



JobWatch
Employment Rights Legal Centre

**MAKE A
SMALL CLAIM
UNDER THE FAIR WORK ACT 2009**

A self-representation Toolkit to assist in recovering minimum entitlements in the Federal Circuit and Family Court of Australia.

Why was this Toolkit published?

A core organisational value of Job Watch Inc (JobWatch) is **access to justice for workers**.

We recognise that the cost of legal representation can deter some people from pursuing their legal rights. We identified a need for this Toolkit following a significant number of calls from employees and former employees who were owed money from their employers and who did not know how to work out their minimum entitlements or how to enforce those entitlements.

This Toolkit is designed to assist national employment system employees in Victoria, Tasmania and Queensland who are capable of representing themselves in what is known as a small claim in the Fair Work division of the Federal Circuit and Family Court of Australia (the Court).

A small claim allows employees to sue their employers if the employer breached the *Fair Work Act 2009* (Cth) (or related laws) by not paying the employee the correct entitlements. There is a cap to the amount that can be claimed through the small claims jurisdiction - \$100,000 as of 1 July 2023.

This Toolkit does not deal with the rights of independent contractors, nor does it provide you with information about claims for underpayment of wages in local state or territory courts because there will be significant differences in procedure, risks and costs associated with making claims in these courts.

We always encourage workers to contact our Telephone Information Service (TIS) for initial legal information relevant to their situation - (03) 9662 1933 for Melbourne metropolitan callers or 1800 331 617 for regional Victorian, Queensland and Tasmanian callers.

Who can use this Toolkit?

If you are a **Victorian** employee, you can use this Toolkit unless you were employed in a sector that provides essential services of core government functions, including state infrastructure services such as electricity and gas, and your employer is not covered by a nationally registered collective agreement.

If you are a **Tasmanian** employee, you can use this Toolkit unless you were a state public sector employee not covered by a nationally registered collective agreement.

If you are a **Queensland** employee, you can use this Toolkit unless you were a state public sector or local government employee not covered by a nationally registered collective agreement.

Important disclaimer

This Toolkit provides general information only. It is not intended to be comprehensive and is not a substitute for professional legal advice.

Readers should not act on the basis of any information contained in this Toolkit without first obtaining professional legal advice that takes into account the particular facts and circumstances of their legal case.

Job Watch Inc. disclaims any liability in respect of any action taken or not taken in reliance upon the contents of this Toolkit.

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Terms used in this Toolkit

Affidavit means a document (plus any attachments) containing a statement of facts. The document must be sworn or affirmed

ABN means an Australian Business Number

ACN means an Australian Company Number

Applicant means the employee making a small claim

Application means the process of starting a small claim under the *Fair Work Act 2009* (Cth) in the Court

Court means the Fair Work division of the Federal Circuit and Family Court of Australia

ASIC means the Australian Securities and Investments Commission

Cross-examination means asking the other party (or their witnesses) questions to test their evidence

Employee includes former employee. It does not include true independent contractors

Employer includes former employer

Enterprise Agreement (EA) means an agreement approved by the Fair Work Commission containing minimum working conditions agreed to by an employer and a group of employees in the one workplace

Enforcement order means an order made by the Court compelling the Respondent to comply with any orders made by the Court

Equal remuneration order means an order of the Fair Work Commission which ensures equal remuneration for work of equal or comparable value (e.g. equality of pay for men and women in similar roles)

Evidence-in-chief means the first part of oral evidence which is given by the Applicant, Respondent or a witness

Filing means submitting documents to the Court's Registry in accordance with Division 2.2 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)

FWC means the Fair Work Commission

FWO means the Fair Work Ombudsman

Letter of demand means a letter (including an email) to your employer demanding payment of outstanding entitlements within a certain time frame

Modern Award (MA) means a legal document approved by the Fair Work Commission containing minimum working conditions for employees in particular industries or occupations

National Minimum Wage Order means an order of the Fair Work Commission establishing a minimum wage for employees including those not covered by a Modern Award or Enterprise Agreement

NES means the National Employment Standards which are 11 minimum employment entitlements that are contained in the *Fair Work Act 2009* (Cth)

Outworker means a worker who works in locations that would not normally be considered a place of business – e.g. works from home in the clothing, textile and footwear manufacturing industry

Respondent means an employer who has a small claim made against them

Service of documents means giving documents to the Respondent listed in your application in accordance with Part 6 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)

Subpoena means a legal document compelling a person to give evidence at a hearing or to produce documents

Warrant means a document issued by the Court authorising a Sheriff to enforce a debt owed by the Respondent

Witness means a person who provides evidence (orally or via an affidavit) in support of your claim

Workplace determination means a determination made by the Fair Work Commission which is either a low-paid workplace determination, an industrial action related workplace determination or a bargaining related workplace determination

What is a small claim in the the Court?

A small claim is a low cost and user friendly way for you to try to recover monies owed to you by your employer. If you wish to make a small claim, the total amount of your claim cannot be more than \$100,000 as of 1 July 2023.

If you wish to claim more than the amounts above, you are still entitled to commence legal proceedings to recover any underpayment, but you will not be eligible to make a small claim.

