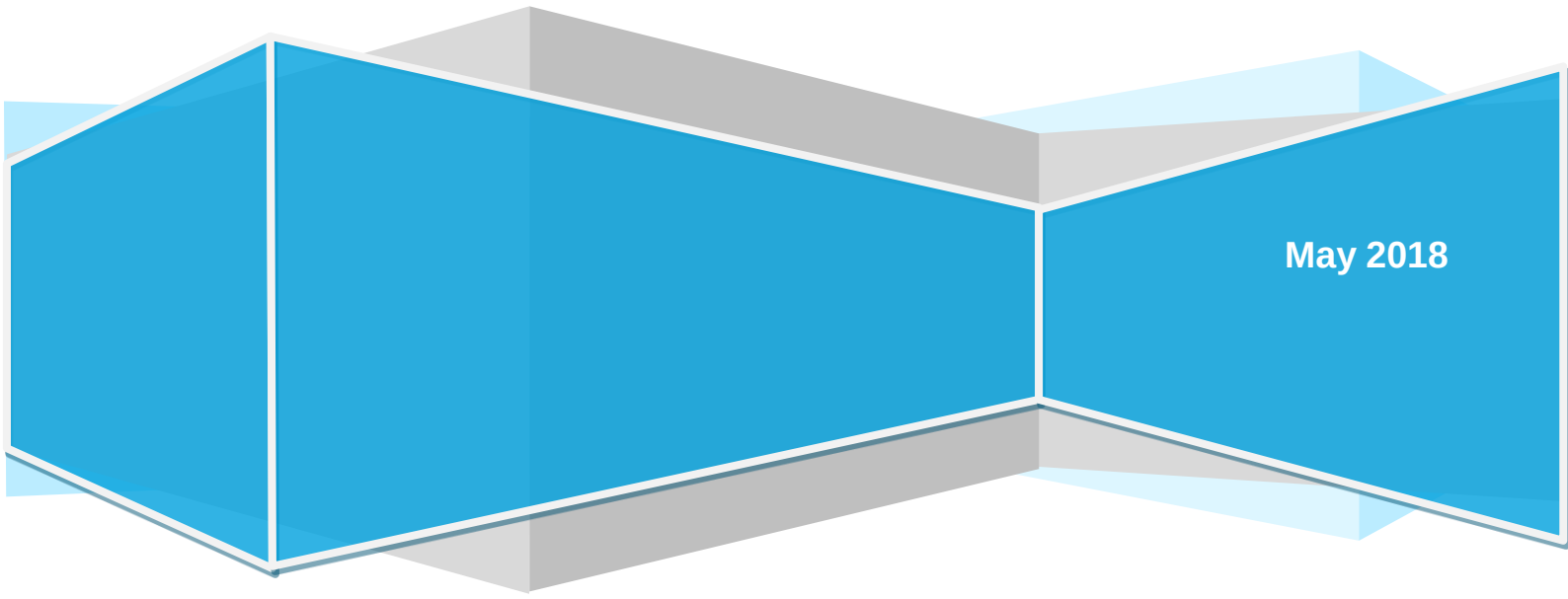
ELC Employment Law Centre of WA (Inc)

Working for WA Workers

ABN 36 365 876 841

Response to Interim Report

Ministerial Review of the State Industrial Relations System



May 2018

ELC Employment Law Centre of WA (Inc)
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Ministerial Review of the State Industrial Relations System
Mr Mark Ritter SC
C/-Secretariat
Department of Mines, Industry Regulation and Safety
Level 4
Gordon Stephenson House
140 William Street
Perth WA 6000

By email: irreviewsecretariat@dmirs.wa.gov.au

1 May 2018

Dear Mr Ritter

Ministerial Review of State Industrial Relations System – Response to Interim Report

Below is the Employment Law Centre of Western Australia's response to the Ministerial Review of the State Industrial Relation System Interim Report (**Interim Report**).

Due to the length of the Interim Report, and the limited time in which to respond, we have only responded to key recommendations and issues raised that appear to be relevant to our client base of vulnerable Western Australian workers. In doing so, we are mindful that some of the recommendations and issues raised in the Interim Report are matters we have already discussed in our submission dated 8 December 2017.

Where we have not responded to other recommendations or issues in the Interim Report, this then does not indicate that we agree with, disagree with, or do not have a view on, that recommendation or issue.

Should you require any further information, we would be happy to assist.

Yours sincerely

Rowan Kelly
Principal Solicitor

Jessica Smith
Principal Solicitor

Contents

Glossary

ELC means the Employment Law Centre of WA (Inc)

ELC's December Submission means ELC's submission to the Review dated 8 December 2017

DMIRS means the Department of Mines, Industry Regulation and Safety

FDV leave means family and domestic violence leave

FW Act means the *Fair Work Act 2009* (Cth)

FWC means the Fair Work Commission

ILO means the International Labour Organisation

Interim Report means the Ministerial Review of the State Industrial Relation System Interim Report

IR Act means the *Industrial Relations Act 1979* (WA)

LSL Act means the *Long Service Leave Act 1958* (WA)

MCE Act means the *Minimum Conditions of Employment Act 1993* (WA)

MCE Regulations means the *Minimum Conditions of Employment Regulations 1993* (WA)

NES means the National Employment Standards under the FW Act

OSH Act means the *Occupational Safety and Health Act 1984* (WA)

PSM Act means the *Public Sector Management Act 1994* (WA)

Review means the Ministerial Review of the State Industrial Relations System

TCR Order means the *Termination, Change and Redundancy General Order 2005 WAIRC 01715*

WAIRC means the Western Australian Industrial Relations Commission

Responses to recommendations and requests for further submissions in Interim Report

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
1. Term of reference 1: Structure of the WAIRC		
Recommendations in the Interim Report		
3	**Drafting of IR Act** The 2018 IR Act is to be in a plain English drafting style and gender neutral.	☑ **ELC supports this recommendation.** ELC is supportive of plain English drafting generally because it makes the legal system more accessible for laypersons (and vulnerable workers especially). The only aim of 'plain English' as described by the Office of Parliamentary Counsel of the Australian Government is to "*simplify all official writing by removing unnecessary obscurity and complexity*."[1] The additional qualification to this position is that, for us, the phrase 'plain English drafting' incorporates the idea that no meaning is lost from the original text; the text is merely made easier to understand. This qualification is generally accepted by plain English supporters.

