

# **Fair Work Ombudsman Small Claims Guide**

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# 1. Glossary of terms

**Adjournment** – A court order by which proceedings are postponed, interrupted or continued at a different time. An adjournment can be for a short time (for example, one hour to allow parties to attempt to resolve some of their issues) or for a longer period (for example, a couple of weeks to allow parties to obtain further evidence, participate in mediation or for any other reason).

**Affidavit** – A written statement, confirmed by oath or affirmation, which can be used as evidence in court proceedings.

**Affidavit of Service** – A written statement confirmed by oath or affirmation that a person has successfully served (given) legal documents to another party in the proceedings.

**Affirmation** – A solemn declaration by a person providing evidence in court processes that the evidence he or she gives will be the truth, the whole truth and nothing but the truth. It is the non-religious version of an oath.

**Applicant** – The person making the small claims application, that is, the person who alleges that money is owed to them.

**Bankruptcy** – A legal status of a person or other entity that cannot repay the debts it owes to its creditors.

**Burden of proof** – The requirement for a party to a small claim to prove their case to the court, using evidence. If the case is not proved it will not succeed.

**Casual Conversion** – Process whereby a casual employee becomes a permanent employee (either part-time or full-time). Rights to and obligations regarding casual conversion are contained in the National Employment Standards (see Division 4A of Part 2-2 of the Fair Work Act 2009)

**Cross Examination** – Questions asked of a witness by a party other than the party who called the witness to give evidence. Cross examination can be conducted by either party in a small claims proceeding.

**Default judgement** – An order made by the court in the absence of a party without a full hearing if that party has failed to participate in the proceedings, or failed to comply with the required court processes.

**Enterprise Agreement** – An agreement made under the *Fair Work Act* 2009 (on or after 1 July 2009) between one or more employers and a group of employees, which contains the terms and conditions of employment for those employees.

**Insolvent** – A person or business is considered to be insolvent if they are unable to pay all debts when they fall due, or if they do not have enough assets to meet all of their financial liabilities.

**Liquidation** – The process of winding up an insolvent company's financial affairs and bringing the company to an end. A liquidator is appointed to assess the company's assets and to arrange the sale of assets in order to pay outstanding debts to creditors and shareholders. Liquidation may be ordered by a court, or may be initiated by shareholders of a company. Legal action cannot be initiated against a company in liquidation without permission of the court.

**Modern Award** – A legal document developed by the Fair Work Commission that sets minimum employment entitlements for employees working in a specific industry or occupation. A modern award applies on top of the National Employment Standards. Modern awards don't apply to employers bound by registered enterprise agreements.

National Employment Standards – The National Employment Standards (NES) are minimum standards of employment. They include:

1. Maximum weekly hours
2. Requests for flexible working hours
3. Parental leave and related entitlements
4. Annual leave
5. Personal / carer's leave, compassionate leave and family and domestic violence leave
6. Community service leave
7. Long service leave
8. Public holidays
9. Notice of termination and redundancy pay
10. Fair Work Information Statement.

Visit the [National Employment Standards page](http://www.fairwork.gov.au/nes) on our website at [www.fairwork.gov.au/nes](http://www.fairwork.gov.au/nes) for more information.

National Minimum Wage Order – An order made by the Fair Work Commission during its annual wage review which sets the national minimum wage for employees who are not covered by a modern award or enterprise agreement.

Oath – A statement by a person who is providing evidence in a court proceeding that he or she swears or promises by a god recognised by that person's religion that the evidence that he or she shall give will be the truth, the whole truth and nothing but the truth.

Outworker – An employee or contractor in the textile, clothing or footwear industry who performs work at a residential premise such as their own home, or other premises that would not conventionally be regarded as business premises.

Registered Office – A company's registered office address. This is the address where official documents may be sent to, or served on, an Australian company. A registered office address is not necessarily the same address as the company's place of business. Details of a company's registered office address can be obtained from the [Australian Securities and Investments Commission website](http://www.asic.gov.au) at [www.asic.gov.au](http://www.asic.gov.au). Depending on the type of information you are looking for, you may be required to pay a fee.

Respondent – The party (i.e. the company or individual employer) who has had a small claims application filed against them, that is, the person who it is alleged owes money to the Applicant.

Safety Net Contractual Entitlement – An entitlement under a contract between an employer and employee that relates to an entitlement covered by the National Employment Standards, or a matter that is included in a modern award. For example, a contractual entitlement to wages which are in excess of minimum wages set out in a modern award.

Service of Documents – The process of sending or giving court documents to a party after they have been filed with the court. The court has strict rules about service of documents. Service ensures all parties have received the documents that have been filed with the court.

Subpoena – A document issued by the court which compels a person to attend court to give evidence, or compels a person to produce documents to the court by a specified date.

Workplace Determination – The Fair Work Commission can make workplace determinations relating to low paid

employees, bargaining or industrial action. A workplace determination is similar to an enterprise agreement but is determined by the Fair Work Commission in particular circumstances, such as when the parties cannot reach agreement on their own.

## 2. Small claims overview

Under Section 548 of the Fair Work Act 2009, employees can choose to take their own legal action to recover employment entitlements using the small claims process up to a maximum amount of \$20,000. The small claims process is also available for certain disputes about casual conversion.

The small claims process is quicker, cheaper and more informal than regular court proceedings. The aim is to settle disputes quickly and fairly, with minimum expense to the parties. Matters are usually resolved with only one hearing. The simple process means there is no need for lawyers; in fact a party must get permission from the court if they want to be represented by a lawyer.

This Small Claims Guide has been designed to assist anyone who is seeking to recover entitlements using the small claims process, or anyone who needs to respond to a small claims action that has been filed against them. The Guide explains procedures and answers frequently asked questions about the small claims process.

This Guide is not intended to be the only source of information for parties involved in small claims proceedings. There's a list of other resources and bodies which may provide further information at the end of this Guide. You may also wish to seek legal advice before starting a small claims application.

Parties should check the court website or contact the relevant court registry for the most up to date information about the court and its small claims procedures. There are some important procedural differences between the courts so parties should check with the registry if they are unsure what fees apply or what forms need to be completed. See the list of ['Small Claims Courts'](#) at the end of this Guide.

## 3. Before starting a small claim

Before starting a small claim, it's important to consider whether going to court is the best way to resolve the dispute.

### **Have you tried to resolve the dispute yourself?**

Parties should try to resolve the dispute using all available dispute resolution options at the workplace, as this is the quickest and easiest way to resolve a dispute. The court will likely have regard to any attempts made to self resolve if a matter proceeds to hearing. Employment contracts, enterprise agreements and modern awards often contain dispute resolution clauses which can provide parties with guidance about how to resolve their dispute. If you're an employee and you no longer work for your employer, you should still try to talk to your former employer and resolve things by agreement before starting a small claim.

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The Fair Work Ombudsman's online course about difficult conversations can help employees and employers talk about their workplace dispute. You can find this course at our [Online learning centre](http://www.fairwork.gov.au/learning) [www.fairwork.gov.au/learning](http://www.fairwork.gov.au/learning).

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## Have you considered mediation?

Mediation is another way parties can settle a dispute without legal action. Many disputes happen because of a breakdown in communication, or a misunderstanding about what the other party needs or wants. A professional mediator can help to open lines of communication between the parties so that they can better understand each other's point of view.

Mediators don't take sides, give advice or make a decision about who's right or wrong. They help the parties work through the issues and reach a solution that is fair, reasonable and acceptable to everyone. Mediation is also confidential which means that anything the parties say during mediation cannot later be used in court, or for any other purpose.

The benefits of mediation are:

- it's less time consuming than going to court
- there are no court fees and related court expenses
- parties can control the outcome of their dispute (in court, a judge or magistrate decides the outcome)
- it's flexible and can often be scheduled to suit the parties' work hours and time commitments
- parties can explore innovative solutions and settlement options which are often more agreeable to both parties than a court judgement
- it's less damaging to an ongoing employment relationship because it allows issues to be resolved by agreement between the parties.

Community Justice Centres and some private dispute resolution providers offer free or low cost mediation services. See the '[Useful contacts for further advice and assistance](#)' section at the end of this Guide for some links and contact information.

## Pre-claim letter

If attempts to resolve the dispute informally fail, employees should try sending a formal letter to their employer (or former employer) requesting payment of what they believe is owed. The letter should outline what the dispute is about and what entitlements are owed. The letter should include clear notice that the employee intends to start a small claim if the matter is not resolved within a set period of time.

Sending a letter gives the employer a final opportunity to try and resolve things without the need to start legal proceedings. A template '[Pre-claim letter to employer](#)' has been included at the end of this Guide.

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Parties should remember to always keep copies of any letters and other written communication. It's a good idea to use registered post with a request for a return receipt when sending letters. The receipt can be kept as evidence that the letter was sent and received. If a letter is sent via email or fax, parties should request a 'read receipt' and keep a copy of the email or the fax transmission report.

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## 4. Other things to consider before making a small claim

### Who can make a small claim?

Employees (or former employees) and outworkers can use the small claims process to recover employment entitlements such as unpaid wages or annual leave. Independent contractors running their own business aren't eligible to use the small claims process, unless they can establish that they were in fact an employee of the business. The Fair Work Ombudsman has [information on independent contracting](http://www.fairwork.gov.au/contractors) at [www.fairwork.gov.au/contractors](http://www.fairwork.gov.au/contractors) to help parties assess whether a worker is an independent contractor or an employee.

### Are you within the time limit for making a small claim?

The time limit for making a small claim is usually 6 years from the date when the employee was supposed to have been paid their entitlement. Employees should, however, file their small claim as soon as possible after exhausting all options for resolution of the matter. This is because it can become more difficult over time to prove the claim or the employer's ability to pay the amount may reduce over time, for instance if the business closes. If you're an employee and you think you may be outside the time limit for making a small claim, you should consider getting legal advice.

