# MAKING A SMALL CLAIM UNDER THE FAIR WORK ACT 2009

A self-representation kit to assist national system employees in Victoria, Tasmania and Queensland to recover minimum entitlements in the Federal Circuit Court of Australia.



This kit was made possible by a grant from The Fair Work Ombudsman

Produced by:	Job Watch Inc. Level 10, 21 Victoria Street Melbourne 3000
Telephone:	03 9662 1933 1800 331 617
Written by:	Gabrielle Marchetti Andrew Maver
Edition:	February 2017
Copyright:	Job Watch Inc 2014

#### Important information and disclaimer

This kit provides general information only. It is not a substitute for professional legal advice.

If you are unsure of how the information contained in this kit applies to the specific circumstances of your case, you should obtain legal advice.

This kit is designed for Victorian and national system employees in Tasmania and Queensland only. If you are not a Victorian employee or a Queensland or Tasmanian national system employee, you should obtain specialist legal advice about your case as soon as possible.

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

This information is current at time of printing.

# Contents

1.	Why we produced this self-representation kit	3
2.	Terms used in this kit	3
3.	What is a small claim in the Federal Circuit Court of Australia (the Court)?	4
4.	Who can make a small claim?	5
	What type of employee are you?	6
5.	How do you calculate the amount you are claiming?	6
	Does the amount you are claiming relate to a breach of the National Employment Standards (NES)?	7
	Does the amount you are claiming relate to a breach of a modern award or enterprise agreement?	7
	Does the amount you are claiming relate to a breach of a National Minimum Wage Order?	8
	Does the amount you are claiming relate to a breach of a safety net contractual entitlement?	8
	What about your superannuation?	9
6.	Try resolving your dispute informally	9
	Collect all relevant information	9
	Talk to your employer	9
	Use the Fair Work Ombudsman's Resources	10
7.	Making a small claim	10
	What forms do you need to fill out to make a small claim?	10
	Who is the Applicant and who is the Respondent?	11
	What breach are you alleging?	11
	What remedy are you seeking?	11
	'Filing' the forms	12
	'Serving' the documents	12
	Do you need a lawyer?	13
	Will there be mediation?	13
	Attending Court	13
	What evidence will you need?	14
8.	How will your small claim proceed at a hearing?	15
	Tips for cross-examination	15
	What if the Respondent doesn't show up?	16
	What orders should you ask for?	16
	What if you don't agree with the Judge's findings?	16
9.	What if the Judge orders in your favour but the Respondent won't pay?	
10.	What if the Respondent is bankrupt, has gone into liquidation or has deregistered the company?	17
11.	Appendices	19
	Step by step checklist	19
	Sample Letter of Demand	20
	Sample Application form	21
	Sample Form 5 - Small claim under the Fair Work Act 2009	24

### 1. Why we produced this selfrepresentation kit and who can use it

This kit is designed for Victorian and national system employees in Tasmania and Queensland only.

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

Job Watch Inc (**JobWatch**) is an independent notfor-profit employment rights community legal centre which provides assistance to Victorian, Tasmanian and Queensland workers in relation to their work rights. Amongst other things, JobWatch runs a free and confidential telephone information and referral service for workers which operates from 9.00am to 5.00pm Monday to Friday and Wednesdays until 8:30pm.

We identified a need for this kit 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.

We have produced this kit to help Victorian, Tasmanian and Queensland employees represent themselves in what is known as a small claim in the Fair Work division of the Federal Circuit Court of Australia (**the Court**). A small claim allows employees to sue their employers for up to \$20,000 if the employer breached the *Fair Work*  <u>Act 2009 (Cth)</u> (or related laws such as the former Workplace Relations Act 1996 (Cth)) by not paying the employee the correct entitlements.

This kit does not deal with the rights of independent contractors, nor does this kit 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.