[1] Australian Government, Office of Parliamentary Counsel, *Plain English Manual* located at http://www.opc.gov.au/about/docs/Plain_English.pdf, 19 Dec 2013, p. 6.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
1. Term of reference 1: Structure of the WAIRC		
		Further, as noted by the Office of Parliamentary Counsel of the Australian Government "*it helps to know who your readers are and why they read the law" and "[s]ometimes you can decide who most of the users of a law will be, and then deliberately aim at them*". In ELC's view, the plain English drafting of the 2018 IR Act should be aimed at an audience that is predominantly laypersons, rather than professional advisors. Equally, we support the 2018 IR Act being drafted in a gender-neutral way.
8	**Multiple claims to be dealt with by IMC (including DCB claims)** The jurisdiction of the IMC is to be amended so that if a claim for enforcement of a State Employment Standard (**SES**), State award, or other State industrial instrument is made to the IMC, the IMC has jurisdiction to deal with all enforcement proceedings, claims and counterclaims arising between the employer and the employee, or former employer and employee, including any claims by the employee or former employee for a denial of a contractual benefit	ELC agrees with the views of other submitters, as noted in the Interim Report, that the denial of contractual benefits jurisdiction generally "works well" within the WAIRC,[2] for the reasons outlined. It generally seems preferable for one tribunal or court to have jurisdiction over such matters, rather than for jurisdiction to be split. In ELC's view, given the WAIRC's experience in dealing with denial of contractual benefits matters, the WAIRC is best placed to continue exercising that jurisdiction.

[2] Interim Report, p. 123.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
1. Term of reference 1: Structure of the WAIRC		
	and any claims of set-off from, or counterclaim to, the denial of contractual benefit alleged by the employee.	On the other hand, ELC can see some merit in allowing employees who have outstanding wages and entitlements arising from both contract to be able to resolve those matters within the one court or tribunal, rather than needing to make multiple claims. Should Parliament decide to allow the IMC to deal with denial of contractual benefits matters where a claim for enforcement of a State Employment Standard, State award or other State industrial instrument is made to the IMC, in ELC's view, this should occur only at the election of the employee. ELC is concerned about the broad nature of any counterclaim or set-off sought to be instituted by the employer. Accordingly, should the IMC be given jurisdiction to deal with denial of contractual benefits claims in the manner proposed, we recommend that limitations be placed on the types of claims which may be brought purely for strategic reasons to put pressure on an employee.
12	**Questions of law – Commission not required to act according to equity and good conscience or without regard to technicalities or legal forms**	☒ **ELC does not support this recommendation.** In ELC's view, the WAIRC should be as accessible as possible for self-represented litigants. In this regard, it is important for the WAIRC to be able to decide matters informally and without regard to

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
1. Term of reference 1: Structure of the WAIRC		
	The 2018 IR Act specify that any section equivalent to the current s 26(1)(a) of the IR Act is not to apply if the WAIRC is deciding a question of law in any matter and upon any issue it is required to decide.	technicalities or legal forms, regardless of whether they concern questions of law. In ELC's experience, laypersons (and vulnerable workers especially) often struggle to understand the technicalities of the legal system, including rules of evidence and so forth. Laypersons should not be disadvantaged in such matters by having failed to adhere to the relevant technicalities or legal forms. Further, we do not consider a conflict necessarily arises if the WAIRC has to consider a question of law according to equity and good conscience. In ELC's view, this does not empower the WAIRC to disregard its statutory function and express powers or fully release the WAIRC from its obligation to apply rules of law. It must still necessarily interpret questions of law in accordance with accepted principles of law. However, to make the basis on which the WAIRC can decide questions of law different from other matters within its power has the prospect of causing complexity and confusion.
13	**Industrial agents** The 2018 IR Act empower the WAIRC to regulate the conduct of registered industrial agents appearing before the WAIRC, by way of a Code of Conduct to be published by the WAIRC, that includes the	☑ **ELC supports this recommendation.**

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
1. Term of reference 1: Structure of the WAIRC		
	entitlement of the WAIRC to, on notice to the agent and with the agent having the opportunity to make submissions on the issue, suspend or revoke an agent's registration or withdraw the right of the agent to appear before the WAIRC, either generally or for a particular matter, occasion or hearing.	
14(a)	**Slip rule** The 2018 IR Act contain: (a) A "slip rule" for orders made by the WAIRC.	☑ **ELC supports this recommendation.** In ELC's view, the WAIRC should have the power to correct mistakes or errors arising from an accidental slip or omission in orders made by the WAIRC.
14(d)	**Conciliations by telephone** The 2018 IR Act contain: (d) Power for the WAIRC to conduct conciliations by telephone.	☑ **ELC supports this recommendation.** In ELC's view, the WAIRC should have the power to conduct conciliations by telephone. However, it should not be the default position that all WAIRC conciliations are conducted by telephone. Instead, the WAIRC should exercise its discretion to determine which format is likely to be most appropriate for the relevant applicant and should give the applicant the opportunity to opt for a particular format, for the reasons set out below.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
1. Term of reference 1: Structure of the WAIRC		
		In ELC's experience, some employees prefer conciliations by telephone because they do not wish to see their employers in person (for instance, where their employment has ended acrimoniously). Equally, telephone conciliations are useful for some employees who cannot easily attend conciliations in person – e.g. employees in rural, regional or remote locations, as noted in the Interim Report.[3] On the other hand, some employees prefer conciliations to be conducted in person because they feel better able to communicate in such an environment – e.g. because they speak English as a second language and require an interpreter, or because they have a disability. Other employees value the formality of attending a conciliation in person because it gives them a greater sense of being heard than a telephone conciliation does. In ELC's experience, the WAIRC is already mindful of these issues and is prepared to accommodate employees' requests to hold telephone conferences in appropriate circumstances.