### Can you commit time for a small claim?

You need to be prepared to spend some time and effort on a small claim. This includes preparing for the hearing, serving court papers and attending the hearing on the day. You must be available to attend court on the allocated hearing date. The hearing date can't be changed to a date that is more convenient for you, unless you have sought and been granted an adjournment by the court well before the hearing date.

### How strong is the claim?

You need to consider whether you have a legal basis for your claim and whether you have enough evidence to support or prove your claim. Sometimes when you are feeling angry or upset about what has happened, it can be hard to objectively assess the merits of the claim. It can be a good idea to discuss the problem with someone who is not involved in the dispute, such as friends or family, to get a second opinion.

A judge or magistrate must follow the law and consider the evidence before them. The person making the small claim, known as the Applicant, bears the onus of proof. This means they must be able to satisfy a judge or magistrate that the other party, the Respondent, did not meet its legal obligations and they must have evidence to support their claim. They must establish their claim on the balance of probabilities which means that a court needs to be satisfied based on the evidence, that the Applicant's version of events is more likely than not to be true.

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Evidence may be documentary evidence such as pay slips and timesheets, or it may be oral evidence given in court by the parties, or a witness. The court is not bound by formal rules of evidence in a small claims hearing which means the court can consider any evidence that is produced by the parties to prove their claim. For example, photos, video, and digital records can be used as evidence in court. Evidence in a small claims process does not always have to be in the form of affidavits which is generally the case in other court processes.

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## Can the other party pay?

It's important that an Applicant considers the Respondent's financial position before starting a small claim. If an Applicant wins, the Respondent may not have money to pay. In this case, the Applicant will need to start separate enforcement proceedings through the court to try and enforce the court's orders and recover the money. Enforcement proceedings can be time consuming and expensive. It's possible an Applicant might not receive any money if the Respondent becomes insolvent and is unable to pay its debts.

A small claim cannot be started against a company that is being wound up on the basis of insolvency, or against a company that is in liquidation. To find out if a company is insolvent (i.e. in liquidation), employees can search the [ASIC Insolvency Notices Register](http://www.insolvencyntices.asic.gov.au) at [www.insolvencyntices.asic.gov.au](http://www.insolvencyntices.asic.gov.au).

If an employer is in liquidation, employees should contact the liquidator as soon as possible to notify them that employment entitlements are outstanding. The employee will be required to prove their debt and supply evidence of any outstanding entitlements. The claim will then be dealt with as part of the liquidation process, rather than through court proceedings.

Small claims action may be limited against an individual (i.e. a sole trader) who has been declared bankrupt. In these cases, debts are dealt with as part of the bankruptcy process and employees should contact the bankrupt's trustee for further information. If however, the amount that is owed by the bankrupt was accrued after they were declared bankrupt, it may be possible to take small claims action. You may need permission of the individual's trustee in bankruptcy. To find out if an individual has been declared bankrupt, and the contact details for their trustee in bankruptcy, you can search the [National Personal Insolvency Index](https://www.afsa.gov.au/debtors/resources/npil) (NPII) at <https://www.afsa.gov.au/debtors/resources/npil>. A fee is charged for this search.

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If you're an employee who is owed employee entitlements and your employer is now bankrupt or in liquidation, you may be able to get financial assistance from the Australian Government through the Fair Entitlements Guarantee (FEG). You can find more information at the [Fair Entitlements Guarantee website](http://www.employment.gov.au/feg) at [www.employment.gov.au/feg](http://www.employment.gov.au/feg) or by calling 1300 135 040. Strict time limits and other conditions apply when applying for FEG assistance.

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## Is there an address for service?

An Applicant can't start a small claim unless they know the Respondent's address and they're able to serve them a copy of the application.

The Respondent must be served a copy of the application so they know:

- that legal proceedings have been filed against them
- the details of the claim and
- when the matter is listed for hearing

The court also needs to have an address for service for each party so that it can send letters and documents related to the proceedings. If the Respondent plans to defend the application, a copy of the response will need to be served on the Applicant once it is filed with the court.

If the Respondent is overseas, it's advisable to seek legal advice in relation to service of documents. It may take longer to serve documents in these circumstances. More information about service of court documents and proof of service is provided below.

## 5. Getting started with a small claim

### Prepare all information and evidence

Before starting a small claim, Applicants should gather as much information and evidence as possible in relation to the claim. Relevant information can include (but is not limited to):

- dates and times that work was performed
- role/s and duties
- applicable industrial instrument (i.e. an award or an agreement)
- level, or classification under the industrial instrument
- details of any leave taken
- details of entitlements that have already been paid
- details of entitlements that are still owed, e.g. wages, annual leave, payment in lieu of notice, and redundancy entitlements.

Examples of documents which might be used as evidence in court include (but it is not limited to):

- pay slips
- payment summary and tax file number declaration
- bank statements or other financial records
- diary entries of hours worked, significant events, conversations and meetings
- rosters, timesheets, leave requests and approvals
- position descriptions
- photographs
- job advertisements
- written contract of employment, or similar document such as letter of offer
- copy of applicable Award or agreement
- any written correspondence (including text messages and emails) between the parties regarding the claim
- calculations showing what entitlements are owed.

Each party must give the other party the documents which they intend to use to prove their claim, or defend themselves against the claim, well before the hearing. If you do not give the other party notice of this information and enough time to consider it, then the court may not let you rely on it at the hearing.

### Witness evidence

Sometimes a party might need to present evidence that can only be provided by a witness. The witness may support one party's version of an event, or may be the only person who has first-hand knowledge about it. The party themselves may need to appear as a witness to present their version of events. This is particularly relevant if the other party wishes to conduct a cross examination.

If you believe that evidence from a particular witness is essential to your claim, you should try to have the witness

attend the hearing. Your witness should prepare an affidavit (a written statement of their evidence) which is filed with the court and served on the other party prior to the hearing. The other party can then decide whether they wish to cross-examine the witness about their evidence at the hearing.

If a witness won't voluntarily come to court or provide the documents you need to present your case, you may need to have a subpoena issued through the court. A subpoena requires a witness to attend court, or requires a person to produce certain documents to the court. A subpoena may be needed to enable a witness to obtain permission from their own employer to be absent from work to give evidence in court. You'll be required to lodge an application to the court for a subpoena to be issued. There's a filing fee for this application so you should consider carefully whether the witness is necessary or whether the evidence they're likely to produce can be presented to the court in a different way.

## Identify applicable legal minimum entitlements

Applicants will need to be able to demonstrate to the court what their legal minimum entitlements are, and be prepared to explain how the Respondent has not met these minimum entitlements. Minimum entitlements might come from:

- The National Employment Standards (NES)
- A modern award
- An enterprise agreement
- The national minimum wage order
- A workplace determination, equal remuneration order, or other order of the Fair Work Commission

In addition, Applicants may have above-minimum entitlements arising under a contract of employment which relate to matters covered by the NES, or a modern award. For example, an employee might have a contract which entitles them to 5 weeks annual leave per year, whereas the minimum annual leave entitlement under a modern award might only be 4 weeks; or they may be paid \$20 per hour when the award rate is \$18 per hour. Any contractual entitlements which are higher than the minimum entitlements in an award, or under the NES, are known as Safety Net Contractual Entitlements (SNCEs) and they can be included in a small claim. Applicants will need to provide evidence to the court to show they have an above-minimum contractual entitlement.

Applicants can only make a claim under the small claims process if their entitlements relate to matters covered by the NES, or an award. Claims for entitlements not covered by the NES or an award can be made through the general court process.

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Applicants who believe they're owed superannuation entitlements should contact the [Australian Taxation Office](http://www.ato.gov.au) (ATO) at [www.ato.gov.au](http://www.ato.gov.au) or on 13 28 61. Superannuation entitlements may be recovered through the small claims process in limited circumstances – for instance, if the relevant award has a clause providing for the payment of superannuation. Employment related taxation issues can't be addressed during a small claims hearing.

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## Calculate what is owed

Applicants need to calculate the exact amount they're owed and explain to the court how they've arrived at that

final amount. Each entitlement must be calculated separately so that the judge or magistrate can see how each entitlement has been calculated. For example:

- How much is owed in wages?
- How much is owed for annual leave?
- How much is owed for redundancy?
- How much is owed for payment in lieu of notice?

A '[Sample Underpayment Calculation](#)' is attached at the end of this Guide. Applicants should attach a copy of any calculations to their application so they can be served on the Respondent to help them understand the claim. Respondents should also attach copies of any calculations to their response that is filed with the court.

It's important to remember that entitlements under an award or agreement can change over time. When calculating entitlements, you'll need to consider the rate of pay or entitlement that applied during the employee's employment, not at the time the small claims application is filed with the court.

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The Fair Work Ombudsman's Pay and Conditions Tool (PACT) can assist you to calculate minimum employment entitlements. You can access PACT, as well as extensive information about minimum employment conditions online. Visit the [Fair Work Ombudsman website](#) at [www.fairwork.gov.au](http://www.fairwork.gov.au) to print information which you can rely on in court.

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## **Decide where to file a small claim**

An Applicant can file their small claim in a state or territory magistrates' court, or the Federal Circuit Court. The most appropriate state or territory magistrate's court will be either the court:

- closest to where the Respondent is located, or
- closest to where the Applicant actually performed work.

You should check the court website or contact the relevant court registry for the most up to date information about the court and its small claims procedures. There are some important procedural differences between the courts so you should check with the registry if you are unsure what fees apply or what forms need to be completed. A list of [‘Small Claims Courts’](#) has been included at the end of this Guide.

Applicants cannot recover more than \$20,000 in entitlements using the small claims procedure under the *Fair Work Act 2009*. Although state and territory courts have specific laws covering small claims processes (for instance which provide for higher or lower maximum claim amounts) the *Fair Work Act 2009* sets out the law for small claims about employment entitlements. If you believe you’re owed more than this, you can still make a claim for these entitlements using other court procedures. The information in this Guide is only relevant to the small claims process and you should seek legal advice if you are contemplating general court action.

