



A GUIDE TO INDUSTRIAL DIVISION SMALL CLAIMS PROCEEDINGS

INTRODUCTION

The Industrial Division of the Magistrates' Court deals with claims brought under the *Fair Work Act 2009* for disputes by an employee against an employer (excluding workplace injury), concerning matters such as entitlements under a contract of employment, Award or Enterprise Agreement. Proceedings may also be brought under the *Long Service Leave Act 1992*, the *Public Holidays Act 1993*, the *Outworkers (Improved Protection) Act 2003*, the *Occupational Health and Safety Act 2004* or the *Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Act 2015*.

. For example, entitlements relating to:

- Wages
- Annual leave
- Long service leave
- Commission

The Industrial Division of the Magistrates' Court only sits at the Melbourne Magistrates' Court.

The Industrial Division of the Magistrates' Court does not deal with claims relating to unfair dismissal or superannuation. For information on how to pursue unfair dismissal, contact the Fair Work Commission. For information on how to pursue unpaid superannuation, contact the Australian Taxation Office. See 'Useful Websites' at the end of this guide.

The Small Claims Division of the Industrial Division deals with claims under \$20,000.

All Industrial Claims exceeding \$20,000 do not fall into the Small Claims Division and should adhere to the Civil Procedures and forms in accordance with the *Magistrates' Court General Civil Procedure Rules 2010* ('the Rules'). All court documents should be endorsed with the words 'Industrial Division'.

FILING A SMALL CLAIMS APPLICATION

A person commencing legal action is called the Plaintiff. The individual or company or business against whom the action is filed is called the Defendant.

It is recommended that you obtain legal advice before initiating a claim in the Magistrates' Court. Court staff can provide you with procedural advice, **BUT NOT** legal advice.

To lodge a Small Claim in the Industrial Division of the Magistrates' Court, a Small Claims Application form must be filed at the Melbourne Magistrates' Court. The Plaintiff must provide a Victorian address for service and should retain two copies of the Small Claims Form 5A in addition to filing a copy at the Court.

The Court cannot accept a non-original (eg. faxed) copy of this document.

IDENTIFYING THE DEFENDANT

In order to lodge a valid claim, the defendant must be a legal entity. A legal entity falls into the following broad categories:

- a) An individual, eg. John Smith
- b) A company or business, eg. 'Acme Pty Ltd' (please include the Australian Company Number (ACN) or Australian Business Number (ABN number)
- c) An individual with a trading name, eg. 'John Smith trading as Smith's Auto'
- d) A company or business with a trading name, eg. 'Acme Pty Ltd trading as Smith's Auto'

You can obtain a company's details by purchasing a full company search through Australian Investment and Securities Commission (ASIC). See 'Useful Websites' at the end of this guide.

FILING FEES

The Small Claims Application form must be filed at Court with the prescribed fee;

\$1,000 or less.	See Magistrates' Court Ready Reckoner
\$1,001 to less than \$10,000.	See Magistrates' Court Ready Reckoner
\$10,001 to \$20,000.	See Magistrates' Court Ready Reckoner

If the amount is above \$20,000 please file on the general Form 5A;

\$20,001 to less than \$40,000	See Magistrates' Court Ready Reckoner
\$40,000 or above	See Magistrates' Court Ready Reckoner

If you are posting the Application, you may attach a bank cheque/money order for the applicable amount made payable to the Magistrates Court of Victoria.

PROCEDURE ONCE SMALL CLAIMS APPLICATION FILED AT COURT

The Court will review the Small Claims Application form. If amendments are required, the form will be rejected and sent back to you with instructions. Once a satisfactory form is filed, the Court will initiate the claim and mail to the Plaintiff a "cover sheet", which confirms the parties' names, advises of the date of filing and provides a court case number. Once this cover sheet is received, endorse all copies of your Small Claims Application form with the court case number. You should keep one copy for your records, and one copy should be served on the Defendant.

SERVING THE SMALL CLAIMS APPLICATION

A copy of the Small Claims Application form, along with two blank Small Claims Response forms must be served on the Defendant within 12 months of the date that the complaint was filed with the Court.

Any person can serve the Small Claims Application form on the Defendant, however specific requirements apply for service depending on whether the defendant is an individual or a company or a business. It is recommended that you obtain the services of a Process Server who will ensure the documentation is served in the correct manner. The person serving the documentation must record all details of service on an Affidavit of Service.