[3] Interim Report, p. 151.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
1. Term of reference 1: Structure of the WAIRC		
Other issues raised in the Interim Report		
17	**DCB claims – Who should exercise jurisdiction** Whether the denial of contractual benefits jurisdiction and/or the interpretation of awards, orders and industrial agreements jurisdiction, currently exercised by the WAIRC, ought to: (a) Continue to be exercised by the WAIRC as currently provided for under the IR Act; or (b) Continue to be exercised by the WAIRC but only by Commissioners of the WAIRC who, before their appointment, had practised law for not less than five years as an Australian lawyer, as defined in s 4 of the *Legal Profession Act 2008* (WA) (LP Act); or (c) Be exercised by the IMC; or (d) Be exercised by members of an Industrial Court to be established under the 2018 IR Act, and where the	In ELC's view, the relevant jurisdiction should continue to be exercised by the WAIRC as currently provided for under the IR Act, with no limitation on the type of member who can hear the matter (i.e. option (a) as proposed in the Interim Report). As noted above in relation to recommendation 8, we share the views of other submitters that the denial of contractual benefits jurisdiction generally "works well" within the WAIRC.[4] In ELC's experience, while there is a diversity of experience and background in the Commissioners of the WAIRC, there is a commonality of having a long-standing practice in industrial matters. Further, practising law for more than five years does not in itself provide greater expertise in industrial matters.

[4] Interim Report, p. 123.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
1.	**Term of reference 1: Structure of the WAIRC**	
	qualification for appointment to the Industrial Court be limited to people who, before their appointment, had practised law for not less than five years as an Australian lawyer, as defined in s 4 of the LP Act.	To then distinguish on capability and role based on a measure such as legal experience is not a ground ELC would support. Further, prior to entering office, each member of the Commission must then make an oath before a judge which includes that he or she will faithfully and impartially perform the duties of his office. There are then safeguards which allow matters to be appealed should there be an error of law.
18	**Representation by lawyers** Whether parties should be entitled in all matters before the WAIRC, however constituted, to be represented by an Australian legal practitioner, as defined in s 5 of the LP Act, subject to a discretion to be exercised by the WAIRC to disallow any or all of the parties from having legal representation in a particular matter, or on a particular occasion or for a particular hearing.	In ELC's view, rather than allowing the parties in all matters before the WAIRC to be represented by a legal practitioner subject to disallowance, it would be preferable for the IR Act to contain a provision equivalent to section 596 of the FW Act, for the reasons set out below. Under section 596 of the FW Act, the parties to a FWC matter must seek the FWC's permission to be represented by a lawyer or paid agent. FWC may grant permission only if: (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
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		(b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter. In our experience, it is more likely for employers to be represented than employees. Many employees find it intimidating when their employer is represented by a lawyer and they are not. This can potentially exacerbate the already unequal positions of the employer and the employee. Having said this, in our view, lawyers often allow matters to be dealt with more efficiently and can assist in resolving matters more effectively. It is therefore our view that section 596 of the FW Act strikes the right balance between allowing the parties legal representation in appropriate cases and not overly disadvantaging employees.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
1. Term of reference 1: Structure of the WAIRC		
19	**Costs** Whether the WAIRC ought to be empowered to make orders for costs, including legal costs: (a) In any matter before the WAIRC, but only in the same circumstances as the FWC may make an order for costs under s 401 and s 611 of the FW Act; or (b) Alternatively to (a), only in a matter that proceeds to an arbitration by the WAIRC, but only in the same circumstances as the FWC may make an order for costs under s 401 and s 611 of the FW Act; or (c) In no cases, so the WAIRC remains a no costs jurisdiction in all matters.	In ELC's view, the WAIRC should remain a no costs jurisdiction in all matters – i.e. option (c), as proposed under the Interim Report. The rationale for our position is as follows. On one hand, ELC acknowledges that there is merit in deterring parties from initiating, or responding to, proceedings frivolously; vexatiously; where the application or response has no reasonable prospects of success; or from behaving unreasonably. Similarly, there is merit in the idea of allowing a party to proceedings in which the other side has commenced, or responded to, the proceedings frivolously or vexatiously to recoup at least some part of his or her costs in relation to the proceedings. On the other hand, in ELC's experience, any risk of a costs order can be enough to deter some employees from seeking protection against unfair dismissal or from seeking unpaid entitlements or wages, even where they have a very strong claim and the likelihood of such a costs order is very low. In ELC's view, vulnerable employees such as low-income earners are most likely to be deterred by any risk of a costs order. It has also been our experience

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
1. Term of reference 1: Structure of the WAIRC		
		that some less than ethical employers abuse costs provisions in comparable legislation by threatening vulnerable employees with costs orders, even where employees' claims have substantial merit. On balance, ELC is of the view that the risk of introducing provisions allowing costs to be awarded in WAIRC matters outweighs the benefits. ELC therefore submits that the existing costs provisions of the IR Act should not be amended.
22	**Discovery** Whether the 2018 IR Act should include, in any industrial matter before the WAIRC, and subject to the overall discretion of the WAIRC, a right for any party to obtain discovery and inspection of relevant documents held in the possession, power or custody of any other party.	ELC supports there being a right for any party to obtain discovery and inspection of relevant documents held in the possession, power or custody of any other party.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
2. Term of reference 2: Jurisdiction and powers of the WAIRC		
Recommendations in the Interim Report		
23	**Abolition of constituent authorities** The Public Service Appeal Board (PSAB), the Public Service Arbitrator (PSA) and the Railways Classification Board be abolished.	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, ELC is of the view that the constituent authorities should be abolished and their powers and functions instead be transferred to the general jurisdiction of the WAIRC.
24(a)	**Single system for public and private sector employees** Subject to (b), the 2018 IR Act include a single system for public sector employers and employees to refer industrial matters to the WAIRC so that all employees who are currently subject to the jurisdiction of the PSA and the PSAB will now be subject to the ordinary jurisdiction of the WAIRC.	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, ELC supports a single system for public and private sector employees, subject to the proviso that no employees should lose their existing entitlements.
25	**Consequential amendments to PSM and Health Services Acts** Subject to the request for additional submissions below, there be consequential amendments to the *Public Sector Management Act 1994* (WA) (PSM Act) and the *Health Services Act 2016* (WA) (HS	☑ **ELC supports this recommendation.**