If you make a small claim, you will need to satisfy the Court that the amount you wish to recover is one of the following:

1. An amount your employer was required to pay you in relation to the performance of work, including leave payments. This entitlement can come from federal or state legislation, a Modern Award or Enterprise Agreement, or an employment contract.
2. An amount your employer was required to pay you under a Modern Award or Enterprise Agreement.
3. An amount your employer was required to pay you under an employment contract if that entitlement is also covered in the National Employment Standards or could be covered in Modern Awards (e.g. your contract entitles you to annual leave or penalty rates). This is known as a safety net contractual entitlement.
4. An amount your employer was required to pay on your behalf (e.g. superannuation), provided you have an entitlement to this under a Modern Award, Enterprise Agreement or safety net contractual entitlement.

Employees can also make a small claim if their employer has breached a workplace determination or an equal remuneration order, but these breaches are not covered in this Toolkit.

Are small claims considered formal Court proceedings?

The Court is not bound by the rules of evidence or procedure in small claim proceedings. The Court can inform itself of matters in any way it considers appropriate.

The judge may act in an informal manner, without getting bogged down in legal technicalities. This informality is designed to make small claims accessible to people without legal training. As such, lawyers cannot represent you or your employer unless the Court gives you permission.

You need to be prepared for the possibility that the judge may ask you to explain why you say certain things or ask you to provide evidence about what you are claiming. As you are the Applicant, you are expected to prove your claim on the balance of probabilities.

This means that the judge will only make findings and orders in your favour if they accept that your version of events is more likely than not to be true.

Note

You have 6 years to make a small claim from the date of each claimed underpayment.

Who can make a small claim?

If you want to make a small claim you must be an **employee** or an **outworker**.

Independent contractors are not eligible to make a small claim in Court. If you believe that you were incorrectly called an independent contractor, then you may still make a small claim in respect of any underpayments. You will need to prove to the Court that you were an employee if you make a small claim.

For more information about independent contractors and how they differ from employees, see JobWatch's 'Independent Contracting Traps' Fact Sheet.

What type of employee are you?

Once you are satisfied that you were, or still are, an employee at the time you were underpaid, you must understand what your employment status was/is, in order to determine your entitlements.

Your employment status can only be one of the following at any one time:

- **Permanent Full-Time Employee:** ongoing employment contract with guaranteed hours and wages for an average of 38 hours per week, plus leave entitlements
- **Permanent Part-Time Employee:** ongoing employment contract with guaranteed hours and wages for less than 38 hours per week, plus leave entitlements
- **Casual Employee:** no guaranteed hours or ongoing employment, and a casual loading for any hours worked in place of paid leave and other entitlements
- **Fixed-Term Employee:** employment has a defined start and end date
- **Trainee or Apprentice:** formal training arrangement combining work and study

If you are still not sure whether you are an employee, an outworker or independent contractor, or what your employment status is, seek further assistance from JobWatch, your union, or a lawyer.

How to calculate the amount you are claiming

You will need to calculate the exact amounts you believe you are owed. For example:

- How much are you are owed in wages?
- How much are you are owed in overtime, penalties, allowances or leave, etc?

Make sure that you claim the correct rate of pay as at the date when the money was due to you.

For example, if you have been underpaid over an extended period of time or you are making your small claim some time after the underpayment occurred, then you cannot rely on the pay rate at the date of your application as it may have increased over time.

The FWO provides online tools to help you, including:

- [Pay Calculator](#) can help you calculate your base rate, allowances and penalties under a Modern Award (e.g. rates for overtime, shift work, weekend work and work on public holidays); and
- [Leave Calculator](#) can help you calculate whether you are entitled to paid leave (and if so, how much) under a Modern Award.

Does your claim relate to a breach of the National Employment Standards (NES)?

The NES are 11 minimum employment entitlements, which are set out in the *Fair Work Act 2009* (Cth). In brief, the 11 NES may entitle you to the following:

1. Maximum weekly hours
2. Requests for flexible working arrangements
3. Offers and requests to convert from casual to permanent employment
4. Parental leave and related entitlements
5. Annual leave

6. Personal/carer's leave, compassionate leave and family and domestic violence leave
7. Community service leave
8. Long service leave
9. Public holidays
10. Notice of termination and redundancy pay
11. Fair Work Information Statement and Casual Employment Information Statement

Not all of the 11 NES entitlements apply to casual employees. You can check your NES entitlements on [the FWO's website](#).

Does your claim relate to a breach of a Modern Award or Enterprise Agreement?

Modern Awards (MAs) and Enterprise Agreements (EAs) are documents that set out minimum terms and conditions of employment. Together with the NES and National Minimum Wage Orders, MAs and EAs make up a safety net of conditions for employees.

The main difference between a MA and an EA is that MAs apply across a whole industry or occupation, whereas EAs are usually specific to particular employers, workplaces or even a category of employees in a particular workplace.

You can contact the FWO for assistance in determining which MA applies to you (if any), or search the FWC website for any EA that applies to you (if any). If an EA applies, you will be covered by the terms of that agreement to the exclusion of terms in any MA.

Note - MAs may contain 'transitional' arrangements which phase in changes in wages, loadings and penalty rates. The FWO online tools can assist you to calculate your entitlements in light of any transitional provisions.