JobWatch's aim is to empower employees by equipping them with the necessary knowledge to make a small claim to the Court and to represent themselves in those court proceedings. We believe that allowing more employees to enforce their rights is a practical way of achieving better access to justice. Click on the hyperlinks in this document to access additional information.

### 2. Terms used in this kit

- 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 <u>Fair Work Act 2009</u> (<u>Cth</u>) in the Court
- **Court** means the Fair Work division of the Federal Circuit 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 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 Court compelling the Respondent to comply with any orders made 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 (e.g. one of your witnesses may give evidencein-chief in support of your case before being cross-examined by your employer)
- *Filing* means submitting documents to the Court's Registry in accordance with Division 2.2 of the *Federal Circuit Court Rules 2001* (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 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 10 minimum employment entitlements that are contained in the <u>Fair Work Act 2009 (Cth)</u>
- **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 Court Rules 2001 (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

# 3. What is a small claim in the Federal Circuit Court of Australia (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. The total amount of your claim cannot be more than \$20,000 if you wish to make a small claim in the Court.

If you wish to claim more than \$20,000, 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 an amount that:

- Your employer was <u>required to pay</u> directly to you (e.g. wages) or on your behalf (e.g. superannuation) and
- 2. Is owed to you under one of the following:
  - a) The National Employment Standards (NES), contained in the <u>Fair Work Act</u> <u>2009 (Cth)</u>
  - b) A modern award or enterprise agreement
  - c) A National Minimum Wage Order
  - d) Your common law employment contract, in so far as it creates a greater entitlement than the NES or modern award (e.g. your contract entitles you to more paid annual leave than the NES

# or award, known as a 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 kit.

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. Accordingly, lawyers cannot represent you or your employer unless the Court gives you permission.

You need to be prepared for the possibility that a 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 party making a small claim, you are expected to prove your claim on the balance of probabilities. This means that a Judge will only make findings and orders in your favour if the Judge accepts that your version of events is more likely than not to be true.

You have 6 years to make a small claim. The 6 year period starts from the day your first debt was due

### 4. Who can make a small claim?

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

An outworker is 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.

Independent contractors are *not* eligible to make a small claim in Court. In Victoria, Independent contractors may commence legal proceedings to recover underpayments in the <u>Industrial Division</u> of the Magistrates' Court of Victoria or the <u>Civil</u> Claims list of the Victorian Civil and Administrative

<u>Tribunal</u>. In Queensland, the appropriate forum is the <u>Queensland Civil and Administrative Tribunal</u> for amounts up to \$25,000 and the <u>Queensland</u> <u>Magistrates Court</u> for larger amounts up to \$150,000. Tasmanian independent contractors may claim underpayments in the <u>Magistrates</u> <u>Court of Tasmania</u>.

The factors set out below may help you work out whether you are an employee or an independent contractor. No one factor alone will determine whether you fall into one or the other category. Rather, you need to consider all these factors together.

Factors suggesting you are an employee are:

- You do ongoing work that is controlled by your employer
- You work hours that you are told to work by your employer
- You are not responsible for your employer's financial risk
- Your employer is required to make superannuation payments on your behalf
- You are entitled to minimum wages
- You have income tax taken out of your pay
- You are paid regularly (i.e. weekly or fortnightly or monthly)
- You are given paid annual leave each year

Factors suggesting you are an independent contractor are:

- You run your own business
- You provide your own equipment
- You decide how to do your work and what skills you need to do it
- You decide whether to employ someone else to do the work
- You carry the risk of whether your business makes a profit or loss
- You pay your own superannuation and tax, including collecting GST
- You have your own insurance
- You are contracted to work for a set time or do a set task
- You decide what hours to work
- You invoice for your work or get paid at the end of the contract or project

The Fair Work Ombudsman (**FWO**) website has information to help you determine whether your independent contracting arrangement is genuine.

If you believe that you were labelled an independent contractor but you were in effect treated as an employee, 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.