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
2. Term of reference 2: Jurisdiction and powers of the WAIRC		
	Act) to allow government officers to refer industrial matters to the ordinary jurisdiction of the WAIRC.	
26	**WAIRC's jurisdiction and powers re: public sector employees** In exercising the jurisdiction referred to in [24] above, the WAIRC have the jurisdiction and powers to make the same orders as it may make in exercising its jurisdiction in relation to the private sector.	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, ELC supports the WAIRC having the jurisdiction and powers to make the same orders as it may make in exercising its jurisdiction in relation to the private sector, subject to the proviso that no employees should lose their existing entitlements.
Other issues raised in the Interim Report		
28	**Breaches of public sector standards** The extent to which a breach of a public sector standard by an agency under the PSM Act may be referred, challenged or appealed by a public sector employee or an organisation on their behalf, to the WAIRC, and the remedies that may be awarded by the WAIRC.	As noted in ELC's December Submission, ELC supports the WAIRC having the jurisdiction and powers to hear breaches of public sector standards. The current framework whereby public sector standards are excluded from the WAIRC causes an additional level of confusion and significant limitations to available remedies. ELC supports there being a division between the role of the Public Sector Commissioner in setting standards and instructions and the

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
2.	**Term of reference 2: Jurisdiction and powers of the WAIRC**	
		WAIRC being able to oversee potential breaches of the standards and provide remedies where possible, as proposed in the Interim Report.[5]
30	**Bullying complaints to WAIRC** Whether the 2018 IR Act should include, for the benefit of both public and private sector employees, an entitlement to bring an application to the WAIRC to seek orders to stop bullying at work based on the model contained in the FW Act Part 6-4B "Workers bullied at work" and, if so, whether there ought to be any variations from that model.	As noted in ELC's December Submission, ELC supports the introduction of an anti-bullying jurisdiction in the WAIRC similar to that which exists in the FWC. However, we note the limitations of the FW Act bullying complaints process and recommend the model be varied to allow the bullied worker to make a complaint even after he or she has been dismissed or resigned, and to allow the worker to seek compensation for the bullying.
31	**Decisions to terminate employment of public sector employees due to redundancy** Whether proposed recommendation [25] should include the repeal of s 96A(1) of the PSM Act, and the amendment of s 96A(2) and s 96A(5)(b) of the PSM Act insofar as they restrict the rights of public sector employees to refer to the WAIRC a decision to terminate their	As noted in ELC's December Submission, ELC supports the expansion of the WAIRC jurisdiction to hear redeployment and redundancy matters in circumstances where the employment of the employee has already come to an end. Accordingly, ELC supports any relevant amendments to the PSM Act to facilitate this.

[5] Interim Report, p. 224.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
2.	**Term of reference 2: Jurisdiction and powers of the WAIRC**	
	employment under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA).	
33	**Public sector discipline matters** Whether the jurisdiction of the WAIRC should be expanded to allow the WAIRC to make General Orders for public sector discipline matters, with the consequent repeal of s 78 of the PSM Act.	In ELC's view, the jurisdiction of the WAIRC should be expanded to allow the WAIRC to make General Orders for public sector discipline matters.
34	**Review of PSM Act** Whether, given the discussion in Chapter 3 of the Interim Report, the recommendations proposed in response to Term of Reference 2 above, and any submissions provided in answer to the other questions in response to Term of Reference 2 above, the Review should recommend to the Minister that the PSM Act be reviewed.	The current proposed recommended changes to the IR Act in relation to public sector employees are significant. ELC notes the considerable interaction between the IR Act and the PSM Act in the governance of public sector employees. Given this, ELC believes it would be prudent to review the PSM Act.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
3. Term of reference 3: Equal remuneration		
Recommendations in the Interim Report		
35	**Equal remuneration provision** The 2018 IR Act is to include an equal remuneration provision based upon the model in the *Industrial Relations Act 2016* (Qld).	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, ELC supports the inclusion of an equal remuneration provision in the 2018 IR Act based upon the model in the *Industrial Relations Act 2016* (Qld). ELC further suggests that the 2018 IR Act include a requirement to ensure awards and agreements provide equal remuneration, broadly similar to the requirement in the *Industrial Relations Act 2016* (Qld).
36	**Equal remuneration principle** The 2018 IR Act is to include a requirement that the WAIRC develop an equal remuneration principle to assist parties in bringing or responding to applications brought pursuant to the equal remuneration provision.	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, the Queensland Industrial Relations Commission issued an equal remuneration principle in 2002,[6] which appears to have provided valuable guidance to parties involved in applications under equal remuneration provisions in the Queensland jurisdiction since its issue. ELC therefore supports the inclusion of a requirement in the 2018 IR Act that the WAIRC develop an equal remuneration principle to

[6] Queensland Industrial Relations Commission, Equal Remuneration Principle, 29 April 2002.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
3. Term of reference 3: Equal remuneration		
		assist parties involved in equal remuneration cases brought under the proposed equal remuneration provision.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
4. Term of reference 4: Definition of employee		
Recommendations in the Interim Report		
37	**Domestic workers** The 2018 IR Act not exclude from its coverage any employee whose place of work is the private home of another person, presently referred to as "any person engaged in domestic service in a private home" in s 7(1) of the IR Act.	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, ELC cannot see any justification for continuing to exclude domestic workers from the definition of an "employee" in the IR Act and the MCE Act.
38	**Pieceworkers and commission-only workers** The 2018 IR Act not exclude from its coverage persons whose services are remunerated wholly by commission or percentage reward, or wholly at piece rates, being persons who are currently excluded from the definition of an employee under s 3 of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) and regulation 3 of the *Minimum Conditions of Employment Regulations 1993* (the MCE Regulations).	☑ **ELC supports this recommendation.** As discussed in ELC's December Submission, ELC can see no reason why pieceworkers and commission-only workers should continue to be excluded from the definition of an "employee" under the MCE Act or the MCE Regulations.
39	**People with disabilities in supported employment** The 2018 IR Act not exclude from its coverage persons: (a) Who receive a disability support pension under the *Social Security Act 1991* (Cth); and	☑ **ELC supports this recommendation.** In ELC's view, people with disabilities in supported employment should receive the same basic employment protections as other employees in WA.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
4.	**Term of reference 4: Definition of employee**	
	(b) Whose employment is supported by "supported employment services" within the meaning of the *Disability Services Act 1986* (Cth), being persons currently excluded from the definition of an employee under s 3 of the MCE Act and regulation 3 of the MCE Regulations.	
40	**Taskforce in relation to the definition of an employee in the IR Act** A taskforce be assembled and chaired by a representative of the Department of Mines, Industry Regulation and Safety (DMIRS), with representatives from the Chamber of Commerce and Industry WA (CCI), UnionsWA and the WAIRC, to assist employers and employees in the change to the regulation of employment in Western Australia contained in proposed recommendations in [37], [38] and [39] above, and any proposed recommendations that might arise after the receipt by the Review of submissions in response to the requests in [42] – [45] below.	☑ **ELC supports this recommendation.**