Case Example 1: Calculating the amount you are claiming

You were employed as a permanent full-time employee. You worked a total of 300 hours on weekdays and 100 hours on Sundays. Your employer paid you a flat rate of \$15 per hour for all 400 hours.

You use the FWO's Pay Calculator and find that your hourly rate should have been \$25 per hour on weekdays and \$45 per hour on Sundays.

This means you were underpaid by \$3,000 for weekday hours (\$10 x 300 hours) and \$3,000 for Sunday hours (\$30 x 100 hours).

The Leave Calculator also shows that you are entitled to 140 hours of annual leave. This means you were underpaid by \$3,500 (140 hours x \$25 per hour).

The total amount you can claim in your small claim is **\$9,500**, made up of:

- \$3,000 weekday hours;
- \$3,000 Sunday hours; and
- \$3,500 annual leave.

Case Example 2: Breach of the NES

You were employed by Jones & Co Pty Ltd for 4.5 years. You claim that they ended your employment because of redundancy. They deny this, saying that you resigned.

Your small claim is for 3 weeks' pay in lieu of notice of termination plus 8 weeks' redundancy pay as per the NES.

Case Example 3: Breach of a MA

You are employed as a waiter by Smith's Café. After 6 weeks you resign because Smith's Café refuses to pay you more than \$15 per hour. You check your MA and confirm your hourly rate should be \$22 per hour.

You decide to make a small claim to recover the underpayment of wages, which you calculate is \$7 (being the underpayment per hour) x 30 hours per week x 6 weeks = \$1,260.

Case Example 4: Breach of a Safety Net Contractual Entitlement

You were employed on a casual basis by a business, Quick Pizza, for 8 weeks. Your boss sent you several text messages before you started in which she agreed to pay you \$650 a week for 20 hours' work, and to pay you weekly by electronic funds transfer.

You received one payment of \$650 into your bank account at the end of your first week working at Quick Pizza but you were not paid for the remaining 7 weeks.

You are covered by a MA, which deals with your minimum wages. Given that the \$650 a week Quick Pizza agreed to pay you is higher than the minimum wages in your MA, you decide to recover your safety net contractual entitlement by making a small claim.

You claim that you are owed \$4,550 (i.e. \$650 x 7 weeks) because your employer breached a safety net contractual entitlement.

Case Example 5: Breach of Superannuation Clause in EA

You worked for ABCD Pty Ltd for 2 years. Not enough superannuation was paid into your super fund. You repeatedly asked your manager Jimmy about these underpayments but he never followed up on your complaints.

When checking your EA you notice the EA deals with superannuation. The EA provides a more generous superannuation contribution than the statutory minimum and creates a right for employees covered by the EA to pursue the employer directly for any underpayment.

You could complain to the ATO, but you decide to pursue it in your small claim as a breach of your EA.

Does your claim relate to a breach of a National Minimum Wage Order?

Every year the FWC reviews the National Minimum Wage Order that sets the minimum wages (including base rate of pay and any casual loading) for employees including those not covered by a MA or EA. If you are not covered by a MA or EA, you may be covered by the National Minimum Wage Order that is applicable at the time of your employment.

You can find more information on National Minimum Wage Orders on [the FWC website](#).

Does your claim relate to a breach of a safety net contractual entitlement?

Regardless of whether or not your employment terms and conditions are in writing, you have an employment contract once you reach agreement with an employer that you will work in return for wages. Your employment contract may be written or verbal or a combination of both.

The written parts of your contract may be in the form of a formal agreement or they may be less formal, e.g. email or text messages.

Terms of a contract may also be implied because of a pattern of behaviour (such as regular payment of a certain amount of money upon completion of a number of hours' work).

If your employment contract deals with subject matter that is in the NES or a MA (e.g. annual leave) but the contractual entitlement is more generous than the NES or the MA (e.g. you get 6 weeks of annual leave under your contract, instead of 4 weeks in the NES), you can still recover your contractual entitlement through a small claim.

What about superannuation?

Your employer must make superannuation (also known as 'super') contributions on your behalf if you are employed on a permanent or casual basis and if:

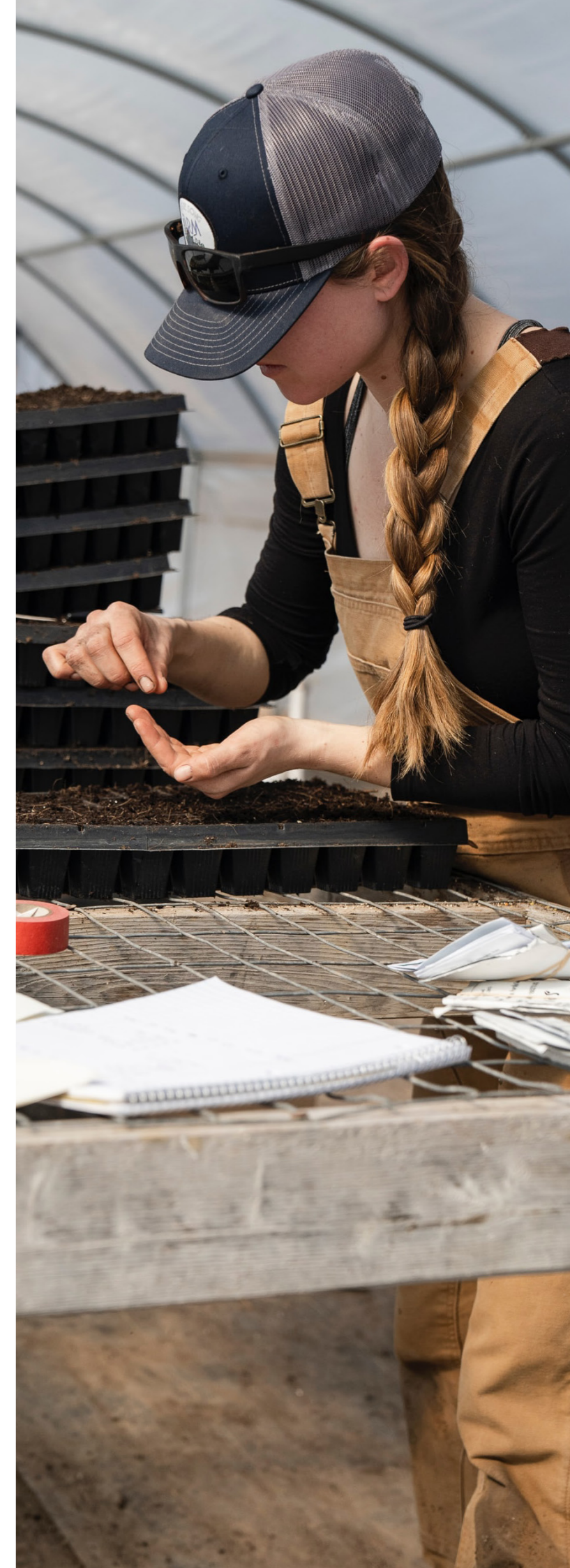
- You are between 18 and 69 years old (inclusive) or
- You are under 18 and work more than 30 hours a week

Employers must pay superannuation into your super fund, in addition to your minimum wages.

Generally, superannuation obligations are enforced by the Australian Taxation Office (ATO). This means that you lodge a complaint with the ATO and it's up to them to investigate your complaint and take any appropriate action against your employer. You can only recover unpaid superannuation in a small claim if:

- You are covered by a MA or EA which specifically gives you an entitlement to superannuation, separate from the superannuation guarantee enforced by the ATO; or
- Your employment contract (written or verbal) gives you an entitlement to superannuation. In this situation you would argue that there has been a breach of a safety net contractual entitlement.

To find out what superannuation is owed to you, call the ATO on 131 020.



Resolving your dispute informally

Collect all relevant information

Once you have calculated the amount you are claiming and you have worked out the basis for your claim, collect and review all the evidence you will need, including:

- Agreements you signed or made with your employer
- Position descriptions or job advertisements relating to your role
- The hours you worked (or are working), including times and dates
- Work rosters, timesheets or written requests to work (including text messages and emails)
- Payments you received, including superannuation
- Payslips you received
- Correspondence relating to the underpayment

Note

Before raising any concerns with your employer, consider the resources on the FWO's website on resolving issues in the workplace.

Note

It is unlawful for your employer to terminate your employment or change your employment terms and conditions to your detriment because you make an inquiry or complaint about your entitlements. See JobWatch's 'General Protections Dispute - Termination claim' and 'General Protections Dispute - Non-Termination claim' Fact Sheets for more information.

Talk to your employer

Depending on your relationship with your employer, you might first try raising your concerns verbally. Stay calm and professional when speaking to your employer; making threats and becoming aggressive will not help.

If your employer ignores your request, or disagrees with the amount you are claiming, send your employer a letter of demand outlining what you are owed. Your letter of demand can be sent by post or by email but, either way, it is important that you keep a copy of it for your own records. The tone of your letter will vary depending on your relationship with your employer.

In your letter of demand you should:

- State why you are claiming your employer owes you money and how much you are claiming
- Show how you calculated the underpayment
- List each occasion you already requested your employer pay that money
- Give a time frame within which your employer must pay you the outstanding amount
- Specify any action you will take if the money is not paid within the specified time frame (e.g. that you will make a small claim)

The letter may provide evidence to the Court that proves you attempted to resolve the dispute with your employer before making a small claim.

We have a sample 'Letter of Demand' available on our website: www.jobwatch.org.au

Request for assistance from the FWO

After sending your employer a letter of demand, but before making a small claim, consider discussing your situation with the FWO and, if necessary, making a formal request for assistance by registering an account on their website.

Making a small claim

Once you have exhausted all possibilities of resolving your dispute with your employer verbally and in writing, calculated any underpayments and collected all relevant documents you should be ready to:

1. Re-check which provision of the *Fair Work Act 2009* (Cth) (including any MA or EA) your employer has breached
2. Re-check your calculations of any unpaid wages and entitlements using the FWO online tools
3. Confirm who actually employed you by checking your payslip and searching the Australian Securities and Investments Commission (ASIC) registers
4. Consider whether you need legal advice or representation if you go to Court (noting that lawyers are only allowed with the permission of the Court)
5. Consider whether you will require an interpreter if you go to Court
6. Consider whether you have all the documentary evidence you will need
7. Prepare a summary, in chronological order, of all key dates and events relevant to the underpayment

What forms do you need to fill out to make a small claim?