Just because your employer calls you an independent contractor doesn't mean the Court would agree

#### What type of employee are you?

Once you are satisfied that you were (or still are) an employee at the time you were underpaid, think about what sort of employee you were. You must understand what your employment status was 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 contract of employment with guaranteed hours and wages for an average of 38 hours per week, plus leave entitlements)
- Permanent Part-Time Employee (ongoing contract of employment 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, call JobWatch on (03) 9662 1933 or 1800 331 617.

# 5. How do you calculate the amount you are claiming?

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

- How much do you say you are owed in respect of wages?
- How much do you say you are owed in respect of 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 simply rely on the applicable pay rate as at the date of your application. Your pay rate may have increased over time.

The FWO provides online tools to help you, including:

- <u>Pay Calculator</u> can help you calculate your base rate, allowances and penalties under an award (e.g. rates for overtime, shift work, weekend work and work on public holidays) and
- <u>Leave Calculator</u> can help you calculate whether you are entitled to paid leave (and if so, how much) under a modern award

#### EXAMPLE:

You were employed as a permanent full-time employee. You worked a total of 300 hours on weekdays and 100 hours on Sundays since last July when your pay rate increased. Your employer paid you a flat rate of \$10 per hour for all 400 hours. You use Pay Check Plus and find that your hourly rate should have been \$20 per hour on weekdays and \$40 per hour on Sundays. This means you were underpaid by \$3,000 for weekly hours and \$3,000 for Sunday hours. The Leave Calculator shows that you are entitled to 140 hours of annual leave (\$2,800). This means that were underpaid by \$8,800 (i.e. \$3,000 + \$3,000 + \$2,800). Accordingly, the total amount you can claim in your small claim is \$8,800.

### Does the amount you are claiming relate to a breach of the National Employment Standards (NES)?

The NES are 10 minimum employment entitlements, which are set out in the *Fair Work* <u>Act 2009 (Cth)</u>. In brief, the 10 NES may entitle you to the following:

- Maximum weekly hours of work (38 hours per week for permanent full-time employees plus reasonable additional hours)
- Requests for flexible working arrangements (certain categories of employees can request a change in their working arrangements)
- Parental leave (up to 12 months of unpaid maternity, paternity or adoption leave plus a right to extend that by an additional 12 months, subject to certain notice and evidence requirements)
- Annual Leave (four weeks' paid leave per year for permanent full-time employees plus an extra week for certain shift workers)
- 5. Personal/carer's leave and compassionate leave (10 days' paid personal leave per year plus up to 2 days of paid compassionate leave when required for permanent fulltime employees and 2 days of unpaid carer's leave when required for all employees)
- Community service leave (up to 10 days' paid leave for jury service plus unpaid leave for certain other community service activities)
- 7. Long service leave (you will need to check whether you have a long service leave entitlement under an applicable enterprise agreement or pre-modern award. If those sources don't provide for long service leave, the default position is that you will be covered by the relevant long service leave act in your State. You can only recover a long service leave entitlement using the small claims procedure in the Court if an entitlement is created in your applicable enterprise agreement, pre-modernised award or common law employment contract)

- Public holidays (paid leave on public holidays for permanent employees unless the employer reasonably requests that you work that day, in which case you must be paid at the applicable rate for public holidays)
- 9. Notice of termination and redundancy pay (minimum period of notice or pay instead of notice, which increases with the employee's length of service, where the employer terminates a permanent employee's employment. Also, a redundancy payment, which increases with the employee's length of service, where an employer terminates a permanent employee's employment because of redundancy)
- Provision of a <u>Fair Work Information</u> <u>Statement</u> (this must be provided to all new employees)

Not all of the 10 NES conditions apply to casual employees. Casual employees may not be entitled to annual leave; paid personal and compassionate leave; notice or redundancy pay

You can check your NES entitlements on the FWO's website.

#### EXAMPLE:

You were employed by Smith Brothers & 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.

