Practice Note 7 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing employees, employers and relevant registered organisations of the process required to be undertaken when seeking the reclassification of a position within the public sector.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 7 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

#### General approach

3. The Public Service Arbitrator encourages discussion between the parties and the disclosure of relevant information and documentation at all stages of the reclassification application process.
4. Before an applicant requests that an application be listed for hearing, the employer should have made the applicant fully aware of the reasons of the employer (and of the classification review committee) for rejecting the application for reclassification. This should include a copy of any report presented to and relied on by the employer for its consideration. However, it should be recognised that such reports are not always accepted by employers and accordingly, may be of little use to the applicant in considering their situation. Whether such a report may be relied upon in the hearing of the application will be a matter for the Public Service Arbitrator to determine. The applicant should have had the opportunity to consider their position, after assessing the employer's reasons, before deciding to proceed with their application.
5. It should be recognised that, in determining reclassification applications, the Public Service Arbitrator is performing a review of the decision made by the employer, including the conclusions of the classification review committee. It is not appropriate for parties to adopt an adversarial approach to the proceedings. There will be an opportunity for each party to ask questions of witnesses for the purposes of clarification and elaboration. However, this is not cross-examination in the sense usually undertaken in hearings before the Commission generally.



6. The reclassification application should be based on the material that was before the employer and not on new material that was not previously considered. Where an applicant seeks to pursue an application based in part or in whole on new material not considered by the employer, or the employer seeks to introduce new material or reasons for rejecting the application, the Public Service Arbitrator is likely to not proceed with the application until that new material has been considered.

## Procedure

7. Unless it is directed otherwise, the following practice applies.
8. At least seven calendar days before the hearing of the application, the applicant is to provide the Public Service Arbitrator with a written statement of the facts upon which the applicant relies to support the application and any relevant witness statement(s).
9. A copy of the applicant's written statement and any witness statement(s) will be served on the employer, or its legal practitioner or agent, by the Registrar.
10. At least three calendar days before the hearing, the employer is to provide the Public Service Arbitrator with a written statement of the basis upon which it relies to refuse or otherwise question the application and any relevant witness statement(s).
11. A copy of the employer's written statement and any witness statement(s) will be served on the applicant, or the applicant's legal practitioner or agent, by the Registrar.
12. The material included in the parties' statements is the primary evidence to be considered by the Public Service Arbitrator. Where there is a need for oral evidence, witnesses may be asked questions by the other party with a view to clarifying or eliciting information. However, this is not an opportunity for cross-examination of a party in the traditional sense.
13. The evidence presented to the Public Service Arbitrator should be confined to that information provided to the employer for consideration of the application for reclassification and the employer's reasons for refusing the application.
14. The hearing of the application will proceed on the following basis:
  - (a) the applicant or the applicant's legal practitioner or agent may, if desired, make a brief opening statement to outline the basis of the application;



- (b) the applicant may give evidence to support the application which, in the normal course of events, will be confined to those matters raised in the written statements submitted by the applicant and the employer;
  - (c) the employer may then question the applicant;
  - (d) the applicant may then be re-questioned in light of the employer's questioning;
  - (e) the applicant may call any other witnesses;
  - (f) the case for the applicant then closes;
  - (g) the employer, or through its legal practitioner or agent, then opens its case and in doing so may make a brief opening statement;
  - (h) the employer may give evidence to support its position which, in the normal course of events, will be confined to those matters raised in the written statements submitted by the applicant and the employer;
  - (i) the applicant may then question the employer;
  - (j) the employer may then be re-questioned as a result of the applicant's questioning;
  - (k) the employer may then call any other witnesses;
  - (l) the case for the employer then closes; and
  - (m) both parties may then make brief closing statements.
15. A period of 1.5 hours is normally set aside for the hearing of each application for reclassification.

## Operative date

16. The normal practice is that successful reclassification applications are effective from the date on which the employee formally notified the employer that a reclassification is sought and provided sufficient information to enable a proper consideration of the application to be made.

## Relevant legislation

*Industrial Relations Act 1979*, ss 27, 28, Pt IIA Div 2, 113.

*Industrial Relations Commission Regulations 2005*, reg 39, Pt 12.