If your claim is just over the \$20,000 limit you may wish to seek legal advice on whether to file a small claim for \$20,000, which may be slightly less than your full claim, or whether to consider a general court action for the full claim.

## 6. Completing the court forms

A small claim can be made in a number of different courts. See the list of [‘Small Claims Courts’](#) at the end of this Guide.

In order to file a small claim, Applicants will need to complete a small claims application form. The court registry can provide assistance to you to locate the correct application form, or the form can be downloaded from the court’s website. The application form will need to include details about the claim, and also the parties to the claim.

It is important to check whether the court you have chosen to file a small claim application has rules that apply to you. The court registry can generally answer questions about process but cannot give you legal advice. For information about your entitlements, visit the [Fair Work Ombudsman website](#) at [www.fairwork.gov.au](http://www.fairwork.gov.au).

### Identifying the parties

It’s important to correctly identify the parties on the application form, otherwise the small claim might be delayed, or any order made may not be enforceable.

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It’s a common mistake for parties to be listed in the application form by their business trading name rather than the company legal name. For example, The Corner Store (trading name) instead of A & B Jones Pty Ltd (legal name).

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Applicants should look at pay slips, payment summaries, employment contracts, or any other correspondence from the Respondent to see if they can locate an Australian Business Number (ABN) or Australian Company Number (ACN) to correctly identify the Respondent. Using the ABN or ACN you can then search the Business Name Register on the [Australian Securities and Investments Commission \(ASIC\) website](#) at [www.asic.gov.au](http://www.asic.gov.au), or [ABN lookup](#) at <http://www.abr.business.gov.au/Index.aspx> to find out further information about the business. For a small fee, Applicants can also obtain a company extract from the ASIC Register which will include details such as the registered office and details about the company’s directors. If an ABN or ACN cannot be located, employees can search the ASIC Register or ABN lookup by business name only, or they can search for the names of individuals to try and identify the company.

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If you conducted an ASIC search at the time of completing your application, it is advisable to conduct another ASIC search immediately prior to the hearing because it's possible that the Respondent may have deregistered the business, or gone into liquidation since the application was filed. You won't be able to start or continue legal proceedings against an employer in liquidation.

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## Explaining the claim

There will usually be a section on the application form where Applicants will need to enter details about their claim. These are sometimes referred to as the particulars of the claim. If there is not enough room on the application form, these details can be set out on a separate piece of paper attached to the application form. Each paragraph should be numbered and all relevant documentary evidence related to the claim such as payslips and employment contracts, should also be attached to the application and referred to as "Attachment A", "Attachment B" etc.

The purpose of particulars is to give the court and the Respondent enough information to know what the claim is about. Applicants should not try to use 'legal language' when outlining the details of their claim. They should just say what happened in their own words and make sure that all important points of the claim are included.

This is what simple particulars might look like on a small claims supplication form:

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## Particulars of Claim

1. The Respondent is a restaurant called Neverland Grill Pty Ltd.
  2. I started working with the Respondent on 12 October 2012. A copy of my employment contract is attached and marked "Attachment A."
  3. I was a casual employee and worked 20 hours per week, Monday to Friday.
  4. It was agreed that I would be employed as a 'waiter' and that I would be paid \$16.00 per hour.
  5. During the period 12 October 2012 to 12 November 2013, I was paid a flat rate of \$16.00 per hour for all the hours I worked. Copies of my payslips showing what I was paid are attached and marked "Attachment B."
  6. Under the terms of my award, being the *Hospitality Industry (General) Award*, I was classified as a Food & Beverage Attendant Grade 2 and so I was entitled to be paid \$17.05 per hour.
  7. I resigned from my job with the Respondent on 12 November 2013.
  8. I am owed \$5,920 by the Respondent in underpaid wages. A copy of my calculations showing what I am owed is attached and marked "Attachment C."
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## Other tips for completing court forms

- Make sure you read the entire form and any notes before you start filling out the form. This will give you a better understanding of what is required and what information you need to provide. The court registry staff may be able to give you general information about completing the forms but can't give you legal advice.
- When listing parties on the application form, use the person or company's full name, not initials or abbreviated names. For example, you should write JOSEPH EDWARDS on the Application form, not J.

EDWARDS or JOE EDWARDS. For a company, you should write JC ROBERTS ROOFING AND SCAFFOLDING PTY LTD, not 'ROBERTS ROOFING AND SCAFFOLDING.'

- If an interpreter is required at the hearing, make sure this is noted clearly on the form.
- On some forms there will be a section asking whether you would like the small claims procedure to apply. Make sure you complete this section so it is clear to the court that you want the claim to be heard in the small claims division of the court.
- Forms can be handwritten, but must be legible. You should use black or blue pen. If you're able to type your application, this is preferable. Many forms are available online and you can fill them out online if you have a computer. You may also be able to get assistance from Community Legal Centres or a similar organisation. A list of other useful contacts that may be able to assist is attached at the end of this Guide.
- Remember to sign and date the application forms.
- If there are a number of employees who want to proceed with a small claims action, each employee will need to complete a separate application form. There can be no 'group' small claims court action.

## 7. Filing a small claim with the court

A small claim can be filed in a number of different courts. See the list of '[Small Claims Courts](#)' at the end of this Guide.

### Filing the application and paying the application fee

Once the application has been completed and all relevant evidence is attached, the application needs to be lodged with the court. This is called filing the application. At least three copies of the application and supporting documents will need to be filed with the court (a copy each for the Applicant, the court and the Respondent). Small claims applications can usually be filed over the counter at the court registry, or by post. Some courts allow applications to be filed online through the court's website.

An application fee needs to be paid to the court when the application is filed. This is sometimes known as a filing fee. Application fees can usually be paid in cash, by credit card, money order, or cheque.

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Application fees can change and payment methods can be different between the courts so you should check with the relevant court registry to confirm the correct application fees and find out what methods of payment will be accepted by the court. See the list of '[Small Claims Courts](#)' at the end of this Guide. You can't claim the application fees as part of the small claims application.

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Once the application is filed with the court and the application fee paid, the court will usually stamp each copy of the application and return the stamped copies to the Applicant. The Applicant will then need to serve a copy of the application on the Respondent, and keep at least one copy for themselves.

### Fee waivers and exemptions

In some special circumstances you can submit a written application to the court asking to be exempted from paying court fees, for example if you are a concession holder. You can also make an application to the court to have court fees waived if you can demonstrate that payment of court fees would cause you financial hardship.



If you believe you may be eligible for a fee waiver or exemption, contact the court registry who will advise you about the correct process for lodging an application and provide you with the appropriate application forms. You may need to provide supporting documentation to the court in support of any fee waiver or fee exemption application.

## **Pre-trial conferences and mediation**

A hearing date will usually be allocated at the time the application is filed with the court. The Applicant will be advised of the hearing date, as well as the time and location of the hearing and these details will usually be written on the application before copies are returned by the court. If you're not sure what is going to happen on that date, you should check with the court registry for more information.

Although small claims matters are usually heard and decided on the first court date, in some courts, you might be allocated a mention date or a pre-trial conference date, or you may be scheduled to attend a mediation or directions hearing. These are meetings that take place at the court, usually in front of the court registrar or a court clerk, who will encourage the parties to come together to discuss the claim, review documents and try to resolve some of the issues and explore settlement options before the hearing.

If a pre-trial conference is arranged, it is compulsory for you to attend. If you don't attend it may mean that the claim will be dismissed. You should be fully prepared to argue your case and have all of your evidence ready at any pre-trial conference. In some cases, the claim might be resolved at this stage and there will be no need for you to proceed to a hearing. If a claim cannot be resolved at this stage, a hearing date will then be set by the court (if not already allocated) and the claim will be heard in front of a judge or magistrate.

Even if a small claim proceeds to a hearing, it is possible that the judge or magistrate might order the parties to attend mediation, either on the day of the hearing, or at a later date decided by the court. The mediation will usually be facilitated by a registrar of the court who has been specially trained. The parties will be expected to fully participate in the mediation process, otherwise the claim could be dismissed.

## **8. Serving the application on the Respondent**

Certain court documents need to be formally given to the Respondent, to prove that they received them. This is called service. If there is a hearing, the court will often require evidence (usually in affidavit form) to prove that the documents were served.

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There are strict legal rules about service of court documents which parties must comply with. It is important that parties check with the court about the different methods and timeframes for service if they are unsure. Failure to serve court documents in accordance with the court rules may mean the claim will fail, or be delayed to another date so that service can occur.

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Different rules of service apply depending on whether documents are being served on an individual, or a company.

### **General requirements for service**

- Sole trader – if you are serving court documents on an individual who is trading under a business name (i.e. John Smith trading as Smith's Car Repairs), you (or the person serving them on your behalf) should serve the documents in person on that individual. Often this is easiest at their place of business, or at their residential address, however personal service can occur anywhere except inside a court building. If the person refuses

to take the documents, you can place the documents down in their presence (for example, at their feet) and explain what the documents are. You can also serve by registered post, however, you need to get the person's signature on delivery so that you can show the court that the documents have been received by that person. If the registered mail item is not collected then this will not prove service.

- Partnership – if you are serving court documents on a partnership (i.e. Smith and Jones trading as Smith and Jones Car Repairs), you should serve documents by hand on at least one of the partners. You can also use registered post.
- Corporation – if you are serving court documents on a company (i.e. John Smith Car Repairs Pty Ltd), you can serve the documents by delivering them to the company's registered office by hand delivering them or by registered or express post. You may also serve documents on a company by giving them directly to at least one of the company directors. You can find out the company's registered office by conducting an [ASIC company search](#) at [www.asic.gov.au](http://www.asic.gov.au). There is a small fee for this search. It's wise to conduct an ASIC search because in many cases the company's registered office address will be different to the actual place of business. If you have other ways of contacting the person you are serving, such as by email or fax, you may wish to also send the documents using these methods, as an extra precaution. The court may take this into account.