#### Does the amount you are claiming relate to a breach of a modern award or enterprise agreement?

Modern awards and enterprise agreements are documents that set out minimum terms and conditions of employment. The main difference between an award and an agreement is that awards apply across a whole industry or occupation, whereas agreements are usually specific to particular employers, workplaces or even a category of employees in a particular workplace (e.g. administrative employees in a workplace).

Together with the NES and National Minimum Wage Orders, modern awards and enterprise agreements make up a safety net of conditions for employees.

You can only be covered by either a modern award or an enterprise agreement, but not both at one time.

To determine which modern award or agreement applies to you, check the coverage or classification schedules in any award or agreement. You can find general information about awards on the Fair Work Commission (**FWC**) website or use the <u>Award</u> <u>Finder</u> tool on the FWO website to find the award that applies to your occupation.

Once you have identified which award applies to you, check the FWC <u>website</u> to see whether an enterprise agreement covers your employer or workplace. If one does, you will be covered by the terms of that agreement to the exclusion of terms in any award.

Modern awards 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

#### EXAMPLE:

You are employed as a waiter by Johnny Smith at Smith Café. After six weeks you resign because Johnny Smith refuses to pay you more than \$10 per hour. You check your award 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 \$12 (being the underpayment per hour) x 30 hours per week x 6 weeks = \$2,160.

### Does the amount you are claiming 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 an award or enterprise agreement. If you are not covered by an award or agreement, 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 <u>website</u>.

### Does the amount you are claiming 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. 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). 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.

If your employment contract deals with subject matter that is in the NES or a modern award (e.g. annual leave) but the contractual entitlement is *more* generous than the NES or the award (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.

#### EXAMPLE:

You were employed on a casual basis by a business, Quick Pizza, for eight 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 modern award, 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 award, you decide to recover your safety net contractual entitlement by making a small claim. You claim that you are owed \$4550 (i.e. \$650 x 7 weeks) because your employer breached a safety net contractual entitlement.

#### What about your superannuation?

Your employer must make superannuation (also known simply 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) and you are paid at least \$450 (before tax) in wages a month or
- You are under 18, work more than 30 hours a week and are paid at least \$450 in wages (before tax) a month

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 an award or enterprise agreement 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 and you are covered by a modern award. 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.

#### EXAMPLE:

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 enterprise agreement you notice the agreement deals with superannuation. The agreement provides a more generous superannuation contribution than the statutory minimum and creates a right for employees covered by the agreement 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 enterprise agreement.

# 6. Try 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

#### 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. Before raising any concerns with your employer, consider the information on the FWO's website on <u>resolving</u> issues in the workplace.

If your employer ignores your request to be paid what you are owed, 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 you adopt in 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 (e.g. you have a NES entitlement) 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 intend taking 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. A sample letter of demand is included at the back of this kit. You will need to amend the details to fit the circumstances of your case.

# Use the Fair Work Ombudsman's Resources

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 <u>registering for an account</u> on the FWO's website. Information about the comparative benefits of making a small claim is also available on the FWO's <u>website</u>. 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. If you have been unfairly treated after making an inquiry or complaint, review the General Protections fact sheets on the JohWetch, NVC or NVO websites, then contact JobWatch on (03) 9662 1933 or 1800 331 617

#### 7. 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 award or agreement) your employer has breached
- Re-check your calculations of any unpaid wages and entitlements using the FWO online tools
- Confirm who actually employed you by checking your payslip and searching the Australian Securities and Investments Commission (ASIC) <u>registers</u>
- 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
- Consider whether you have all the documentary evidence you will need
- Prepare a summary, in chronological order, of all key dates and events relevant to the underpayment

Following these steps will help you make a small claim with confidence and will make filling out the small claim application forms easier.

# 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 <u>website</u>. Sample forms are provided at the end of this kit. Always check the Court's website for the most up-to-date copies of the forms.

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.

# Who is the Applicant and who is the Respondent?

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**.