## Useful resources

17. The Commission's website contains additional [resources](#).

**S J Kenner**  
**SENIOR COMMISSIONER**



## PRACTICE NOTE 8 OF 2021

### Concurrent expert evidence

#### Introduction

*This Practice Note 8 of 2021 replaces Practice Note 1 of 2006, issued on 28 June 2006.*

1. Practice Note 8 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) to provide guidance in relation to the process adopted by the Commission when dealing with concurrent expert evidence.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 8 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

#### Practice of Commission

3. Where more than one expert witness is to be called in a matter and the Commission decides that the evidence of the expert witnesses will be heard together, unless the Commission otherwise determines, the procedures set out below in *Prior to the hearing* and *At the hearing* should be followed.

#### Prior to the hearing

4. As soon as possible after the filing of the experts' reports prior to the hearing, the Commission will advise the parties' legal practitioners or agents of the intention of the Commission to hear the evidence of expert witnesses together and direct the parties to advise the expert witnesses to be called by them:
  - (a) that the Commission requires the experts to meet and confer with one another in the absence of the parties and their legal practitioners or agents;
  - (b) that the object of the experts conferring is for them to prepare a written statement containing the matters in their respective reports about which they agree, and to identify any matters in their respective reports about which they disagree and the reasons for that disagreement;
  - (c) that the expert witnesses are to use their best endeavours to reach an agreement;
  - (d) that the expert witnesses are to each sign the written statement and



arrange for one of them to lodge it with the Commission, and give copies of it to the parties, no less than three days before the commencement of the hearing; and

- (e) that if any of the expert witnesses considers that further work is required to be done before the written statement can be finalised, the expert witnesses should prepare and sign the written statement in relation to those matters which are able to be agreed and identify in that document what further work is required to be done. The expert witnesses should complete any further work as quickly as possible and complete, sign and lodge with the Commission a further written statement and give copies of it to the parties.

### At the hearing

5. The Commission will call the expert witnesses to give evidence together and each will be sworn in by the Associate.
6. The Commission will arrange for the expert witnesses to be seated at a table where their evidence may be conveniently transcribed and heard by the Commission and each of the parties and their legal practitioners or agents.
7. The Commission will then explain the procedure to be followed and ask the expert witnesses if they have any questions regarding that procedure.
8. The Commission will then mark the filed written statement as an exhibit.
9. The Commission will then ask questions of the expert witnesses.
10. The Commission will then give the expert witnesses an opportunity to ask each other any questions which they consider might assist the Commission.
11. The Commission will then provide an opportunity for the expert witnesses to be asked questions by the parties or their legal practitioners or agents.
12. The Commission will then ask the expert witnesses if any matters arise from the questions asked by the parties or their legal practitioners or agents upon which any of them wishes to comment and give them an opportunity to do so.
13. That will then complete the evidence given by the expert witnesses and they will then be discharged from giving evidence.



## Relevant legislation

Industrial Relations Act 1979, ss 27, 28, 33, 113.

Industrial Relations Commission Regulations 2005, regs 39, 45.

## Useful resources

14. The Commission's website contains additional [resources](#).

**S J Kenner**  
**SENIOR COMMISSIONER**



## PRACTICE NOTE 9 OF 2021

### Witness outlines and witness statements

#### Introduction

1. Practice Note 9 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing parties to matters before it of the general practice in relation to witness outlines and witness statements.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 9 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

#### General

3. As a general approach, and subject to any direction made by a Commissioner, in accordance with this Practice Note, evidence in chief from a witness in a hearing will be given orally.
4. There may be circumstances where, given the nature of the case, such as the number of witnesses to give evidence in a hearing and the likely nature of that evidence, that a Commissioner may make directions for the filing of witness outlines or witness statements. Such directions will only generally be made if this course will assist in the expeditious and just determination of a matter.
5. In cases where a witness's evidence is likely to be contentious, involving the memory of a witness, or will involve matters of credit of the witness, then directions for the filing of witness statements are unlikely to be made.

#### Witness statements

6. Where a Commissioner has made directions for the filing of witness statements, the written statement will be the evidence the witness would have given orally in chief. When the witness adopts the statement in the hearing, it will stand as the witness's evidence in chief. Generally, a witness will not be able to give further evidence in chief, without the leave of the Commission.
7. If in a witness statement a witness refers to a document, a copy of that document should be attached to the statement and marked as "Annexure 1, 2, 3 etc".
8. At the hearing of a matter, when the witness is called to give evidence, a copy of



the witness statement will be produced, and the witness asked to identify it. Subject to any objections as to its content, the witness statement will then be tendered into evidence and given an exhibit number.