To make a small claim in the Court you must fill out:

- An Application form
- A Form 5 – *Small claim under the Fair Work Act 2009*.

You can download the above forms from the Court's website www.fcfcga.gov.au under the heading 'Fair Work'.

In order to assist the judge to understand your complaint, it may also be helpful to add documentary evidence such as any written contract, payslips, PAYG statements etc, to your Form 5. Remember to bring these documents with you on the day of the hearing.



Note

Both the Application form and the Form 5 ask you to name the 'Applicant' and the 'Respondent'. As you are making the application, you are the Applicant. Your employer will be the Respondent.

Correctly identifying your employer

It is vital that you correctly identify your employer. This may seem obvious but many employees do not know the name of their actual employer. If you list the Respondent as the wrong business name (e.g. you write their trading name instead of their company name) you will be adding unnecessary complications to your small claim. It is even possible that your small claim will fail or it will not be enforceable if you have not named the correct Respondent.

Think about whether you were employed by a sole trader, a partnership or a company. To help you work this out, look at any payslips or correspondence you received from your employer; these should show the employer's name and either an Australian Business Number (ABN) or an Australian Company Number (ACN).

Once you have a name, an ABN or an ACN, you can search the Organisation and Business Name register on [the ASIC website](#) or do an [ABN lookup](#). This will tell you whether the business is a sole trader, a partnership or a company, what the trading name is and other relevant details.

For a fee, ASIC can also provide you with the details of your employer's registered address and the names of its directors. You may need this information for serving documents on the Respondent.

Case Example 6: Finding the right Respondent

You were employed by a take-away business that had large signage above the front door saying "Eat Out". You were not given any payslips.

You thought that Eat Out was the name of your employer but when you check the ASIC website, you realise that Eat Out is simply a trading name. The correct name of your employer is EO Pty Ltd trading as Eat Out. You list EO Pty Ltd as the Respondent.

What breach are you alleging?

When filling out your Form 5 you must tick a box indicating what part of the *Fair Work Act 2009* (Cth) the Respondent breached. For example, has the Respondent breached:

- One of the NES?
- A term of a MA?
- A term of an EA?
- A National Minimum Wage Order?
- A safety net contractual entitlement?

What remedy are you seeking?

When filling out your Form 5, you must indicate how much you are claiming for each breach you alleged.

Any calculations you made when filling out the form should be set out in detail. This will show the judge how you arrived at the final amounts you are claiming as a remedy.

You must properly identify and calculate all entitlements owed to you before completing and filing your Form 5. If you make a mistake you may need to re-complete, re-file and re-serve the Form 5 on the Respondent well before the date of the hearing

Note

If you will need an interpreter on the day of the hearing, inform the Registry on the day you file your application forms.

'Filing' the forms

Once you have completed the Application and Form 5 forms you can file them with the Court:

- Online using the Court's eLodgment system or;
- In person at the Court's Registry.

Information about eLodgment is available on this website: www.fedcourt.gov.au/online-services/elodgment

If you wish to file in person at the Court's Registry (contact details on the Court's website), you will need to make three copies of the Application and Form 5 forms, take them to the Court's Registry and pay the filing fee.

The Registry may waive the filing fee if you have a concession card or if, in the opinion of the Registrar, payment of the fee at the time would cause you financial hardship. Check the Court's website for more information about fee waivers.

Once you've paid the filing fee, the Registry will allocate a matter number and hearing date, and return the forms to you. You have now 'filed' your Application.

Next, you must give copies of these forms to the Respondent. This is known as serving the Application and Form 5 forms on the Respondent.

Note

You can search the ASIC registers to confirm the address of a company's registered office.

Note

For around \$100, you can engage a process server to serve documents on your behalf. You can find process servers online.

'Serving' the documents

Although the Court is not bound by the rules of procedure, it is expected that you 'serve' a copy of your filed and sealed Application form and Form 5 (including any attachments) on the Respondent in compliance with Part 6 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

Attachments to your Form 5 may include documents and affidavits in support of your Application.

You can serve the documents on the Respondent any time up to **7 days** before the hearing date, but it is advisable to serve them as soon as possible. This ensures that the Respondent knows the hearing date, knows what you are alleging and is given a chance to respond.

If possible, try to serve the documents on the Respondent by hand (i.e. you should hand the documents to the Respondent in person). If the person does not take the documents, you may put them down near the person and tell them what the documents are. You will then have to complete an Affidavit of Service (Fair Work) form, detailing all the steps you took to serve the documents on the Respondent.

If the Respondent is a corporation (including a company and an incorporated association), an unincorporated association or organisation, you can serve the documents by:

- Handing them personally to someone who works for the Respondent at the registered office or, if there is no registered office, at the principal place of business; or
- Sending them by post to the company's registered office (registered post helps to prove that you sent the documents).

You can check the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth) to see what (and when) service is required for different types of documents, and how you can serve documents when service by hand or post is not possible (e.g. substituted service by electronic or social media, advertising, etc).

'Serving the documents' (cont.)