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 <u>Organisation and Business Name</u> <u>register</u> on the ASIC website or do an <u>ABN lookup</u>. 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

#### EXAMPLE:

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 Part G of 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 modern award?
- A term of an enterprise agreement?
- A National Minimum Wage Order?
- A safety net contractual entitlement?

#### What remedy are you seeking?

When filling out Part H of your *Form 5,* you must indicate how much you are claiming for each breach you alleged in Part G.

Any calculations you made when filling out Part H should be set out in detail in Part I of *Form 5*. 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

#### 'Filing' the forms

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

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

Information about eLodgment (i.e. filing documents electronically) is available in the electronic filing section of the Court's website.

If you wish to file in person at the Court's Registry, 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** (i.e. the application fee), which currently is:

- \$215 for claims less than \$10,000
- \$355 for claims between \$10,000 and \$20,000

The Court's addresses in Tasmania, Victoria and Queensland and relevant phone numbers are available on the Court's website.

The Registry may waive the filing fee if you have a concession card (e.g. health care, pensioner or senior's card) or if, in the opinion of the Registrar, payment of the fee at the time would cause you financial hardship. Check the Federal Court of Australia's <u>website</u> 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 forms on the Respondent.

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

#### '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 the <u>Federal Circuit Court</u> <u>Rules 2001 (Cth).</u>

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 him/her what the documents are. You will then have to complete an *Affidavit of Service (Fair Work)* form, detailing all the steps you took in 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 <u>Federal Circuit Court Rules 2001</u> (<u>Cth</u>) 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).

You can search the ASIC registers to confirm the address of a company's registered office. For around \$100, you can engage a process server to serve documents on your behalf. You can find process servers <u>online</u>.

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. Take a photocopy before you file it, 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 <u>website</u> under the "Industrial Law" heading.

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

#### Example:

Your employer is a company. You serve your small claim Application and Form 5 on your employer by registered post. You photocopy 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 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.

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.

#### **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 brought 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

#### 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 if possible, 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.

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.

# For guidance on preparing affidavits, visit the Court's website

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*.

#### Example:

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. 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 Court Rules 2001 (Cth)

# 8. 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:

- 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. S/he may make orders on the day or may decide s/he needs further evidence or wants to give the parties an opportunity to resolve the matter themselves.

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, s/he 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 (including how you felt about any alleged issues to do with your performance or conduct). Remember that you are in this jurisdiction to try and recover your minimum entitlements.

#### 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.

If you do need to cross-examine the Respondent, (or one of his/her witnesses) 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 elucidate 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 crossexamination

The Judge may question you, the Respondent or a witness about evidence at any time

#### Example:

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 her, and claiming you were a volunteer. When she has finished, you cross-examine her. You ask her: "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?" She admits it is. The Respondent appears to have lied. The Judge is not impressed and does not view the Respondent as a credible witness.

# 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, he/she 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?

Part H of your *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 pre-judgment interest calculated at 4% above the current Reserve Bank of Australia <u>cash rate</u>, in line with the <u>Federal</u> <u>Court Rules 2011 (Cth</u>). Accordingly, add interest onto your total in Part H of the Form 5. You may wish to use an online interest rate calculator to help you with your calculations. For example, Lawtech, provides a free online tool.

The Judge cannot compensate you for damages (e.g. lost income, pain and suffering) in a small claim.

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 Court of Australia <u>website</u> for more information about appeals.

You should seek legal advice before appealing. You can find a lawyer to assist you through your State's Law Institute or Law Society's referral service.

# 9. 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 <u>website</u>.

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 specialist lawyer to enforce the debt by calling your State's Law Institute or Law Society's referral service.

Victoria: Law Institute of Victoria - 9607 9311

Tasmania: Law Society of Tasmania - 6234 4133

Queensland: Queensland Law Society 1300 367 757

Applying for an enforcement order in the Court is free, but there may be some costs associated with an enforcement hearing, 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

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

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. You can also call the Australian Financial Security Authority (**AFSA**) on 1300 364 785 or visit the AFSA <u>website</u>.