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Immediately after serving court documents, make some notes about what documents were served, the date and time you served the documents, how the documents were served, and who was served with the documents. If serving documents by hand, you should make notes of everything that was said when the documents were served. For example, did you tell the person what the documents were about? What did they say in response? Was anyone else present when you served the documents? Making a record of this information while it is still fresh in your mind makes things easier when it comes to preparing an affidavit of service. More information about affidavits of service is contained below.

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## Professional process servers

Professional process servers can be hired to serve court documents if parties do not wish to serve the documents themselves. They can sometimes be useful if parties are having difficulties locating a particular person or company in order to serve them. You can find a professional process server by conducting a [White Pages business name search](#) at [www.whitepages.com.au](http://www.whitepages.com.au). There will be a cost involved in this option – you should check their fees before you engage them to serve court documents.

## Timeframes for service

The court has strict rules about timeframes for service of court documents which must be complied with. Generally speaking, Applicants should serve their application on the Respondent as soon as possible prior to the first court date. It is preferable that the application be served on the Respondent immediately after it has been filed with the court.

The reason for the tight timeframes is to make sure the Respondent enough time to review the application and understand the case being made against them. It also gives them time to seek legal advice if necessary and prepare for the hearing.

Applicants should serve the application on the Respondent *at least* 7 days before the first court date. If you haven't

been able to serve your documents before the hearing date you should contact the court to check what you should do.

## **Proof of service – affidavit of service**

On the day of the hearing you will need to demonstrate to the court that your application has been properly served on the Respondent. You must keep good records of how the documents were served so that you can provide the court with specific details of all steps that were taken to serve the court documents in accordance with the court rules.

When the application has been served, the Applicant will need to complete an affidavit of service, also known as proof of service. This is a legal document which details the time, date, method of service, identity of the person who was served, and other details about the circumstances of service. An affidavit of service must be sworn or affirmed before a person authorised by law to witness the swearing of affidavits. This can include a lawyer, notary public or Justice of the Peace.

The affidavit of service can be presented by an Applicant to the court as evidence that the Respondent was aware of the proceedings. This is particularly important if the Respondent does not attend court on the day of the hearing.

The court can provide parties with a blank 'affidavit of service,' or one can usually be downloaded from the court's website. See the list of ['Small Claims Courts'](#) at the end of this Guide for contact information.

## **Filing an affidavit of service with the court**

An affidavit of service should be filed with the court registry at least a few days before the hearing. There's no filing fee for this. The court registry will require the original signed affidavit of service, usually along with at least one additional copy for the court registry. The affidavit of service will be kept on the court file as proof that the Respondent has been served with a copy of the application. If an Applicant doesn't file an affidavit of service with the court before the hearing, the Applicant should take copies of the affidavit of service to the hearing so that a copy can be handed to the judge or magistrate if required.

## **Other tips for serving documents**

- Copies of all documents that were served on the Respondent should be attached to the affidavit of service, along with any other related documents that might assist prove service, for example, copies of ASIC searches confirming the company's registered office, or a registered post delivery confirmation receipt showing delivery of documents to the registered office.
- If the Applicant is having difficulty serving documents on the Respondent in accordance with the court rules (e.g. if documents are returned after they have been sent to the registered office, or if the Respondent appears to be avoiding service), Applicants should detail all attempts they have made to serve the documents in their affidavit of service.
- In some circumstances the court may allow what is called substituted service, which means that the court will allow the Applicant to serve the documents in an alternative way, such as by email or by delivering to the place of business or a family member of the Respondent, if the Applicant can explain that the documents are likely to be seen by the Respondent using that delivery method.

## **9. Tips for employers - answering the claim**

Once a small claims application has been served on the Respondent, the Respondent can file a response, or defence, with the court. The time limit for filing a response varies between courts so Respondents should check the relevant

time limit with the court. See the list of '[Small Claims Courts](#)' at the end of this Guide for contact information. Respondents may wish to seek independent legal advice in relation to the claim so it's important that Respondents act quickly when served with a small claim so that a response can be filed with the court in time.

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The '[Small Claims Courts List](#)' at the end of this Guide contains further information about which court forms need to be completed in order to respond to a small claim.

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Respondents should review the application to ensure the legal entity identified by the Applicant is the correct employing entity, including checking that the ABN/ACN listed in the application is correct. If there are errors, they should be corrected in the response.

It is important that the Respondent nominates an address for service where they'll receive court documents and notices related to the proceedings. For example, if the registered office address is an accountant, the Respondent should notify someone at that address to forward any correspondence immediately.

If you're a Respondent who has been served with a small claims application, you can choose to:

- Admit the claim and agree to pay the money as a lump sum.
- Admit the claim and negotiate an agreement about payment, such as an instalment plan.
- Dispute the claim, either in part or in full, and file a response with the court and serve a copy of the response on the Applicant before the hearing so that a court can determine the matter.
- Not respond and not participate in the proceedings. Orders may be made against you in your absence if the Applicant can prove you were aware of the proceedings and they have a valid claim.

A Respondent should outline in the response which parts of the Applicant's claim are admitted, and which parts are opposed. Clear reasons for any opposition should be provided.

For example:

- if you dispute the Applicant's claims on the basis that the industrial instrument (ie the award or agreement) nominated by the Applicant doesn't apply to their employment, you should include clear reasons why you don't think it applies;
- if you admit the Applicant has been underpaid an entitlement, but dispute the amount that's been calculated by the Applicant, you should attach a copy of your own calculations to the response showing what you think is owed, together with any evidence that supports your response;
- if you dispute the amount claimed by the Applicant because the amount has already been paid, you should provide the exact details of the payments, for example by showing bank transfers or cheque payments for particular disputed amounts.

Being unable to afford to pay an amount claimed by an Applicant is not a valid defence. If you agree that the amounts are owing but you are unable to pay them in full, you should try to arrange a payment plan with the Applicant to resolve the matter.

If you're a member of an employer association, you can ring them for advice and assistance about employment entitlements.

You may also want to get legal advice. If you decide to do this, remember that the lawyer isn't allowed to represent

you at the hearing unless the court gives permission. Even if you have a lawyer, you should also attend the hearing, in case the lawyer isn't allowed to appear and you need to represent yourself or your company.

## Filing and serving the response

At least three copies of the response need to be filed with the court by the Respondent. There is no filing fee for this. A copy of the response, along with any supporting documentation, should then be served on the Applicant at least a few days before the hearing.

In some circumstances a Respondent may choose to not file a response with the court, but will attend the hearing to argue their case on the day. This is not recommended because the Applicant will not have had an opportunity to consider the response prior to the hearing. The matter may be delayed by the court in order to give the Applicant further time to consider the response.

If the Respondent can't file a response because the Applicant has not given them enough time to prepare a response prior to the hearing, the Respondent should still attend the hearing and tell the court that they have not had sufficient time to prepare and serve a response. The Respondent should be fully prepared for the possibility that a judge or magistrate may still decide to hear the case on the day.

## 10. The day of the hearing

On the day of the hearing, parties should find their courtroom at least 30 minutes before the scheduled hearing time and report to the judge's associate or court clerk to let them know they have arrived. The associate or clerk will be either in the courtroom or just outside it. Cases are not always called in the order that they are listed so parties should remain seated in the courtroom, or just outside the courtroom, until their case is called. If the judge or magistrate calls the case and the parties are not present, the case may be dismissed so it's important that parties notify court staff if they need to leave the courtroom for any reason before the matter is called.

### Announcing appearances

Often cases where the Respondent is not present will be heard first. These matters usually take less time because evidence given by the Applicant is heard unopposed. When the case is called, parties should approach the bar table, which is the long table at the front of the court room. The Applicant will stand first and announce their appearance. The Applicant should say "*Your honour, [insert name], the Applicant*" and then be seated. The Respondent should then announce their appearance saying "*Your Honour, [insert name], the Respondent*" and be seated. You should always stand when you are speaking to a judge or magistrate and be seated when the other party is speaking.

### The hearing

Courts approach a small claims hearing in different ways according to that court's practices. The judge or magistrate is free to manage their court list in a way that will be most efficient for the court. The judge or magistrate may begin by asking parties whether they have had discussions to try and resolve the dispute. Parties will be encouraged to attempt a resolution if they have not already done so and might be given an opportunity to participate in mediation to see if the dispute can be resolved without a hearing. The judge or magistrate may begin by asking each party questions in order to learn more about the facts, or may choose to focus on points they know are important. The judge or magistrate might ask the parties questions while they are presenting their evidence. You need to stand up if the judge or magistrate is speaking directly to you. You can sit down when the other party is speaking.

Parties should note that the judge or magistrate may not have read all of the details of the claim so they may need to provide a brief overview of the case before taking the judge or magistrate through all of the facts of the matter. If you have important documents which you would like the judge or magistrate to see, which were not filed with the

court as part of the application or response, you can ask the judge's associate or court clerk to hand them to the judge or magistrate at the hearing. However, the judge or magistrate may decide not to consider them if you haven't given the other party notice of these documents.

It's likely that each party will only have a few minutes to explain their case and answer questions, so it's important that you're prepared to present your most important facts first, and that you have all evidence and documents with you, and easily accessible. You should be prepared to go straight to the main issue of your case so that the judge or magistrate knows exactly why you are there. You should avoid presenting your case in a narrative style that is, avoid starting from the beginning and going through all the details of the claim to arrive at the most important point at the end.