Once you've served the documents on the Respondent you should file an Affidavit of Service (Fair Work) form showing what you served on the Respondent (including any attachments), and how. Keep a copy in case you need to show it to the judge who hears your small claim.

The Affidavit of Service form specific to small claims is on the Court's website www.fcfcga.gov.au/gfl/forms under the heading 'Fair Work'. The Respondent must file a response to your claim and serve it on you within **14 days** of being served your documents. Their response should indicate what parts of your claim they dispute and why, and what orders they seek

Case Example 7: 'Serving' Documents

Your employer is a company. You serve your small claim Application and Form 5 on your employer by registered post. You keep a copy of the registered post envelope showing the address and the Australia Post receipt. Your employer does not file a response within **14 days** or attend the hearing.

On the day of the hearing the judge asks you if you served the Respondent. You give your Affidavit of Service (with the attached photocopies) to the judge's associate, who hands them to the judge.

The judge is satisfied that you served all documents correctly and that the Respondent should have been aware of the hearing. The hearing proceeds without your employer. The judge believes your version of events and finds in your favour.

Do you need a lawyer?

The general rule is that lawyers are not allowed in the small claims jurisdiction without leave (i.e. permission) of the Court. However, a lawyer can represent your employer at the hearing if the lawyer is an employee or officer of your employer and your employer is a company.

The Court may give you permission to be represented by someone else if:

- That person is your union representative
- Your claim is so complicated that it would be unjust if you weren't represented by a lawyer
- Your employer is represented by a lawyer and it would be unjust if you weren't also represented

If you feel that you should be represented by a lawyer or another person (e.g. your union representative), talk to the Court's Registry as early in the application process as possible. Your representative will then need to ask the judge for leave to appear on your behalf at the start of your hearing. Remember, there is nothing stopping you from getting advice at any time before the hearing.

Will there be mediation?

Mediation is a confidential and less formal way of resolving disputes than through Court proceedings. There is no requirement for parties involved in a small claim to mediate. The judge has discretion to order parties to deal with the matter in whatever way the judge thinks is best.

Although the Court tries to resolve small claims at the first hearing, the judge may refer the matter to mediation and delay the taking of evidence to a later date (e.g. if you did not serve documents properly or if you did not make any attempt to resolve the dispute before making your small claim).

If the Court orders mediation, the judge will appoint a neutral party to facilitate discussion between you and your employer with the aim of reaching an agreement. Both you and your employer may have the opportunity to hold private discussions with the mediator. The outcome of mediation will depend on you and your employer reaching agreement.

If no agreement can be reached at mediation, your small claim may be re-listed for a hearing on the same day or on a later date.

Attending Court

To ensure that you maximise your prospects of success on the day of any Court hearing, you should follow these basic tips:

- Wear neat casual or business attire
- Ensure you bring along all relevant material
- Arrive at the Court at least 15 minutes before your hearing is listed
- Re-check with the Registry whether an interpreter is available
- Do not take food or drink into the Court
- Turn off your mobile phone
- Tell the judge's associate who you are when you enter the room
- Stand up when a judge enters or exits the Court room
- Sit on the left side of the bar table when your matter is called
- Stand up when addressing the judge or the judge addresses you
- Address the judge as "Your Honour"
- Do not interrupt a judge
- Take notes
- Be truthful and accurate
- If a judge makes any orders during a hearing, you must comply with these orders

The length of a hearing will depend on the issues and facts in dispute, the arguments made by each party, and whether the judge orders mediation. Allow an entire day for the hearing.

In some circumstances, the Court may decide to hold the hearing remotely via video conference using software such as Microsoft Teams. If this happens, the Court will send you instructions about how to join the video conference and how to provide the Court with any relevant material.

What evidence will you need?

A small claim may be less formal than other legal proceedings but, if you want to succeed, you still need to be well prepared and present rational, convincing evidence that supports your allegations.

Bring all the evidence you have, including:

- Any written employment contract
- Copies of your relevant Modern Award or Enterprise Agreement
- Any correspondence to/from your employer, or other employees
- Timesheets, rosters, payslips or financial records (e.g. bank statements showing deposits)
- Your Affidavit of Service
- Any supporting affidavits (e.g. from your witnesses)
- Any other relevant material

You may have already served some of these documents on the Respondent before the date of the hearing. It is a good idea to do this, as some judges will be reluctant to proceed if one party surprises the other with documents which were not previously provided.

Your evidence should be organised in a logical manner in a folder. Bring enough copies of all documents to hand to the judge and to the Respondent. Know key dates and events. Bring a pen and paper to take notes.

Case Example 8: Cross-Examination

You say you were a permanent full-time employee. Your employer isn't paying your annual leave, insisting that you were a casual employee.

While you cross-examine your former boss, you produce an email he wrote where he stated "we are pleased that you accepted our offer of full-time employment...".

The judge is satisfied that your boss' written and oral evidence are unreliable and you win your small claim.

You need to be prepared to give oral evidence to the judge, and you can call and question witnesses in support of your claim. The judge may require witnesses to give evidence from the witness box, so you or anyone who swears/affirms an affidavit in support of your claim should attend the hearing as a witness.