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 after 5 December 2012. If bankruptcy or liquidation occurred before 5 December 2012, the General Employee Entitlements and Redundancy Scheme (**GEERS**) scheme may apply.

Both the FEG and GEERS schemes 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 these schemes call the Department of Employment on 1300 135 040, or visit their <u>website</u>.

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

# 11. Appendices

### Step by step checklist

Tick the boxes as you complete each step

### **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	

#### Sample Letter of Demand

This is a sample only. You will need to amend names, dates and calculations etc. to reflect you own claim

Ms Janie Smith 34 Wilson Street, MELBOURNE VIC 3000

1 February 2017

Dear Ms Smith,

#### **Re: Underpayment of wages and superannuation**

I was employed by you at Pencil Factory Pty Ltd from 23 August 2015 until 17 June 2016 as a pencil sharpener. I worked a total of 98 hours. You paid me \$500.00 for these hours and did not make any superannuation payments on my behalf. I did not receive a PAYG summary for income earned whilst working for you at Pencil Factory Pty Ltd.

I have checked my entitlements under the *Pencil Sharpener Award 2010*. The amount you should have paid me is as follows:

	\$ 1908.06	(Total amount outstanding)
	<u>\$ 500.00</u> =	(already paid)
Total	\$ 2408.06	
	<u>\$ 462.90</u> =	(15 hours worked on Sunday x \$30.86)
	\$ 661.25 +	(25 hours worked on Saturday x \$26.45)
	\$ 71.16 +	(3 hours worked before 7 am x \$23.72)
	\$ 1212.75 +	(55 normal hours x \$22.05)

I would like to resolve this matter with you now, without proceeding with enforcement action. Accordingly, please pay the full outstanding amount of **\$1908.06** by EFT into my bank account within seven days from the date of this letter.

- BSB: 645 090
- Account name: J Jones
- Account number: 198 550 201

If I do not receive my full outstanding entitlements within this time frame, I will commence legal proceedings against you to recover those entitlements plus interest and/or make a complaint against you to the Fair Work Ombudsman for breaches of the relevant award. I also intend to report you to both the Australian Taxation Office for failing to provide a PAYG summary or pay superannuation into my nominated fund.

Yours Sincerely,

Johnny Jones

#### Sample Application form

This is a sample only. You will need to amend it with your own details

IN THE FEDERAL CIRCUIT COURT OF AUSTRALIA REGISTRY: SMALL CLAIMS LIST File number:

#### JOHNNY JONES Applicant

PENCIL FACTORY PTY LTD (ABN 24 876 625 424) First Respondent

#### **APPLICATION– Fair Work Division**

This application is commenced in the Court's jurisdiction under:

the Workplace Relations Act 1996 the Fair Work Act 2009

the Building and Construction Industry Improvement Act 2005

#### Small claims list

The applicant elects for these proceedings to be dealt with under the Court's small claims procedures.

Yes 🖂 No 🗌

#### First court date

This application is listed for hearing at (court location):

Court date and time (registry staff to insert): at am/pm.

All parties or their legal representatives should attend this hearing. Default orders may be made if any party fails to attend. The Court may hear and determine all interlocutory or final issues, or may give directions for the future conduct of the proceeding.

(for) Registrar Date: / /

#### Final orders sought by applicant (select one box only)

Filed on behalf of Johnny Jor	les			
Prepared by		Lawyer's code		
Name of law firm				
Address for service in Australia	31 Nice Street			
Cranbourne	State	VIC	Postcode	3977
Email jjones@germail.com			DX	
Tel 0409 044 780	Fax	Attenti	on	