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
4. Term of reference 4: Definition of employee		
41	**Taskforce in relation to the gig economy** A taskforce be assembled and chaired by a representative of DMIRS and include a member from the CCI, UnionsWA, the WAIRC, the State Solicitor's Office and a nominee of the President of the Law Society of Western Australia, to monitor the engagement, working conditions and termination of engagement of people in the gig economy and to consider and report to and make recommendations to the Minister as to whether and to what extent the regulation of the industry can or ought to be pursued by the State Government, by way of representations to the Commonwealth Government, separate legislative action or otherwise.	☑ **ELC supports this recommendation, subject to the comments below.** As discussed in ELC's December Submission, in our view, consideration needs to be given to what protections should be afforded to workers in the gig economy, particularly since they are typically engaged in low-paid work. We therefore support there being a taskforce to examine these issues. However, it is important to ensure that the establishment of such a taskforce does not result in any protections for workers in the gig economy being delayed, given how rapidly the economy has changed in recent years and the fact that the number of gig economy workers is ever-increasing.
Other issues raised in the Interim Report		
45	**Protection for unlawful non-citizens / lawful non-citizens working contrary to visas** Whether: (a) The 2018 IR Act could contain a legally operative provision, broadly similar to s 192 of the *Workers' Compensation and Injury Management Act 1981* (WA), that would have the effect of allowing the 2018 IR Act to cover people who are,	In ELC's view, the 2018 IR Act should, as a matter of policy, contain a provision equivalent to s 192 of the *Workers' Compensation and Injury Management Act 1981* (WA). ELC strongly supports any measures that enhance legal protections for migrant workers. In ELC's experience, migrant workers are particularly vulnerable to exploitation, face significant barriers to enforcing their rights (due to the fact that their employment is tied to

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
4.	**Term of reference 4: Definition of employee**	
	under the *Migration Act 1958* (Cth) either unlawful non-citizens in Australia who have engaged in work for an employer, or who are lawful non-citizens in Australia who have engaged in work for an employer that is contrary to the conditions of their visa, having regard to s 109 of the *Commonwealth Constitution*, the contents of s 235 of the *Migration Act* and the *Migration Act* as a whole. (b) If the answer to (a) is yes, whether, as a matter of policy, the 2018 IR Act ought to contain such a provision.	their visa status, their lack of familiarity with English, their lack of familiarity with the Australian legal system and so forth), and in practice, do not receive the same conditions and entitlements as Australian workers, as outlined in evidence ELC gave at a recent Senate inquiry.[7] It may be the case that the WAIRC and the IMC would treat migrant workers without a valid visa or working in breach of their visas in the same way as any other WA workers, regardless of whether there is an express provision in the IR Act allowing them to do so. However, given the legal uncertainty about whether it is possible to enforce a migrant worker's contract where the migrant worker is working in breach of the Migration Act, as outlined in the Interim Report,[8] it seems preferable to remove this uncertainty by expressly providing for this in the IR Act.

[7] Evidence to Senate Education and Employment References Committee, Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on Temporary Work Visa Holders, Parliament of Australia, Perth, 10 July 2015, pp. 16-25.
[8] Interim Report, pp. 314-317.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
4.	**Term of reference 4: Definition of employee**	
46	**People employed by foreign state or consulate or as sex workers** Whether the IR Act, MCE Act or, if included in the 2018 IR Act, the State Employment Standards, ought to apply to: (a) People who are employed in Western Australia by a foreign state or consulate. (b) People who are employed as sex workers.	ELC is of the view that the IR Act, the MCE Act or, if included in the 2018 IR Act, the State Employment Standards, ought to apply to both people who are employed by a foreign state or consulate and to people who are employed as sex workers. In ELC's view, there is a need to provide employment protections for sex workers particularly because of the prevalence of modern slavery in the sex work industry. The ILO estimated in 2017 that out of 24.9 million people in forced labour worldwide, 4.8 million (19% total) were victims of forced sexual exploitation.[9] Given the uncertainty about determining the legal status of a sex worker, as discussed in the Interim Report,[10] in our view it is preferable for sex workers to be expressly included in the definition of an employee under the IR Act, the MCE Act or the State Employment Standards (as the case may be).