## Witness outlines

9. A witness outline is not a witness statement and is not tendered into evidence. It is an outline of the evidence it is expected a witness will give in a hearing.
10. A witness outline must only cover matters relevant to the case. It should refer to the topics the witness will give evidence about and the substance of that evidence, including any important conversations.
11. Where a document is referred to in a witness outline, it should be identified clearly and if a copy of the document has not been provided to the other party or access to it has not been provided, a copy of the document should be annexed to the witness outline.
12. Subject to any order or direction a Commissioner may make, a witness outline may not be used to cross-examine the witness, without the leave of the Commission.

## Relevant legislation

*Industrial Relations Act 1979*, ss 27, 28, 33, 113.

*Industrial Relations Commission Regulations 2005*, regs 39, 43.

## Useful resources

13. The Commission's website contains additional [resources](#).

**S J Kenner**  
**SENIOR COMMISSIONER**



## PRACTICE NOTE 10 OF 2021

### Evidence or submissions by telephone or video-link

#### Introduction

1. Practice Note 10 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing parties to matters before it, of the general practice in relation to the taking of evidence or the making of submissions in proceedings before the Commission, by telephone or by video-link.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 10 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

#### General

3. The taking of evidence or the making of submissions in matters before the Commission by telephone or video-link may be permitted on application to the Commission by a party to the proceedings.
4. Subject to any order or direction a Commissioner may make, the party seeking to have evidence taken or submissions made by telephone or video-link may be responsible for any costs involved.

#### Application

5. The party seeking to have evidence given or submissions made by telephone or video-link must make an application to the Commission in accordance with reg 44 of the *Industrial Relations Commission Regulations 2005* using Form 1A – Multipurpose Form.

#### Obligations on a party

6. If an application to have evidence taken or submissions made by video-link is approved by the Commission, the relevant party must ensure that any video-link equipment is compatible with the Commission's equipment.
7. The Associate to the presiding Commissioner will arrange a test prior to the day that the evidence is to be given or submissions are to be made, to ensure that the video-link equipment is of the appropriate quality and is operational.



8. To prepare for evidence to be given by telephone or video-link, the party calling the witness must take several steps prior to the hearing including:
- (a) The witness is in a quiet and private room that may be closed off such that only the person appearing, and any other person permitted by the Commission, is present.
  - (b) The witness has advised the form of oath or affirmation to be taken and in the case of an oath, the witness has available to them an appropriate religious text.
  - (c) Ensuring the witness has with them a copy of any witness statement they have made and any documents to which they will refer in giving their evidence. Any such documents not already on the Commission's file must be lodged in the Registry no later than two clear days prior to the hearing and a party must ensure that the application number of the matter and the names of the parties are clearly marked on a covering page.
  - (d) Explaining to the witness that giving evidence by telephone or video-link is an extension of a hearing room and is a formal proceeding before the Commission.

### **Obligations on a witness**

9. A witness must be present at the video-link facility no later than 15 minutes prior to giving their evidence.
10. A witness must be appropriately dressed to reflect the solemnity of the proceedings before the Commission.

### **Relevant legislation**

*Industrial Relations Act 1979*, ss 27, 28, 33, 113.

*Industrial Relations Commission Regulations 2005*, regs 39, 44.





## Useful resources

11. The Commission's website contains additional [resources](#).

**S J Kenner**  
**SENIOR COMMISSIONER**



## PRACTICE NOTE 11 OF 2021

### Electronic devices in hearing rooms

#### Introduction

1. Practice Note 11 of 2021 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing parties to matters before it of the general practice in relation to the use of electronic devices in hearing rooms in Commission proceedings.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 11 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 23 March 2021, and remains in force until such time as it is replaced.

#### General

3. Unless permitted by a Commissioner or by this Practice Note, electronic devices may not be used in any hearing room.
4. Additionally, an electronic device may not be used in a hearing room:
  - (a) to record or digitally transcribe the proceedings except as permitted by this Practice Note or by a Commissioner;
  - (b) in a way that disrupts the hearing room recording system or other equipment;
  - (c) to record video images, to take photographs, to generate sound or require speaking into the device; or
  - (d) in any manner that disrupts the solemnity of the proceedings or the decorum in the hearing room.
5. Members of the legal profession, registered industrial agents and self-represented parties may use an electronic device to send and receive text-based messages provided the device is in silent mode, does not interfere with proceedings and earphones are not used.