When your witnesses give oral evidence in support of your claim this is called evidence-in-chief. When you get to ask questions of your employer or their witnesses in an attempt to uncover some inconsistencies or untruths in their oral evidence, it is called cross-examination.

Speak to the Registry if you need a Court order requiring the attendance of a particular witness or the production of particular documents as evidence. You may need to issue a subpoena. This must be done in accordance with the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

How will your small claim proceed at a hearing?

Although a judge may hear your small claim in a relatively informal manner, generally the proceedings will follow this order:

1. You explain to the Court what you are seeking and why. You may seek to amend your Application if you made a mistake when filling it out.
2. The Respondent gives a brief response.
3. You and the Respondent present your evidence.
4. The judge considers your Application and makes a decision about how to deal with it. They may make orders on the day or may decide they need further evidence or want to give the parties an opportunity to resolve the matter themselves.

If your hearing is in person, sometimes a judge will ask a party (you and/or the Respondent) to give evidence from the witness box.

First, you will be asked whether you want to take a religious oath or make a non-religious affirmation. Either way, you will be asked to make a promise to the Court that you will tell the truth.

Then the judge may ask you questions or may allow the Respondent to ask you questions (this is known as cross-examination).

It is also possible that a judge may not ask for opening statements but will jump straight to asking the parties specific questions.

Where a judge considers that the parties might be able to resolve the matter themselves, they might adjourn or stand the matter down for a period of time so as to give the parties an opportunity to settle the matter.

It is important that in presenting your case, including when you answer any questions, you stick to the issues in your claim. Try not to focus on any personal issues you may have had with the Respondent. Remember that you are in this jurisdiction to try and recover your minimum entitlements.



Case Example 9: Using evidence in cross-examination

You make a small claim to recover unpaid wages. In your opening submission you state that the Respondent owes you \$4,500 in unpaid wages and that you seek orders that the Respondent pays you this amount. You give evidence of the dates your employment started and ended.

The judge determines that the Respondent's evidence is best given from the witness box. The Respondent is sworn in and gives oral evidence disputing you ever worked for them, and claiming you were a volunteer.

When they have finished, you cross-examine them. You ask them: "Did you ever agree to pay me?" She says: "No".

You say to the judge: "Your Honour, may I produce a document?"

You produce three copies of an email from your evidence folder. You hold out two copies of the email and the associate gives one to the judge and one to the Respondent.

In that email, the Respondent writes "Thanks for your hard work, xoxo. Your pay (4.5k) will be in your account soon".

You ask the Respondent "Is this email from your email address?"

They admit it is. The Respondent appears to have lied.

The judge is not impressed and does not view the Respondent as a credible witness.

Tips for cross-examination

You should be prepared for cross-examining the Respondent just in case the judge gives you the opportunity to do so. A simple approach is:

- Prepare questions in advance, anticipating aspects of your claim the Respondent is likely to dispute or deny.
- Use questions that lead to "yes" or "no" answers, e.g. "Is it true that you employed me as a casual waitress?" and "Do you agree that my employment contract states that I would be paid \$65 per hour on weekends?" The aim of your questions is to prove your version of events or show inconsistencies in the Respondent's defence.
- Put your understanding of the facts to the Respondent or their witness and give them an opportunity to agree or disagree with each of your facts. Aim to get answers that support your claim or show the Respondent is mistaken or being dishonest (if they are being so).
- Dispute any untrue statement made by the Respondent. If you don't, the judge may infer that you agree.
- Present documents to the Respondent that contradict any of their untrue or inaccurate oral evidence.
- If needed, use re-examination to clarify evidence given by your witness under cross-examination.

Note - the judge may question you, the Respondent or a witness about evidence at any time.

Note

The judge cannot compensate you for damages (e.g. lost income other than unpaid employment entitlements, pain and suffering) in a small claim.

What if the Respondent doesn't show up?

If the Respondent does not show up to the hearing, you will be asked to provide your Affidavit of Service form and any attachments showing how you served the application forms.

If the judge is satisfied that you correctly served the Respondent, they may assume the Respondent knew of the hearing date and does not wish to challenge your small claim.

You may be asked to put your evidence to the judge. If the judge accepts your version of events, judgment may be awarded in your favour in the Respondent's absence.

If you cannot attend the Court you must let the Registry know well before any hearing date and request an adjournment. If you fail to attend, your claim might be dismissed

What orders should you ask for?

The Form 5 asks you to indicate what orders you think the judge should make. If you persuade the judge that you were underpaid, the judge may order the Respondent to pay you what you are owed, including calculated pre-judgment interest.

Accordingly, add interest onto your total in the Form 5. You may wish to use an online interest rate calculator to help you with your calculations.

In addition to written orders, you may ask the judge to provide a written judgment explaining how they arrived at their decision. Judges do not ordinarily do this, as decisions are given orally, but if you provide a good reason (e.g. you are certain that the Respondent, who didn't show up to the hearing, will try to appeal the orders) then the judge may grant your request.

You must serve a copy of any order on the Respondent by hand within the time frame stated in the order unless the Respondent is present when the order is made.



What if you don't agree with the judge's findings?