[9] ILO, *Global estimates of modern slavery: Force labour and forced marriage*, Geneva, 2017, p. 29.
[10] Interim Report, pp. 319-320.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
4. Term of reference 4: Definition of employee		
		Similarly, ELC agrees with the view expressed in the Interim Report that it would appear sensible to ensure that employees of foreign states and consulates are not excluded from the coverage of the IR Act or the MCE Act conditions of employment.[11]

[11] Interim Report, p. 319.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
5. Term of reference 5: Minimum conditions		
Recommendations in the Interim Report		
47	**State Employment Standards to be included in new IR Act** The 2018 IR Act include a Part that provides for minimum conditions of employment for employees covered by the State system to be called the State Employment Standards (SES).	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, ELC recommends that Parliament enact a single piece of legislation dealing with workplace relations in Western Australian, including comprehensive minimum employment standards and the TCR General Order. While ELC does not have a view on what those minimum conditions of employment should be called, we note two minor matters are worth taking into consideration: • SES is an acronym already widely known in different contexts, so there is the potential for confusion; and • The reference to 'State', which is not a word specific to WA, may have the potential for confusion as to the scope or application of these minimum conditions. Another option may be to refer to the minimum conditions as the Western Australian Employment Standards - WAES.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
5. Term of reference 5: Minimum conditions		
48	**Content of State Employment Standards generally** The SES include: (a) The minimum wage (including for employees who have a disability that has been assessed to affect their productive capacity to perform their particular job). (b) Subject to (d), the National Employment Standards (NES), as contained in the FW Act, other than the long service leave NES. (c) Conditions comparable to those contained in Part 3-6, Division 3 (Employer obligations in relation to employee records and pay slips) and Part 2-9, Division 2 (Payment of wages and deductions) of the FW Act. (d) Any minimum condition of employment, as contained in the MCE Act, if the condition is, on the issue to which it relates, more beneficial to an employee or in addition to any NES condition of employment. (e) The conditions set out in the *Termination, Change and Redundancy General Order* of the WAIRC (TCR General	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, the minimum conditions of employment and protections in the State system should be expanded to include at least any of the conditions of employment and protections that exist in the national system, where such conditions or protections are new or more beneficial to employees. <u>TCR Order exclusion in respect of employers who employ less than 15 workers</u> ELC notes the statement in the Interim Report that the Review does not think it is in the position to recommend any reduction or change from the standards set by the General Order.[12] Recommendations 51 and 52 then set out a process for there to be a review of any or all of the SES. In the circumstances, ELC wants to put on record it also supports an amendment to clause 4.10 of the TCR Order, which provides:

[12] Paragraph 1128.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
5. Term of reference 5: Minimum conditions		
	Order) in lieu of Part 5 of the MCE Act, but incorporating the provisions contained in the FW Act that are more beneficial to employees than the TCR General Order. (f) Subject to [49] below, provision for long service leave. (g) Provision for Family Domestic Violence (FDV) leave as a minimum condition of employment, in accordance with recommendations to be made after receiving additional submissions as requested in [54] below.	"*Subject to an order of the Commission, in a particular redundancy case, subclause 4.4 shall not apply to employers who employ less than 15 employees*". In our experience, this limitation has a significant impact on vulnerable State system employees who are dismissed due to their position being purportedly made redundant by a small business employer. These vulnerable State system employees are then not automatically entitled to redundancy pay and can find it difficult to apply to the Commission for an order varying this exclusion. In ELC's view, either: • the number of employees for this exclusion should be reduced from 15; or • the onus in respect of this exclusion should be reversed such that it permits an **employer** to seek an order varying the entitlement to redundancy pay if it is a small business employer.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
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		This then provides an incentive for employers to more properly and fully consider whether there are redeployment opportunities and reduces the risk of an employer manufacturing or using a redundancy situation, as a shield against a potential unfair dismissal claim in circumstances where that employer does not have to make any redundancy payment. <u>Flexible working arrangements</u> As noted in ELC's December Submission, the right to request flexible working arrangements and the right to request an extension of unpaid parental leave are fairly limited under the FW Act. No penalties apply if the employer refuses the request, even if the refusal is not on reasonable business grounds. ELC is of the view that the right to request flexible working arrangements and an extension of unpaid parental leave should be strengthened in the State legislation by introducing sanctions where the employer refuses the request other than on reasonable business grounds.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
5. Term of reference 5: Minimum conditions		
49	**Content of long service leave provision** The SES condition with respect to long service leave include the following: (a) Express provision for casual employees to be entitled to receive long service leave and guidance on how to calculate their continuous employment. (b) Express provision for seasonal workers to be entitled to receive long service leave and guidance on how to calculate their continuous employment. (c) A provision that no long service leave may be "cashed out" until it is an entitlement that has accrued or crystallised as a legal entitlement. (d) Provision for all forms of paid leave to count towards an employee's continuous employment. (e) Provision for continuous employment to apply in circumstances equivalent to when there has been a transfer of business under Part 2-8 of the FW Act. (f) A provision that an employer be obliged to provide a copy of an employee's employment records, relevant to an assessment of if, and when, they will be entitled to long	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, the LSL Act provisions should be amended to provide greater clarity around continuity of service associated with the transmission of business. This also extends to providing greater clarity around the matters set out in the Interim Report where those matters are for the benefit of the employee (for example, express provisions dealing with casual employees and seasonal workers).

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
5. Term of reference 5: Minimum conditions		
	service leave, to any subsequent employer to whom the first employer's business has been transferred, at the time of or within one month of the transfer of the business.	
50	**Enforcement of long service leave** The law in Western Australia be amended so that, under the 2018 IR Act, a failure to comply with the long service leave SES will, like the other SES, be able to be enforced by the imposition of a pecuniary penalty, compensation and/or associated orders made by the IMC, on application by an industrial inspector, the person who was the subject of the alleged failure to comply or an industrial organisation of which the person is a member.	☑ **ELC supports this recommendation.**
51	**Review of State Employment Standards after passing of new IR Act** (a) Subject to (b), within 12 months of the passing of the 2018 IR Act, the WAIRC, sitting as the Arbitral Bench, is to review the SES in the 2018 IR Act and decide whether any of the SES ought to be enhanced or clarified by a General Order, including by reference to the comparable conditions that then apply under the FW Act.	As noted in ELC's December Submission, ELC is generally supportive of the statutory minimum conditions of employment being periodically updated, subject to the following provisos: (a) that no employees be worse off under any changes; and (b) that such updates not occur too frequently, so as to be overly onerous for the parties involved in the review process.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
5. Term of reference 5: Minimum conditions		
	(b) The SES review referred to in (a) is to be on notice to stakeholders and other members of the public who are to have the opportunity to make submissions on the issues to the WAIRC.	ELC supports this recommendation, subject to the point raised in the Interim Report that legislation could enshrine that the WAIRC cannot reduce the minimum standards.[13]
52	**Regular reviews of State Employment Standards** In addition to the initial review of the SES referred to in [51]: (a) The WAIRC will be required to review the SES every two years (after the initial review) and decide by a General Order whether, and to what extent, the SES ought to be added to and/or enhanced. (b) The SES review referred to in (a) is to be on notice to stakeholders and other members of the public who are to have the opportunity to make submissions on the issues to the WAIRC.	As noted above, ELC is generally supportive of the statutory minimum conditions of employment being periodically updated, subject to the following provisos: (a) that no employees be worse off under any changes; and (b) that such updates not occur too frequently, so as to be overly onerous for the parties involved in the review process. This requires then, at a minimum, that the WAIRC be adequately funded and resourced in order to conduct this review in a meaningful way. ELC notes that the combined effect of Recommendation 51 and 52 is that the WAIRC will be reviewing the SES twice in three years and every two years afterwards. ELC is concerned that the critical importance and necessarily large extent of this SES review which