$\square$	The orders sought by the applicant are set out in the claim filed with this application
	A claim has not been filed with this application and the orders sought by the applicant are:
	(This option is only available if rules 45.05, 45.09 or 45.14 apply to the proceeding. If so, state precisely each order sought by way of final relief)
1.	
2.	
3.	
Gro	unds of application (select one box only)
$\square$	The grounds of the application are set out in the claim filed with this application
	A claim has not been filed with this application and the grounds of the application are:
	(This option is only available if rules 45.05, 45.09 or 45.14 apply to the proceeding. If so state briefly the grounds of the application)
1.	
2.	
3.	
	rlocutory, interim or procedural orders sought by applicant aplete only if interlocutory, interim or procedural orders are sought)
1.	
2.	
3.	
Sign	ature of applicant, lawyer or authorised representative

Signed by Johnny Jones

 $\boxtimes$  the applicant

- lawyer for the applicant
- authorised representative of the applicant

\_\_\_\_\_

Date: 12/03/2017

#### **IMPORTANT NOTICE TO RESPONDENT/S**

To the respondents:

PENCIL FACTORY PTY LTD (ABN 25 886 626 424), and

**Janie Smith** 

of: 34 Wilson Street, Melbourne VIC 3977

You should seek legal advice about this application. You may file a response. If you file a response, you must file and serve the response within 14 days of receiving this application. You may also need to file an affidavit; see Rule 4.05 of the *Federal Circuit Court Rules 2001*. If you do not file a response, you must file and serve a notice of address for service before the hearing.

Form approved by the Chief Judge for general federal law proceedings pursuant to Subrule 2.04(1A) for the purpose of Subrule 4.01(1)

FWCAPP\_FCC\_0313.V1

### Sample Form 5 - Small claim under the Fair Work Act 2009

This is a sample only. You will need to amend it with your own details

### IN THE FEDERAL CIRCUIT COURT OF AUSTRALIA REGISTRY:

File number:

JOHNNY JONES Applicant

#### PENCIL FACTORY PTY LTD (ABN 24 876 625 424) Respondent

**Form 5** Fair Work Division Rule 45.12(b)

Part A – Details of employee or outworker		
1. Name	Mr 🔀 Mrs 🗌 Ms 🗌	
	Other [] (give details):	
	Family name: Jones	
	Given names: Johnny	
2. Address	31 Nice Street	
	Cranbourne Postcode: 3977	
3. Phone	Business hours: ()	
	After hours: ()	
	Mobile: 0409 044 780	
4. Date of birth	20/05/1980	
5. First language	English	
	Other (specify): Spanish	
	Does the applicant require an interpreter?	
	No 🗌 Yes 🖂	
	If Yes, what language: Spanish	

Small claim under the Fair Work Act 2009

Part B – Details of employer or outworker entity				
6. Name of employer or outworker entity	PENCIL F	FACTORY PTY LTD (A	BN 25 886 626	424)
7. Address or registered office	34 Wilson Melbourne		Postcode:	3000
	Phone:	(03) 9388 0715		
	Fax:	(03) 9388 0716		

Part C – If the applicant is an individual – details of representation		
8. Is an organisation such as a union, acting on your behalf?	<ul> <li>No - go to 15</li> <li>Yes - go to 9</li> </ul>	
9. Name of organisation		
10. Address		
	Postcode:	
11. Contact person	Name:	
	Phone: ()	
	Fax: ()	

Part D – If the applicant is an industrial association – details of representation		
12. Is a member, officer or employee of the applicant representing it?	<ul> <li>No - go to 15</li> <li>Yes - go to 13</li> </ul>	
13. Name of the member, officer or employee		
14. Address		
	Postcode:	
	Phone: ()	
	Fax: ()	

Part E – Notices from the Co	ourt	
15. Where do you want notices from the Court sent?	$\boxtimes$	address in 2
		organisation in 9-11
		address in 13-14
		other (give details):