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For example, an Applicant might say, *"Your Honour, I am here today because the Respondent didn't pay me overtime rates that I was entitled to by my Enterprise Agreement. The issue is whether I volunteered to work overtime, or was directed to work overtime. The Respondent claims that I volunteered to work overtime and so I was not entitled to overtime rates. I have evidence to show that I was directed to perform this overtime and so I was entitled to be paid at overtime rates under the terms of my Enterprise Agreement."*

The Respondent might say in response, *"Your Honour, I dispute the allegations raised by the Applicant on the basis that the Applicant volunteered to work overtime. The Applicant signed a document at the start of her employment indicating that all overtime would be worked on a voluntary basis. The company never directed the Applicant to work overtime. Under Clause 4.5 of the Enterprise Agreement, overtime that is worked voluntarily is paid at ordinary rates. Penalty rates only apply where overtime is directed. The Applicant has been paid her correct entitlements under the Enterprise Agreement."*

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The judge or magistrate will want to know exactly how you have decided on the amounts being claimed, so you should be prepared to explain to the court how the amount has been calculated. You should prepare a written calculation summary which can be handed to the judge or magistrate, and also the other party, to assist their understanding of the matter (see the attached [Sample underpayment calculations](#) at the end of this Guide). It's preferable that any underpayment calculations be attached to a copy of the application when it's filed with the court so that the Respondent has time to consider these calculations prior to the hearing.

## **Cross-examination**

During the hearing, parties may be required to take the witness stand and provide evidence under oath or affirmation. Parties may be cross-examined by the other party in relation to this evidence, or the judge or magistrate may ask questions of any witness. You need to direct your answers to the judge or magistrate. If you're giving evidence or being cross-examined in the witness stand and you need a moment to think, or take a break, just ask the judge or magistrate. If you don't understand a question that is being asked of you, ask the person to repeat it. It's very important to tell the truth at all times when you are giving evidence. If you don't know the answer, say that you don't know, rather than try to guess or offer an opinion.

## **11. The judgement**

After hearing from both parties, the judge or magistrate will make a decision about the matter. The formal decision made by the judge or magistrate is called an 'order'. The judge or magistrate will make orders in favour of the Applicant, or the Respondent, or may make a decision that accepts some parts of the claim but dismisses others,

based on the evidence that is presented to them.

In small claims hearings, the judge or magistrate will often decide the matter straight away and announce the decision in court at the end of the hearing. You should make notes of the decision. The court clerk or judge's associate will either hand you a copy of the orders in the courtroom, or a copy will be posted to you.

The judge or magistrate might not make a decision until a later date. This is called reserving the decision. When the judge or magistrate reserves their decision, this means they are taking further time to consider the evidence. The judge or magistrate may ask you to come back to the court at a specified time that day when the matter has been decided, or if the judge or magistrate requires further time, you will be notified when the orders are ready to be delivered.

Sometimes a judge or magistrate may adjourn the hearing, or reschedule it to a later date and request that the parties do certain things before the hearing. You might be asked to gather further evidence or further advice about your claim. It's important that you follow the judge or magistrate's instructions otherwise the matter could be dismissed. If you do not understand the instructions, you should ask the judge or magistrate to clarify the instructions, or ask the court clerk or judge's associate for further guidance.

If the matter is not decided in your favour, that doesn't necessarily mean that the judge or magistrate did not believe what you said. The judge or magistrate has to follow the law and can only base their decision on the evidence that is presented to the court. You may not have produced enough evidence to prove your claims on the day, or the other party's evidence may have been more convincing. The successful party will be the party who can best prove their claim through evidence and convince the judge or magistrate that their case is more likely to be true.

### **Judgement against a party who doesn't attend the hearing**

If an Applicant doesn't attend the court hearing, the court will likely dismiss the application.

If the Respondent doesn't attend the hearing, the key question for the court will be whether the Respondent received proper notice of the hearing. The Applicant will need to prove to the court that the Respondent was served with a copy of the application in accordance with the court rules. If the Applicant cannot prove this to the court's satisfaction, the court may adjourn the hearing to give the Applicant further time to properly serve the Respondent.

If the Applicant proves that they properly served the application on the Respondent, the judge or magistrate will usually consider the Applicant's evidence and decide the case in the Respondent's absence, or the court may make a default judgement order. Judgement isn't automatically awarded against a Respondent who doesn't attend the hearing. The Applicant will still be required to prove their claim based on evidence. If the evidence is strong enough to convince the judge or magistrate that the claim is made out, the judge or magistrate may award some or all of the amount claimed.

In some circumstances, the Respondent may be able to make an application to the court to set-aside default judgement. There are strict time limits to this process so the Respondent should contact the court for further advice as soon as they are aware that default judgement has been made.

## **12. After the judgement**

The party who wins a small claims action and who has been awarded money is known as a judgement creditor. The party who is obligated to pay the judgement debt is known as a judgement debtor. Orders made by the court are made to the Applicant personally. This means that the orders are in the Applicant's name and the Applicant is the only person with authority to enforce these court orders if the judgement debtor doesn't comply with them. If you are a judgement creditor, you'll need to make arrangements for payment with the judgement debtor. The court

won't collect this money for you. The court orders will usually specify a date for payment and if the judgement debtor doesn't pay you in accordance with the judge or magistrate's orders, you may need to take further legal action to recover the money. This process is called enforcing the judgement debt. There are costs associated with enforcing a judgement debt, so it is worth considering whether the judgement debtor has income or assets to pay you before deciding to start enforcement action.

Judgement creditors should make sure the judgement debtor is aware of the judgement and the amount ordered by the court, and knows where to send payment. Judgement creditors can try sending a letter to the judgement debtor requesting the court orders be paid. A template '[Request for payment of court orders](#)' is attached at the end of this Guide. It's good practice to attach a copy of the court orders to this letter. You should also include your contact details and address or bank account details for payment. If you believe that the judgement debtor may not have enough income or assets to pay the court orders in full, you might consider offering to accept weekly or monthly payments in exchange for full payment of the money owing.

If you're a judgement debtor and you don't pay money in accordance with a court order, there are serious consequences and there may be additional costs as the judgement creditor can take steps to enforce the judgement debt.

## Enforcement procedures

Different enforcement procedures apply in different courts, so you should ask the court or check the court website for further information. See the list of '[Small Claims Courts](#)' at the end of this Guide for contact information.

If a judgement debtor fails to respond to a written request for payment, the judgement creditor can make an application to the court to enforce the orders. An application for an enforcement order must usually be made within 6 years from the date that judgement was given.

The court registry can assist with further information about the relevant application forms and filing fees, however, the court registry cannot provide legal advice. If you're a judgement creditor and you're considering enforcement action, you should get legal advice because this area of the law can be complex and can involve additional costs. A listing of community legal contacts has been included at the end of this Guide under '[Further Advice & Assistance](#).'

There are a number of enforcement options available through the courts that can be used to enforce court orders:

- **Summons for Oral Examination.** If you don't know whether the judgement debtor has any assets or income, you can ask the court to issue an Examination Order which requires the judgement debtor to attend court to give information under oath about their financial position. The judgement debtor will be served with a summons to appear in court and will be asked questions about their ability to pay the court orders by the court registrar.
- **Warrant to Seize and Sell Property.** This is the most cost effective and least complicated enforcement procedure if the judgement debtor owns personal property. A warrant is issued by the court which allows the court sheriff to seize and sell the judgement debtor's personal assets (e.g a car) to pay the court orders. A court sheriff will attend the debtor's private property, produce the warrant and explain that if the amount on the warrant is not paid, goods will be seized and auctioned to pay the orders. A sheriff can only take certain goods and will generally not be able to take tools of trade (up to a certain value) or ordinary household goods such as furniture and bedding. Generally the sheriff will allow the judgement debtor time to get the money, negotiate with the judgement creditor or enter into an instalment order to pay the court orders.
- **Warrant to Seize and Sell Real Property (otherwise known as a writ for the levy of property).** This warrant



allows the sheriff to seize and sell the judgement debtor's real property (i.e. their home) to pay the court orders.

- Attachment of earnings order (otherwise known as garnishee order for wages or salary). An order requiring a portion of the judgement debtor's wages to be paid to the judgement creditor directly until the court orders are paid in full. This option is only available if the judgement debtor is an individual (i.e. not a company) who is employed and earning wages. The order is served on both the judgement debtor and their employer.
- Attachment of debt order (otherwise known as a garnishee order for debt). An order requiring a third party who owes money to the judgement debtor (e.g a tenant who owes rent), to pay money directly to the judgement creditor, instead of to the judgement debtor, until the court orders are paid in full. The attachment of debt order is served on the third party who owes the debt to the judgement creditor, who is known as the 'garnishee.'
- Forced (Involuntary) Bankruptcy. A bankruptcy notice from the [Australian Financial and Security Authority \(ASFA\)](http://www.asfa.gov.au) (www.asfa.gov.au). This is only an option if the judgement debtor is an individual (i.e. not a company) and the amount of the court orders is more than \$5000. There is a fee for issuing a bankruptcy notice which is paid to ASFA. A bankruptcy notice is a formal letter of demand which is served on the judgement debtor which requires them to pay the amount stated in the court orders within 21 days. Failure to pay will mean that the judgement debtor has committed an act of bankruptcy. An application can then be made to the court to have the judgement debtor declared bankrupt. Taking steps to declare an individual bankrupt can be a time consuming and costly process and you should get legal advice about this option.
- Winding up a company. If the judgement debtor is a company and the court orders are more than \$2,000, a judgement creditor can take action to wind up the company on the basis of insolvency. This can be done by issuing a statutory demand requiring the judgement debtor to pay the court orders within 21 days. The requirements for making a statutory demand are set out in various sections of the *Corporations Act 2001*. If the judgement debtor does not pay the court orders within 21 days, the company will be deemed to be insolvent and the judgement creditor can make an application for a winding up order in the Supreme or Federal Court which will stop the company carrying on business. Winding up a company is a complex process and parties should get legal advice.

## 13. Frequently asked questions

### **Can I have a lawyer represent me at the small claims hearing?**

Parties can't be represented by a lawyer unless the court gives permission. Generally there's no need for lawyers because small claims proceedings are informal compared to regular court proceedings. Parties can get advice from a lawyer about preparing and filing a small claims application or response, but they'll need to stand in front of a judge or magistrate to present their case by themselves on the day of the hearing, unless the court allows a request for a lawyer to appear. If the Respondent is a company, a lawyer who is an employee of the company may appear on the company's behalf.