[13] Paragraph 1145.

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5. Term of reference 5: Minimum conditions		
		will be dealing with a number of minimum conditions of employment, may be overly onerous on both the WAIRC and other stakeholders who it is important for the WAIRC to hear from. This is particularly so noting the combined effect of other resource intensive processes on these parties such as the review and replacement of Awards.
Other issues raised in the Interim Report		
53	**Casual loading** Should the "casual loading" currently set at 20 per cent under the MCE Act be increased or should the issue be deferred to consideration by the WAIRC, either on an award by award basis, or as a possible updated or enhanced SES, to be determined by the Arbitral Bench.	ELC submits that the statutory casual loading should be increased to at least 25%, consistent with casual loading in the national system, and the WAIRC should have the ability under its own motion to review and set a higher percentage for casual loading.
54	**Family and domestic violence leave** The nature and extent of the FDV leave to be included in the SES, including the length of the leave and the extent to which the leave should be paid or unpaid.	ELC is of the view that FDV leave should be included in the SES. In general terms, the nature and extent of the FDV leave should include terms that deal with the following matters: • at least 10 days' paid leave;

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
5. Term of reference 5: Minimum conditions		
		• the ability to take additional unpaid leave; • confidentiality; • the right to flexible working arrangements and to transfer to a safe job; and • protections from discriminatory treatment. In arguing against FDV leave, the arguments often used are that it is a slippery slope to other forms of leave, that it will act as a disincentive to hiring women, and that it will be costly to employers. In ELC's view, this is an entitlement which needs to be examined on its own merits and not in comparison to other forms of hypothetical leave. It is trite to say, but FDV leave is different from annual leave and is more akin to sick leave. It is an entitlement which arises in specified circumstances, and the ability to access FDV requires a person to be subject to conduct which cannot be condoned. Hopefully, it is then leave which all employees will never need to access. However, where an employee is subject to FDV and

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5. Term of reference 5: Minimum conditions		
		requires leave to deal with certain matters, this should be facilitated by the employer and should be on a paid basis. To the extent it is argued this will detrimentally impact on women's employment prospects, protections already exist to protect women from being discriminated against on the ground of gender. It should also be noted that various employment protections relating to pregnancy, family responsibility and sex do not act as a disincentive from hiring women – rather they protect women from discriminatory conduct. In relation to the argument that FDV leave is likely to be costly to employers, this is not borne out by recent research, which found that:[14] • *Only about 1.5 percent of female employees, and around 0.3 percent of male employees, are likely to utilise paid domestic leave provisions in any given year.*

[14] Jim Stanford, Centre for Future Work at the Australia Institute, *Economic Aspects of Paid Domestic Violence Leave Provisions*, December 2016, p. 3.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
5. Term of reference 5: Minimum conditions		
		• *Incremental wage payouts to workers on domestic violence leaves associated with the universal extension of a 10-day paid domestic violence leave policy will be modest – in the order of $80-$120 million per year for the whole economy.* • *Those incremental wage payouts are equivalent to less than one-fiftieth of one percent of existing payrolls (0.02 percent).* • *The costs to employers associated with those payouts are likely to be largely or completely offset by benefits to employers associated with the provision of paid domestic violence leave: including reduced turnover and improved productivity.*

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6. Term of reference 6: Awards		
Recommendations in the Interim Report		
55	**Review and replacement of existing awards with New Awards** Subject to recommendation 56, the 2018 IR Act is to include a Part, or Transitional Provision, that requires the WAIRC to, within three years, review and replace the existing private sector awards of the WAIRC with New Awards, on the following basis: (a) Subject to (b) the current conditions of employment of employees under existing awards are not to be reduced under the New Awards. (b) Despite (a) the New Awards should not include any work practice or condition of employment that is obsolete and/or would breach any Australian or Western Australian equal opportunity legislation.6 (c) Similar to the FW Act, the New Awards have either industry based or occupational scope clauses, in accordance with (d). (d) The industries and occupational groups covered by the New Awards are, subject to the WAIRC deciding otherwise, to be those set out in Schedule A. (e) Subject to (a), although a New Award should specify that conditions of employment are included in the SES they	As noted in ELC's December Submission, in ELC's view there should be a process for the updating of State awards for private sector employers and employees, subject to a number of provisos, including that no employees be worse off under any changes. Awards should not be examined under the prism of employees 'being overall no worse off'. Rather, each entitlement should be examined to ensure that no employee is worse off in respect of each entitlement. In ELC's view, the focus of this review should first be on the scope clauses of the award, which often have the potential to cause the greatest confusion. However, in ELC's view, the use of the word 'obsolete' in the context of a work practice or condition of employment is potentially a confusing or loaded term. This may require further clarification, for example, obsolete should not be interpreted as providing employers with the scope to argue a work practice or condition of employment

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
6. Term of reference 6: Awards		
	should not otherwise provide for any condition of employment contained in the SES, unless the WAIRC is of the opinion that the condition is required to be included in a New Award because of the particular circumstance or requirements of the industry or occupational group to be covered by the New Award. (f) The New Awards are to be drafted in a plain English style, with the aim of being user friendly for employers and employees. (g) In the process of making the New Awards, the WAIRC will give registered organisations and employer groups whose membership includes employees and employers to be covered by the New Award, and peak body organisations, the Minister and any other interested person or stakeholder the opportunity to make submissions about the terms of the New Award.	is obsolete merely on the basis there is a better or preferred way of doing it. As noted above in relation to recommendation 3, ELC is also supportive of plain English drafting generally because it makes the legal system more accessible for laypersons (and vulnerable workers especially). The only qualification to this position is that, for us, the phrase "plain English drafting" incorporates the idea that no meaning is lost from the original text; the text is merely made easier to understand.