#### Accredited media

6. Subject to any order or direction of a Commissioner, accredited media, who may be required by Commission staff to produce photo identification issued by their media organisation, may use electronic real-time text-based communications and



social media for the purposes of accurate reporting of proceedings.

7. This is subject to the accredited media representative not interrupting the proceedings and ensuring that any suppression or other non-publication orders are not contravened. Additionally, any such communications must not enable witnesses excluded from a hearing room until they are called, from being informed about the content of evidence being adduced by a witness.
8. Any such audio recording made by an accredited media representative must not be broadcast or published in any way.

### **No restriction**

9. This Practice Note does not alter or detract from the restriction on the publication of proceedings in a hearing room under the *Industrial Relations Act 1979* (WA) or by order or direction of the Commission.

### **Relevant legislation**

*Industrial Relations Act 1979*, ss 27, 28, 33, 113.

*Industrial Relations Commission Regulations 2005*, reg 39.

### **Useful resources**

10. The Commission's website contains additional [resources](#).

**S J Kenner**  
**SENIOR COMMISSIONER**



## PRACTICE NOTE 12 OF 2021

### Written and oral submissions to the Full Bench and the Commission in Court Session

#### Introduction

*This Practice Note 12 of 2021 replaces Practice Note 3 of 2021, issued on 23 March 2021.*

1. Practice Note 12 of 2021 is issued by The Western Australian Industrial Relations Commission for the purpose of informing appellants/applicants, respondents, interveners, and objectors to matters listed for hearing and determination before the Commission, of the practice required to be undertaken concerning the filing of documents.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 12 of 2021 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 22 December 2021, and remains in force until such time as it is replaced.
3. For the purposes of this Practice Note “the Commission” means the Full Bench, the Commission in Court Session or the Commission constituted to hear and determine appeals under s 106 of the *Prisons Act 1981*; s 11CH of the *Young Offenders Act 1994*; and s 33P and s 33ZI of the *Police Act 1892*.

#### Exclusion to comply with this Practice Note

4. The Commission may, in any appeal or application made to it, direct that an unrepresented party need not comply with this Practice Note in whole or in part, if in all the circumstances the Commission considers it appropriate to do so.

#### Required Practice

5. Subject to par 4 above, in any appeal or other matter listed for hearing and determination by the Commission, unless it is directed otherwise, the following practice applies.
6. The appellant/applicant is to file a written outline of submissions, and a list of the legislation and authorities they rely upon at least 14 calendar days prior to the date and time listed for the hearing of the matter.



7. A copy of the appellant/applicant's documents filed in accordance with par 6 above, will be served on the respondent and any intervener or objector by the Registrar within 24 hours of filing.
8. The respondent and any intervener or objector are to file a written outline of submissions, and a list of the legislation and authorities they rely upon at least seven calendar days prior to the date and time listed for the hearing of the matter.
9. A copy of the respondent's (and any intervener or objector's) documents filed in accordance with par 8 above will be served on the applicant/appellant by the Registrar within 24 hours of filing.
10. Any legislation or authorities which the appellant/applicant, respondent, intervener, or objector intends to refer to or read from at the hearing should be marked with an asterisk (\*).
11. In circumstances where par 10 above is complied with, parties are not required to provide hard copies of that legislation and/or those authorities to the Commission, at the hearing of the matter.
12. In accordance with s 61 of the Interpretation Act 1984, where the last day of filing of a written outline of submissions falls on an 'excluded day' (...Saturday, Sunday, public service holiday, and a bank holiday or public holiday throughout the State... - see s 61(2)), the time for filing an outline of submissions will be the next business day.

## Relevant legislation

Industrial Relations Act 1979, ss 27, 28, 49, 55, 66, 67, 72, 72A, 73, 82, 84, 84A, 113.

Prisons Act 1981, s 106.

Young Offenders Act 1994, s 11CH.

Police Act 1892, s 33P.

Interpretation Act 1984, s 61.

Industrial Relations Commission Regulations 2005, regs 39, 59, 60, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 102, 103.



## Useful resources

13. The Commission's website contains additional [resources](#).

**S J Kenner**  
**CHIEF COMMISSIONER**