### **Can my union, employer organisation or a friend help me at the hearing?**

If the court agrees, either party can be represented by an agent, (such as an officer of a union or an employer organisation) at the hearing. You'll need to seek permission from the judge or magistrate if you want to have an agent speak on your behalf.

If the court agrees, you should still be prepared to give evidence at the hearing because a representative won't be able to give evidence on your behalf.

You can bring a friend or family member to court to support you at the hearing. They'll need to sit in the public gallery at the back of the courtroom unless the court has given permission for them to speak on your behalf.

## **How long will it take for the case to be listed for hearing after the application is filed with the court?**

Most small claims matters are listed for a first court date within a couple of months of being filed with the court. The matter could be resolved at the first court date, or be adjourned and a later hearing date set. This date can sometimes be several months after filing the application. In the majority of small claims matters, the court will aim to resolve the matter on the first court date so you should be prepared to present your case on that day.

## **How long will the hearing take?**

You should be prepared to spend the whole day at court. Small claims hearings can run anywhere between a few minutes to a few hours. Parties can sometimes be asked to leave the courtroom for a long period to talk to each other, or parties may be asked to participate in mediation before a hearing takes place. On the day of your hearing there might be only one or two matters listed for hearing, or there might be several. You may need to wait in the courtroom for several hours until your matter is called.

## **How much will it cost?**

You'll need to pay a small claims application fee, also known as a filing fee. Small claims application fees vary between the courts and can change depending on the amount that's being claimed. Check with the court registry or search the court fees section on the court website to find out the correct fees. See the list of '[Small Claims Courts](#)' at the end of this Guide for contact information.

There may be some additional costs associated with conducting company searches and serving court documents on the other party. If you succeed in your small claims application, and the Respondent does not pay you in accordance with the court order, there'll also be further costs associated with bringing enforcement proceedings to recover the debt.

## **Can I make a small claim if I am under 18 years old?**

If you're under 18 years old, you can file a small claim, but, you'll need a litigation guardian (generally a parent or legal guardian) to represent you in the small claims proceedings. The litigation guardian will need to complete the court application forms and also appear at the hearing. If your parent or guardian is filing a small claims application on your behalf, they'll need to submit documentation to the court showing that they consent to act as your litigation guardian. You could still be required to give evidence, particularly if it's about incidents in the workplace that your litigation guardian doesn't have first-hand knowledge of. Contact the court registry for more information about this process. See the list of '[Small Claims Courts](#)' at the end of this Guide for contact information.

## **Can I make a claim for interest and costs as part of my small claims application?**

You may be able to claim interest on the amount that you're claiming in your small claims application. If your case is successful, the court may add these amounts to the amount it orders the Respondent to pay you. The amount of interest will be determined by the court at the time of the judgement, in accordance with the court rules. If you're making a claim for interest, you should clearly indicate on the application form that you're claiming a separate amount for interest in addition to any other amounts being claimed.

Costs can only be ordered in very limited circumstances, such as if the court is satisfied that one party's unreasonable act or omission caused the other party to incur costs. Court fees and service fees usually can't be recovered as part of a small claims action.

## **What if one of the parties needs an interpreter?**

A party may need an interpreter so that they can effectively take part in the court proceedings. The court needs as much notice as possible so that arrangements for an interpreter can be made.

## **Can the court make special arrangements for me if I have difficulties with access, or if I have impaired hearing or sight?**

The court can make arrangements to assist applicants who require special access, or who are visually impaired, deaf, hearing impaired and/or speech impaired. You should contact the court to find out what support services are available and let the court know early what assistance is required. Some services may be available to make it easier for you to attend court. For example, courts can arrange for an infra-red hearing loop to be available on the day of a court hearing. See the list of '[Small Claims Courts](#)' at the end of this Guide for contact information.

## **What if I live in a regional area?**

Special arrangements may be made to accommodate parties who live in regional areas. Local magistrates courts may have audio visual facilities available so that court proceedings can be run from remote or regional areas. You should check with the court to see whether these facilities need to be booked and whether there are any charges. The Federal Circuit Court also runs hearings in regional areas on specified dates throughout the year. You should enquire about the services available in regional areas before deciding which court you'll file your claim in. See the list of '[Small Claims Courts](#)' at the end of this Guide for contact information.

## **What if I settle (resolve) my claim with the other party before the hearing?**

Either party can make an offer to settle part, or all, of the claim at any time before the hearing. If the claim is settled, or if the Applicant wants to discontinue court action for any other reason before the hearing, the Applicant must notify the court, in writing, as soon as possible. You can do this by filing a Notice of Discontinuance with the court. A copy of the Notice of Discontinuance will also need to be served on the Respondent so the Respondent knows that legal proceedings have been discontinued.

If parties settle the dispute on the day of the hearing, when the case is called they should tell the judge or magistrate that the matter has been settled. The judge or magistrate might order dismissal of the case without prejudice (meaning the case can be re-filed if the settlement amount is not paid), make orders agreed to by the parties (for example, if the parties agree to orders together, known as consent orders), or adjourn the hearing for a short time to enable the Respondent to pay the claim. If the amount owed is paid before the next hearing date, the Applicant should then file a Notice of Discontinuance with the court.

## **What if I can't make the hearing date set by the court?**

The court will need a good reason and notice for a hearing date to be changed. If you can't attend court on the date of your hearing, you should contact the court as soon as possible. The registrar may ask you to put your request in writing and provide supporting documentation before a new hearing date can be scheduled. For example, if you cannot attend court because you are sick, you may be asked to provide a medical certificate or other supporting documentation to the court before a new hearing date can be scheduled. Attending court must take priority over all other commitments including work.

## **What happens if the other party doesn't pay the amount ordered by the court?**

If your claim is successful and the Respondent doesn't pay the amount in the court order, you have a right to start legal proceedings to enforce the payment (which is called a 'judgement debt'). There are various enforcement procedures available through the court and you should contact the court to get further information about this

process. Some information about the various enforcement options available are explained above in this Guide.

## Can I appeal a small claims decision?

If you're unhappy with the decision made in a small claims proceeding, you may be able to appeal. There are restrictions on the grounds on which you can make the appeal, as well as time limits for making an appeal. You cannot appeal just because you don't like the decision of the judge or magistrate. You should contact the relevant court for more information and also get legal advice if you are planning to appeal a small claims decision.

## 14. Tips – before the hearing

- Review the claim, the response (if any has been filed) and all documents that have been filed with the court.
- List the points you want to cover at your hearing and how you will prove each point.
- Write an outline of what you want to say to the judge or magistrate.
- Make sure you know the facts of your case thoroughly. Prepare a timeline of key dates and events so that you can refer to it during the hearing.
- Gather all of your original documents and organise them in logical order into a folder, with the documents clearly marked so that you can find each document quickly without getting flustered. Use an index and some folder dividers to assist you if needed.
- Prepare two spare copies of all of documents and other evidence and keep these copies in a separate folder in case you're required to hand a copy to the judge or magistrate, or the other party, during the hearing.
- If you're relying on witness evidence, contact your witnesses to make sure they know the hearing date and time and the court location.
- Prepare a list of questions for your witnesses. Think about what evidence they can give to help prove your case.
- Prepare a list of questions you would like to ask the other party, or their witnesses (if they're also relying on witness evidence).
- Inform the court as soon as possible prior to the hearing if either party needs an interpreter, special access arrangements, or if TV or video facilities need to be made available on the day of the hearing, because these will usually need to be booked by the court in advance.
- If you are catching public transport to the hearing, make sure you check the timetables and leave plenty of time to arrive at court. If you are driving, or someone else is driving you, make sure you allow enough time for traffic or parking issues. You should also familiarise yourself with the route before the court date so you don't get lost or need to rush.

## 15. Tips - the day of the hearing

### Getting ready to attend court

- Dress appropriately in neat casual or business attire. Jeans, singlets and thongs are not appropriate.
- Give yourself plenty of time to travel to the court and find your courtroom. Plan to arrive at court at least 30 minutes before your hearing is listed.

- Have the phone number of the court with you in case you are delayed and you need to notify them.
- Make sure you have all documents and evidence, including original documents such as your application and/or the response, and at least two copies, along with a notebook and pen.