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7. Term of reference 7: Compliance and enforcement		
Recommendations in the Interim Report		
58	**Additional powers for industrial inspectors** Under the 2018 IR Act, industrial inspectors are to be empowered to: (a) Issue infringement notices for breach of record-keeping and pay slip obligations. (b) Issue compliance notices, based on the model contained in s 716 of the FW Act, if it is in the public interest to do so. (c) Issue enforceable undertakings, based on the model contained in s 715 of the FW Act, if it is in the public interest to do so.	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, there needs to be a range of available enforcement mechanisms to achieve the outcome of specific and general deterrent, such as enforceable undertakings. Further, in ELC's view, industrial inspectors play a critical regulatory role in ensuring employers comply with their obligations and it is important that they have a range of powers and alternative mechanisms to enforce compliance and to deter wrongdoing. As part of this, it is important that industrial inspectors have sufficient resources to carry out their duties. ELC also notes that the Review was unsure[15] as to its submission that industrial inspectors have the power to enforce contractual matters relating to statutory minimum entitlements and confirms that this is in respect of the capacity for the enforcement of 'safety net contractual entitlements' in the FW Act.

[15] Paragraph 1360 of the Interim Report.

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
7. Term of reference 7: Compliance and enforcement		
59	**Penalties** The penalties in enforcement proceedings brought in the IMC be amended to be equivalent to the penalties set out in s 539 of the FW Act, and contain a method for indexation of the penalties, so that the maximum penalties change over time to take into account inflationary change.	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, the penalties for non-compliance should be significantly increased.
60	**Accessorial liability** The 2018 IR Act is to include provisions comparable to s 550 of the FW Act to enable those involved in any contravention of a relevant breach to be penalised and/or ordered to rectify any non-payment, or ordered to pay compensation or any other amount that the employer may have been ordered to pay.	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, there need to be accessorial liability provisions to allow individuals to be held responsible for the actions of their businesses where they are an accessory to the contravention.
61	**IMC's powers re: penalties** The 2018 IR Act is to include provisions to enable the IMC to impose penalties for a breach of the SES or any applicable award, agreement, or other industrial instrument, including but not limited to breaches of long service leave obligations.	☑ **ELC supports this recommendation.**

Para. no. in Interim Report	Nature of recommendation or issue	ELC's response to the recommendation or comment
7. Term of reference 7: Compliance and enforcement		
62	**Onus of proof where no pay slip or records** The 2018 IR Act is to include a section comparable to s 557C of the FW Act to the effect that, if, in a contravention proceeding against an employer where an applicant makes an allegation in relation to a matter and the employer was required to make and keep a record, make available for inspection a record or give a pay slip, in relation to the matter, and the employer has failed to comply with the requirement, the employer has the burden of disproving the allegation.	☑ **ELC supports this recommendation.** In ELC's view, in circumstances where an employer has failed to meet its record-keeping obligations, it should not then be able to gain the benefit of that failure with the burden of proving an allegation falling on the employee. Rather, the burden should be borne by the employer to disprove the employee's allegation.
63	**False or misleading records and pay slips** The 2018 IR Act is to include sections comparable to s 535(4) and s 536(3) of the FW Act prohibiting an employer from wilfully making, keeping or maintaining a false or misleading employment record or wilfully providing a false or misleading pay slip.	☑ **ELC supports this recommendation.** In ELC's view, this proposed change is unobjectionable and merely captures a longstanding principle that business records should not be knowingly false or misleading.
64	**Information-sharing between agencies** The 2018 IR Act is to include provisions comparable to s 112 and s 113 of the *Fair Trading Act 2010* (WA) to provide for the ability of industrial inspectors to share information acquired during an investigation within DMIRS or with other State Government	☑ **ELC supports this recommendation.** In ELC's view, this should also be extended to sharing information acquired during an investigation with Federal government agencies and, to the extent possible, having the reciprocal arrangements to obtain information. Where it is not possible to achieve this statutorily,

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7. Term of reference 7: Compliance and enforcement		
	agencies, or to obtain relevant information within DMIRS or from another State Government agency.	the legislation should enable (or at least not prohibit) agreements being formed with Federal government agencies that enable such information sharing.
65	**Industrial location** Section 98 of the IR Act be amended so that there is no restriction on the powers of industrial inspectors only being exercised at an "industrial location". Instead, consistent with the FW Act, an industrial inspector may exercise their powers at either: (a) The premises where work is or was being performed; or (b) Business premises where the inspector reasonably believes there are relevant documents or records.	☑ **ELC supports this recommendation.**
66	**Enforcement of orders under s 84A** The present s 84A(5) of the IR Act be amended to empower the Judicial Bench to impose a maximum penalty for a breach of $12,000 or imprisonment for not more than 12 months or both.	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, the penalties for non-compliance should be significantly increased.

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8. Term of reference 8: Local government		
Recommendations in the Interim Report		
69	**Local government regulated by State system** Local government employers and employees be regulated by the State industrial relations system.	☑ **ELC supports this recommendation.** As noted in ELC's December Submission, the dual system of employment laws that exists in Western Australia can be very difficult for local government employers and employees to navigate because of the lack of certainty as to whether each individual local government entity amounts to a constitutional corporation or not. In ELC's view, there is therefore merit in treating all local government employers and employees as State system employees, because it will improve certainty and reduce confusion. Additionally, there is some logic in local government employers and employees being in the State system rather than the national system because local government entities are created through State, rather than federal, legislation. ELC does not have any particular views on the exact mechanisms by which all local government employers and employees could be regulated by the State industrial relations system and has therefore not made any comments on recommendations 70 to 73.