If you believe the judge did not correctly apply the law in your small claim, you may be able to appeal to the Federal Court of Australia. An appeal will not involve a re-hearing of your small claim. If the Court, on appeal, agrees that the law was applied incorrectly in your small claim then it may make an order stating that your matter must be re-heard.

You can check [the Federal Circuit and Family Court of Australia website](#) for more information about appeals. You should seek legal advice before appealing. You can find a lawyer to assist you through your state's legal referral service.

What if the judge orders in your favour but the Respondent won't pay?

If the judge makes an order in your favour and the Respondent doesn't pay within the time specified in the order, you can take steps to enforce the Court's decision. Information about the process of seeking enforcement of a judgment can be found [on the Federal Court of Australia website](#).

You can apply to the Court for an enforcement order to compel the Respondent to pay the debt owed to you. There are a variety of enforcement orders that you can seek, including:

- That the Respondent comply with the original order
- That the Respondent's assets be seized and sold to cover the debt owed to you
- That the amount owed be deducted in full or by instalments from the Respondent's wages
- That the Respondent's business be wound up and the assets liquidated to cover the debt to you
- That the Respondent be taken into custody for violating the original order

Which enforcement order you apply for will depend on which order best suits your circumstances (or the Respondent's). The enforcement orders the Court can make are the same as those that can be made in the state in which the debt was incurred.

Make sure you ask for an order that includes you being compensated for any enforcement costs you incur in attempting to enforce the Court's order.

You can find a lawyer to enforce the debt by calling your state's legal referral service.

Applying for an enforcement order in the Court is free, but there may be some costs associated with enforcement, depending on the orders sought. Given you will already have an order in your favour, the Respondent may be liable for costs you incur in enforcing the debt, including any court fees, costs associated with serving documents and any lawyer's fees.

What if the Respondent is bankrupt, has gone into liquidation or has deregistered the company?

If there is a risk the Respondent company may be deregistered, contact ASIC and ask them to hold any deregistration while your legal claim is underway.

Seek legal advice immediately if the Respondent is bankrupt (in the case of a natural person) or has gone into liquidation or has deregistered (in the case of a company). Your small claim will be stayed unless you seek leave to continue.

The Australian Government may be able to assist you financially under the Fair Entitlements Guarantee (FEG) if your employer declared bankruptcy or went into liquidation.

The FEG scheme may assist you with payments of:

- Unpaid wages (up to 13 weeks)
- Unpaid annual leave, long service leave, payment in lieu of notice (up to 5 weeks) or redundancy pay (up to 4 weeks for each year of service)

For information about the FEG, visit: www.ag.gov.au/industrial-relations/fair-entitlements-guarantee-feg

Note

Even if you correctly identified your employer's business when you made your application, it's a good idea to do an ASIC register search immediately before your hearing – it is possible your employer deregistered their business between the time you filed your small claim application and the hearing date.

Key Contacts

JobWatch's Telephone Information Service

03 9662 1933 / 1800 331 617

www.jobwatch.org.au

For legal information regarding workplace issues, including a wide range of Fact Sheets.

Federal Circuit and Family Court of Australia

1300 352 000

www.fcftoa.gov.au

For small claims forms and general information about lodging a small claims through the court.

Fair Work Commission

1300 799 675

www.fwc.gov.au

For unfair dismissal forms and general assistance in lodging an unfair dismissal application and/or obtaining further information to do with a possible General Protections Dispute - Termination application.

The Fair Work Infoline (Fair Work Ombudsman)

13 13 94

www.fairwork.gov.au

For assistance in figuring out and recouping wages and entitlements and general employment information.

Australian Council of Trade Unions

1300 486 466

For assistance in joining a union.

Australian Tax Office

13 28 61

For assistance with any tax implications on any unfair dismissal 'settlement' offer.

Australian Financial Security Authority (AFSA)

1300 364 785

For assistance with employers who have gone bankrupt, gone into liquidation or has been deregistered.

Australian Securities and Investments Commission (ASIC)

1300 300 630

For seeking official registered information about an employer.

Legal Referral Service (Law Institute of Victoria): 03 9607 9311

Queensland Law Society: 1300 367 757

Law Society of Tasmania: 03 6234 4133

For referral to a lawyer.



Appendix

Step-by-step checklist

Pre-Litigation

- STEP 1:** Collect relevant information (i.e. pay slips, emails)
- STEP 2:** Calculate the amounts you are claiming using the FWO online tools
- STEP 3:** Attempt to resolve your dispute informally with your employer
- STEP 4:** Send a letter of demand to your employer

Small Claim Application

- STEP 5:** Identify the correct Respondent by searching pay slips and the ASIC registers
- STEP 6:** Complete the application forms (Application and Form 5)
- STEP 7:** File the application forms with the Registry and pay the filing fee
- STEP 8:** Serve the filed documents on the Respondent
- STEP 9:** Complete an Affidavit of Service

Prepare for Hearing

- STEP 10:** Familiarise yourself with the Respondent's response to your claim
- STEP 11:** Develop your strategy for giving evidence and for cross-examination
- STEP 12:** Organise notes and key documents, ensuring you have multiple copies
- STEP 13:** Confirm with the Registry whether an interpreter will be present if you need one
- STEP 14:** Confirm with any witnesses that they are aware of the hearing date