### **Inside the courtroom**

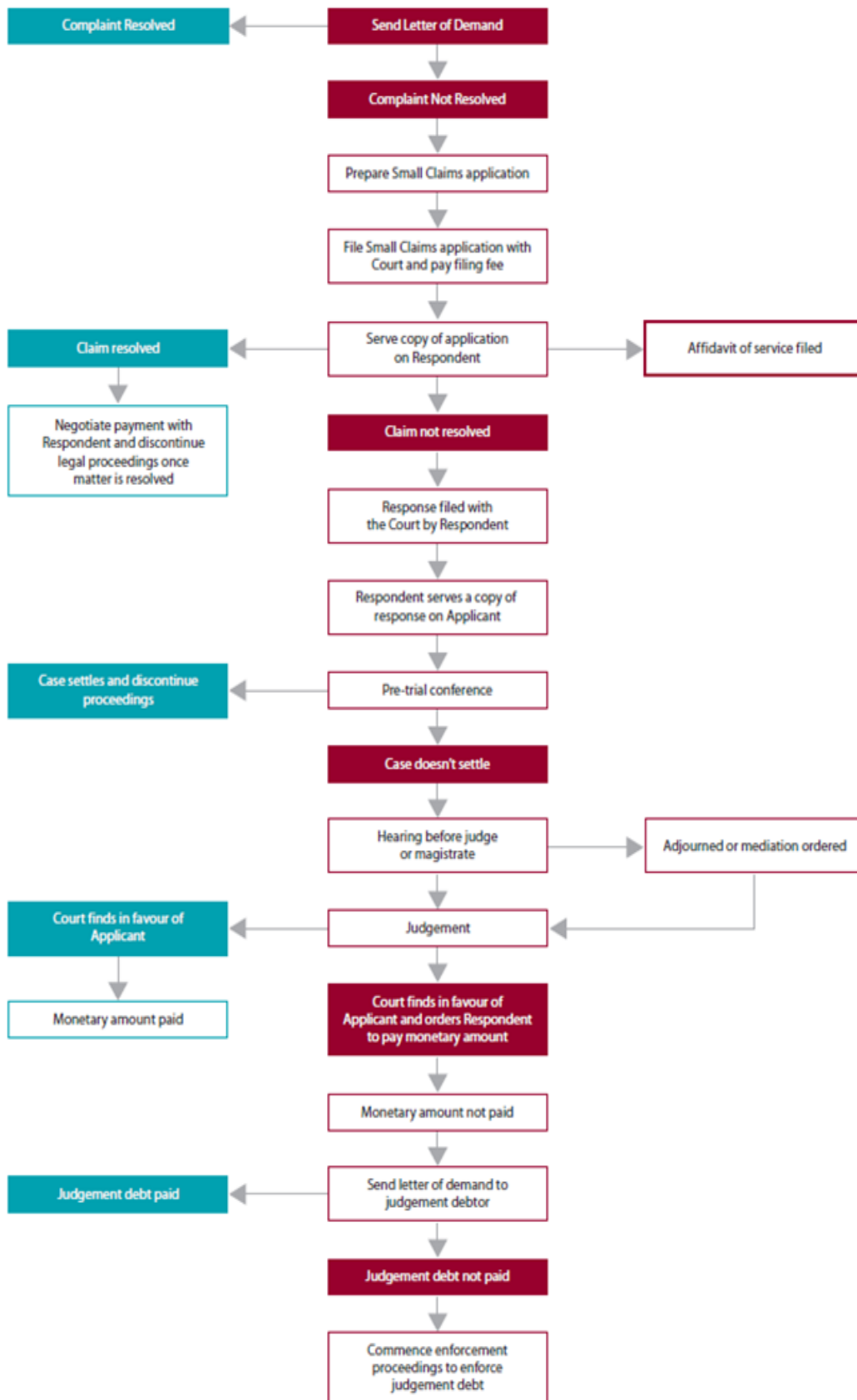
- Do not take food or drink into the court.
- Turn off your mobile phone once inside the court. Taking photos, video or sound recording isn't allowed in court buildings unless you have permission from the court.
- Stand up and bow when the judge or magistrate enters or exits the court room.
- Stand up when you're speaking to the judge or magistrate, or when the judge or magistrate is speaking to you.
- Address the judge or magistrate as "Your Honour".
- Speak only to the judge or magistrate during the hearing, and not to the other party. The only time you'll talk directly to the other party is if you are cross-examining the other party about their evidence in the witness stand.
- Do not interrupt the judge or magistrate, or the other party, while they're speaking. If you disagree with something that's said, make a note of it. You'll have an opportunity to respond once they have finished speaking.
- Be courteous, including to the other party. Don't raise your voice, or make insulting remarks about the other party or any witness, no matter how angry you get.
- Do not refer to any settlement negotiations or information discussed during mediation as this information is confidential.
- You should continue to behave appropriately after the hearing and outside of the court room.

### **Role of court officers**

- Remember that the judge or magistrate can't help parties to conduct their case because they are impartial.
- Court staff such as the court registrar can help parties with general information about court practice and procedure, but they can't give legal advice, tell you what to say in court, or give you an opinion about whether the case will be successful.

# Attachments

## 1. Small claims process flow chart (Guide only as processes vary in different courts)



## 2. Pre-claim letter to employer

You can use this template to write a letter to your employer if you believe you're owed money or other entitlements. You should use this letter to try and resolve your concerns with your employer before lodging a small claims application with a court.

This template has been colour coded to help you complete it accurately. You simply need to replace the <red writing> with the information that applies to you and your situation.

Explanatory information is shown in *blue italics* to assist you and should be deleted once you have finished the letter.

### Suggested steps for preparing a pre-claim letter to your employer

#### Step 1: Confirm your entitlements

You should check your entitlements under the relevant award or agreement and compare these entitlements to what you have already received, in order to work out what you are still owed. A range of tools and resources are available to help you work out your entitlements at the [Fair Work Ombudsman website](http://www.fairwork.gov.au): [www.fairwork.gov.au](http://www.fairwork.gov.au).

#### Step 2: Draft letter and send to employer

Use the template below to draft a letter to your employer and include as much information as possible about your outstanding entitlements. The more information you can provide, the easier it will be to resolve your concerns.

Keep a copy of the letter for your own records. You should also consider delivering the letter by certified mail with Australia Post. Keep the postal receipt as a further record of your attempts to try and resolve the matter.

#### Step 3: Resolving your concerns

If your employer contacts you after you've sent your pre-claim letter, you should work with them to try and resolve the matter. If you can't resolve the matter, or if your employer hasn't contacted you, the next step will be to file your small claims application with the relevant court.



<Your address>

<Your phone number>

<Name of employer>

<Address of employer>

<Date>

Dear <insert name of employer>

I am writing about a concern I have in relation to certain employee entitlements that I do not believe I have received.

*Choose the appropriate option below.*

I was employed by you between <starting date of employment> and <finishing date of employment> on a <insert employment status eg full-time, part-time or casual> basis as a <insert job title>.

or

I have been employed with you since <starting date of employment> on a <insert employment status eg full-time, part-time or casual> basis as a <insert job title>.

I understand that my employment <is/was> subject to <insert name of relevant award or agreement, or the Fair Work Act 2009 if you are award free>. Under this <award/agreement/Act> I believe I am entitled to <insert details of outstanding entitlements, including the exact amount of money being claimed>.

I have included documents outlining my entitlements in support of my claim.

*Delete the above sentence if not relevant. You can find documents about entitlements such as wages and leave at [www.fairwork.gov.au](http://www.fairwork.gov.au).*

I would appreciate your consideration of this matter. If I do not hear from you within 7 days, I will consider lodging a small claims application with the <insert name of relevant court>. Information in relation to your obligations can be found at [www.fairwork.gov.au](http://www.fairwork.gov.au). Alternatively you may wish to seek independent legal advice.

I look forward to an early resolution of this matter.

Yours sincerely,

<Insert name and signature>

### 3. Template terms of settlement agreement

<Your address>

<Your phone number>

<Name of employer>

<Address of employer>

#### Terms of Settlement Agreement

1. <Insert Respondent legal name> trading as <Insert Respondent trading name (if applicable)> [the Respondent] will pay <insert Applicant name> [the Applicant] the sum of <insert amount owed> (less applicable tax).
2. The Respondent agrees that the above amount will be paid by Electronic Funds Transfer into the Applicant's bank account in equal instalments of <insert amount>, to be paid weekly, with the first payment to be paid on <insert date>, and the last payment to be paid on <insert date>. The agreed payment schedule is set out in full below:

Payment Date	Payment Amount (Gross)
<insert date>	\$<insert amount>
<insert date>	\$<insert amount>
<insert date>	\$<insert amount>
<insert date>	\$<insert amount>

Total payment: \$<insert amount>

3. The Applicant agrees that the above payment, once made in full, constitutes full and final settlement of the following claims arising out of the employment of the Applicant by the Respondent under the terms and conditions of the <insert industrial instrument>, specifically:

<insert details of non-payment or underpayment i.e. 'non-payment of two weeks wages, non-payment of one week's pay in lieu of notice, underpayment of hourly rate'>

<Insert Applicant name>

<Insert Applicant signature>

<Insert date>

In the presence of <insert witness name> on <insert date>

<Insert Respondent name>

<Insert Respondent signature>

<Insert date>

In the presence of <insert witness name> on <insert date>

#### 4. Sample underpayment calculations

##### Calculations

Employer: Tiny Traders Pty Ltd (ACN 000 000 000)

Applicant: Joe Smith

Employment Status: Full Time Shop Assistant

Modern Award: General Retail Industry Award (MA000004)

Classification: Retail Employee Level 1

Pre-Modern Award: Shop Employees (State) Award (NSW) (AN120499)

Classification: Group 1, Shop Assistant

Date of commencement: 12/07/2012

Date of termination: 22/4/2013

Ordinary rate of Pay: 1 July 2012 = \$17.53/hour

##### A) WAGES

Weekly pay period start date	Ordinary time entitlement	Amount paid	Amount owed
12/7/2012	\$666.14 (\$17.53 x 38 hours)	\$500	\$166.14
26/7/2012	\$666.14 (\$17.53 x 38 hours)	\$500	\$166.14
etc	etc	etc	etc
	Overtime rate (150% for 1 <sup>st</sup> 2 hours)	Amount paid	Amount owed
12/7/2012	\$52.59 (\$17.53 x 150% x 2 hours)	\$0	\$52.59
26/7/2012	\$52.59 (\$17.53 x 150% x 2 hours)	\$0	\$52.59
etc	etc	etc	etc
	Overtime rate (200% there after)	Amount paid	Amount owed
12/7/2012	\$70.12 (\$17.53 x 150% x 2 hours)	\$0	\$70.12
26/7/2012	\$70.12 (\$17.53 x 150% x 2 hours)	\$0	\$70.12
etc	etc	etc	etc
		<b>Total</b>	<b>\$577.70</b>

##### B) NOTICE

	2 weeks PILN	Amount paid	Amount owed
Payment in lieu of notice (PILN)	\$1,332.28 (\$666.14 x 2)	\$1,000	\$332.28

##### C) ANNUAL LEAVE

		Amount paid	Amount owed
Leave owed on termination	\$2,664.56 (\$666.14 x 4 weeks)	\$2,000	\$664.56
Annual Leave Loading	\$466.30 (17.5 %)	\$0	\$466.30