Part F – Details of work pe	rformed by employee or outworker	
16. Occupation	Pencil Sharpener	
17. Work or services performed	Sharpening pencils for use by customers and staff	
18. Duties A brief summary of the employee or outworker's duties	<ul> <li>stocktaking</li> <li>purchasing pencils and pencil sharpeners</li> <li>sharpening pencils</li> <li>periodically maintaining pencils</li> <li>sanding bite marks from pencils as required</li> <li>attaching pencils to order forms</li> <li>attending pencil sharpening conferences</li> </ul>	
19. Classification level under applicable Modern Award, enterprise agreement, workplace determination or contract	Level 3, Sharpener grade 2	
20. Place of work or services	Pencil Factory Pty Ltd 34 Wilson Street	
	Melbourne Postcode: 3000	
21. Period of employment or outworker contract	Date started work:23/08/2015Last date worked:17/06/2016if employment or outworker arrangement terminated	
22. If the employee's employment or the outworker's contract was terminated, was a written notice of dismissal or termination given?	<ul> <li>No</li> <li>Yes - copy attached</li> </ul>	

23. Employment status	<ul> <li>☐ full-time</li> <li>☐ part time</li> <li>➢ casual</li> <li>☐ fixed term</li> <li>☐ seasonal</li> <li>☐ outworker</li> </ul>		
24. Hours of work	Did the employee or outwo ∑ Yes ☐ No If Yes, complete the follow	ing:	
	Day	Start time (state am or pm)	Finish time (state am or pm)
	Monday		
	Tuesday		
	Wednesday		
	Thursday		
	Friday	09:00	11:00
	Saturday		
	Sunday		
		1	1]

Part G – Contravention alleged		
25. The applicant alleges that the employer or outworker entity has	one of the National Employment Standards <i>Please specify the standard:</i>	
breached: (select one or more as appropriate)		
	an enterprise agreement	
	Please specify the enterprise agreement and the relevant term:	
	a workplace determination	
	Please specify the determination and the relevant provision:	
	a national minimum wage order <i>Please specify:</i>	
	an equal remuneration order Please specify:	
	a safety net contractual entitlement Please specify:	
	other Please specify:	

Part H – Remedy sought			
26. Tick the box for each sort of claim you are making and insert the amount	🔀 wages	\$712.75	
claimed	overtime rate	\$	
	penalty rate	\$1195.31	
	allowances	\$	
	leave		
	annual	\$	

	personal/carer's	\$
	compassionate	\$
	jury service	\$
	other (please identify):	\$
	public holiday	\$
	payment in lieu of notice of termination of employment or contract	\$
	redundancy pay	\$
	Total	\$1908.06
		\$2070.24 (with interest @ 8.5%)
27. To whom should any compensation be paid?	The Applicant	

Part I – details of claim	
Describe the basis for the claim for each of the boxes ticked in Question 26 and the method of calculation of the amount claimed.	<ul> <li>The Respondent did not pay me in full for hours I worked (I have not received a Payment Summary for the hours I worked). The amount of \$1908.06 claimed is an aggregate of:</li> <li><i>Normal Hours</i></li> <li>normal hours x casual rate – wages paid - (55 hrs x \$22.05 – \$500)</li> <li><i>Penalty Rates</i></li> <li>Hours worked before 7am x "early work" penalty (3 hrs x \$23.72)</li> <li>Saturday hours x Saturday penalty (25 hrs x \$26.45)</li> <li>Sunday hours x Sunday penalty (15 hrs x \$30.86)</li> <li><i>Interest</i></li> <li>Underpayment / 100 x interest rate (1908.06 / 100 x 8.5)</li> <li>The above hourly rates and penalties were calculated using the Pay Check Plus online tool.</li> <li>The interest rate was determined by the Reserve Bank of Australia cash rate plus 4% as per the Federal Court Rules.</li> </ul>

#### Signature of applicant or authorised representative

.....

Signed by Johnny Jones

the applicant

 $\square$ 

authorised representative of the applicant

Date: 12 March 2017

Form approved by the Chief Judge pursuant to Subrule 2.04(1A) for the purpose of Subrule 45.04(2)(a)

FWCFORM5\_FCC\_0313.V1