**TOTAL AMOUNT OUTSTANDING**  $(577.70 + 332.28 + 664.56 + 466.30) = \$2,040.84$

## 5. Small claims courts list

Court	Jurisdiction	Court Contact Details	Forms
Federal Circuit Court	<p>If the claim is for \$20,000 or less, and involves a breach of:</p> <ul style="list-style-type: none"> <li>- one of the National Employment Standards</li> <li>- a term of a Modern Award</li> <li>- an enterprise agreement</li> <li>- a workplace determination</li> <li>- a safety net contractual entitlement</li> <li>- a national minimum wage order</li> <li>- an equal remuneration order</li> <li>- or another Fair Work Commission order</li> </ul> <p>or if the application relates to a dispute about casual conversion listed in section 548(1B) of the <i>Fair Work Act 2009</i>, then you can elect to have the claim dealt with as a small claim in the Fair Work Division of the Federal Circuit Court.</p>	<p>The Federal Circuit Court has a Registry located in each State and Territory.</p> <p><a href="#">Registry contact details</a> can be accessed via the following link: <a href="http://www.federalcircuitcourt.gov.au/html/contacts.html">http://www.federalcircuitcourt.gov.au/html/contacts.html</a></p> <p>Further information about the <a href="#">small claims process in the Federal Circuit Court</a> can be accessed at:</p> <p><a href="http://www.federalcircuitcourt.gov.au/services/html/workplace.html">http://www.federalcircuitcourt.gov.au/services/html/workplace.html</a></p>	<p><b>Employee Forms</b></p> <p><i>Application - Fair Work Division</i></p> <p><i>Form 5 – Small Claim under the Fair Work Act 2009</i></p> <p><i>Affidavit of Service (Fair Work)</i></p> <p><b>Employer Forms</b></p> <p><i>Response (General Federal Law)</i></p>
<a href="#">New South Wales Local Court</a>	<p>Court has jurisdiction under the <i>Fair Work Act 2009</i> to hear small claims up to \$20,000.</p>	<p>Court website: <a href="http://www.localcourt.lawlink.nsw.gov.au/localcourts/index.html">http://www.localcourt.lawlink.nsw.gov.au/localcourts/index.html</a></p>	<p><b>Employee Forms</b></p> <p><i>Application for Recovery of Money</i></p> <p><b>Employer Forms</b></p> <p><i>Form 37 - Notice of Appearance</i></p>
<a href="#">Magistrates Court of Queensland</a>	<p>Court has jurisdiction under the <i>Fair Work Act 2009</i> to hear small claims up to \$20,000.</p>	<p>Court website: <a href="http://www.courts.qld.gov.au/courts/magistrates-court">http://www.courts.qld.gov.au/courts/magistrates-court</a></p>	<p><b>Employee Forms</b></p> <p><i>Form 2A - Employment Claim</i></p> <p><b>Employer Forms</b></p> <p><i>Form 6A - Notice of Intention to Defend an Employment Claim</i></p>
<a href="#">Magistrates Court of Western Australia</a>	<p>Court has jurisdiction under the <i>Fair Work Act 2009</i> to hear small claims up to \$20,000.</p>	<p>A listing of metropolitan and regional court locations and contacts can be accessed via <a href="http://www.magistratescourt.wa.gov.au/C/court_locations_contacts.aspx?uid=5152-6960-2893-3038">http://www.magistratescourt.wa.gov.au/C/court_locations_contacts.aspx?uid=5152-6960-2893-3038</a></p>	<p><b>Employee Forms</b></p> <p><i>Form 4 - Minor Case Claim</i></p> <p><b>Employer Forms</b></p> <p><i>Form 15A - Response to Minor Case Claim</i></p>
<a href="#">Magistrates Court of Tasmania</a>	<p>Court has jurisdiction under the <i>Fair Work Act 2009</i> to hear small claims up to \$20,000.</p>	<p>Registry contact details can be accessed via <a href="http://www.magistratescourt.tas.gov.au/about_us/contacts">http://www.magistratescourt.tas.gov.au/about_us/contacts</a></p>	<p><b>Employee Forms</b></p> <p><i>Form 1 – Claim</i></p> <p><i>Form 3 – Affidavit of Service</i></p> <p><b>Employer Forms</b></p>

Court	Jurisdiction	Court Contact Details	Forms
			<i>Form 4 – Defence</i>
<a href="#"><u>Magistrates Court of Victoria</u></a>	Court has jurisdiction under the <i>Fair Work Act 2009</i> to hear small claims up to \$20,000.	<a href="http://www.magistratescourt.vic.gov.au/jurisdictions/civil">http://www.magistratescourt.vic.gov.au/jurisdictions/civil</a>	<b>Employee Forms</b> <i>Industrial Division Small Claims Form 5A – Complaint</i> <b>Employer Forms</b> <i>Industrial Division Small Claims Form 8A Response</i>
<a href="#"><u>Northern Territory Magistrates Court</u></a>	Court has jurisdiction under the <i>Fair Work Act 2009</i> to hear small claims up to \$20,000.	Registry contact details can be accessed via <a href="http://www.nt.gov.au/justice/ntmc/small_claims.shtml">http://www.nt.gov.au/justice/ntmc/small_claims.shtml</a>	<b>Employee Forms</b> <i>Form 7A Statement of Claim [Debt or Damages]</i> <b>Employer Forms</b> <i>Form 8A Notice of Defence</i>
<a href="#"><u>Magistrates Court of South Australia</u></a>	Court has jurisdiction under the <i>Fair Work Act 2009</i> to hear small claims up to \$20,000.	Website: <a href="http://www.courts.sa.gov.au/GoingtoCourt/CourtLocations/CityCourts/Pages/Adelaide-Magistrates-Court.aspx">http://www.courts.sa.gov.au/GoingtoCourt/CourtLocations/CityCourts/Pages/Adelaide-Magistrates-Court.aspx</a>	<b>Employee Forms</b> <i>Form 3 - Minor Civil Action – Claim</i> <b>Employer Forms</b> <i>Form 4 - Defence</i>
<a href="#"><u>Industrial Relations Court of South Australia</u></a>	Court has jurisdiction under the <i>Fair Work Act 2009</i> to hear small claims up to \$20,000.	Website: <a href="http://www.industrial-court.sa.gov.au">www.industrial-court.sa.gov.au</a>	<b>Employee Forms</b> <i>Form 7 - Application for Directions form</i> <i>Affidavit/Statutory Declaration in support of the Application for Directions form</i> <b>Employer Forms</b> <i>Answer General - Form 4</i>

## 6. Template request for payment of court orders

[Insert date]

[Insert employer's name]

[Insert employer's address]

Dear <insert employer name> ,

<Insert name of proceedings and number of court order>

I refer to the above Order made by the <insert name of Court> on <insert date of Order> .

The Order requires <name of the person or company on whom the Order was imposed> to make the following payment:

\$<insert amount> .

This amount became outstanding on <insert date payment was due under the Order> .

Please make payment in full within seven (7) days from the date of this letter. Payment can be made by cheque to <insert mailing address> or via electronic funds transfer to <bank account name and bank account details> . If I do not receive payment within this time, I will commence enforcement proceedings through the court to recover this sum, with interest.

If you have any questions in relation to this matter, please contact <insert name and preferred contact details> .

Sincerely,

.....

<Insert name>

## 7. Useful contact information for further advice and assistance

### National

- [National Association of Community Legal Centres](http://www.naclc.org.au/) – www.naclc.org.au/
- [Working Women’s Centres Australia](http://www.wwc.org.au/) – www.wwc.org.au/
- [Australian Securities & Investments Commission](http://www.asic.gov.au/) – www.asic.gov.au/
- [Australian Financial Security Authority](http://www.afsa.gov.au/) – www.afsa.gov.au/
- [Department of Employment, Fair Entitlements Guarantee](http://www.employment.gov.au/feg) – www.employment.gov.au/feg

### ACT

- [ACT Law Society](http://www.actlawsociety.asn.au/) – www.actlawsociety.asn.au/

### NSW

- [Law Access NSW](http://www.lawaccess.nsw.gov.au/) – www.lawaccess.nsw.gov.au/ and [www.lawassist.lawaccess.nsw.gov.au](http://www.lawassist.lawaccess.nsw.gov.au)
- [The Law Society of New South Wales](http://www.lawsociety.com.au/) – www.lawsociety.com.au/
- [Community Justice Centre New South Wales](http://www.cjc.nsw.gov.au/) – www.cjc.nsw.gov.au/

### NT

- [Law Society Northern Territory](http://www.lawsocietynt.asn.au/) – www.lawsocietynt.asn.au/
- [Community Justice Centre Northern Territory](http://www.cjc.nt.gov.au) – www.cjc.nt.gov.au

### QLD

- [Queensland Association of Independent Legal Services Inc](http://www.qails.org.au/) – www.qails.org.au/
- [Queensland Law Society](http://www.qls.com.au/Home) – www.qls.com.au/Home
- [Queensland Department of Justice Dispute Resolution Branch](http://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/dispute-resolution-in-the-workplace/) – www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/dispute-resolution-in-the-workplace/

### SA

- [Legal Services Commission of South Australia](http://www.lsc.sa.gov.au/) – www.lsc.sa.gov.au/
- [South Australian Community Legal Centres](http://www.saccls.org.au/) – www.saccls.org.au/
- [The Law Society of South Australia](http://www.lawsocietysa.asn.au/) – www.lawsocietysa.asn.au/
- [Southern Community Justice Centre](http://www.scjc.com.au/) – www.scjc.com.au/

### TAS

- [The Law Society of Tasmania](http://www.lst.org.au/) – www.lst.org.au/

### VIC

- [Jobwatch](http://www.jobwatch.org.au/) – www.jobwatch.org.au/
- [Law Institute of Victoria](http://www.liv.asn.au/) – www.liv.asn.au/
- [Dispute Settlement Centre Victoria](http://www.disputes.vic.gov.au/) – www.disputes.vic.gov.au/

### WA

- [Employment Law Centre of WA](http://www.elcwa.org.au/) – www.elcwa.org.au/
- [The Law Society of Western Australia](http://www.lawsocietywa.asn.au/) – www.lawsocietywa.asn.au/