Except where otherwise provided by the Rules, the documentation must be served personally on each defendant. 'Personal Service' is defined under Order 6 of the Rules which provides that:

(1) Personal service of a document is effected-

- a. by leaving a copy of the document with the person to be served, or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document; or*
- b. by delivering a copy of the document to the place of residence of the person to be served to a person apparently above the age of 16 years who resides at that place but when the place of residence is a hotel, boarding house or similar establishment, to some person apparently above that age who is apparently in charge of the establishment or engaged in the office of the establishment; or*
- c. if the person to be served conducts a business, by delivering a copy of the document to the place of business of the person to be served to a person apparently above the age of 16 years who is apparently in charge of that business or is employed in the office of that business.*

If the Defendant is a company, the complaint must be served on the registered address of the company, and may be served by post. The registered address of a company may be obtained by conducting a search of the records held by ASIC. Service by post is deemed to have taken effect from the date upon which the Defendant received the documentation. It is recommended that if serving by post, you send the documentation by registered mail so that you have a record of the date upon which it was received.

If you served the documentation yourself, when filling out the Affidavit of Service please ensure that you complete the section which corresponds to the method of service you used. This document will be checked by a Magistrate once the matter proceeds and if they are not satisfied that service is valid, you may be asked to re-serve the documentation and fill out another form.

You must have the Affidavit of Service witnessed and sworn or affirmed by an appropriate person: either a police officer of the rank of sergeant or above, an Australian lawyer, or a Court Registrar.

Once completed, please keep a copy of the Affidavit of Service for your records and submit to the Court. There is no filing fee.

FILING A RESPONSE FORM

Once the Defendant has been served with the above documentation, they may file a Response. A Response is filed if they wish to defend against the claim. If they do not wish to defend against the claim, they are not required to file any Response and may enter into arrangements to pay the Plaintiff. If they do not lodge a Response, and do not enter into arrangements with the Plaintiff, the Plaintiff may obtain and enforce a Court order requiring the Defendant to pay. Again, it is recommended that the Defendant obtain legal advice before filing a Response.

The Response form **must** be filed at the Melbourne Magistrates' Court **within 21 days of service of the Application**. A Response can be filed outside of the 21 day period, however the Plaintiff may apply for a Court order against the Defendant as soon as the 21 day period expires. For this reason, it is recommended that the Response be filed within 21 days. There is no filing fee, and a faxed copy is acceptable.

The Defendant must respond to each element of the Plaintiff's claim by admitting, not admitting, or denying each element. If denying an element of the claim, the Defendant is required to provide details as to why they are denying.

The Defendant is also required to serve a copy of the Response on the Plaintiff.

DIRECTIONS HEARING

If a Response is filed at the Court, the Court will list the matter for a Directions Hearing before a Magistrate in approximately 3 weeks from when they receive the Response. The Industrial Division does not sit in the school holidays, so the 3 week time period may be extended. A hearing notice will be sent to both parties to advise them of the date. It is therefore important that if you change your address, you notify the Court.

A directions hearing is in the nature of a preliminary hearing where the Magistrate will be introduced to the matter and will make orders as to how it is to further proceed. It is not a Contested Hearing (please see the section on Contested Hearings). The Magistrate may do the following:

- Adjourn the matter for further Directions Hearing
- Refer the matter to Mediation, to be conducted by a Judicial Registrar
- Refer the matter to Pre-Hearing Conference, to be conducted by a Registrar. If this occurs, it will in the majority of instances take place on the same day as the Directions Hearing
- List the matter for a Contested Hearing before a Magistrate
- Require the parties to file and serve further documentation

You should expect to be in attendance at Court for half a day and organise your time accordingly.

If the Defendant is a company, the Director should attend the Directions Hearing and any subsequent hearings.

Please bring copies of all relevant documentation with you, including your copy of the Application and Response.

SEEKING LEAVE TO BE REPRESENTED

Both the Plaintiff and Defendant are required to seek leave (permission) from the Magistrate to be represented by a lawyer, Union representative or other. Leave may be verbally sought at the Directions Hearing.

INTERPRETERS

The Court does not supply interpreters in Civil and Industrial proceedings.

- If the Defendant requires an interpreter, they must contact the Plaintiff and it is the Plaintiff's responsibility to book and pay for an interpreter.
- If a witness is subpoenaed to give evidence, it is the responsibility of the party who subpoenas the witness to book and pay for an interpreter.

The interpreter must be properly qualified and accredited.

AMENDING YOUR APPLICATION/RESPONSE

If you wish to amend any information on your Application/Response and you have already filed it with the Court, you must prepare an amended Application/Response. To do so, you must amend your original document by titling it 'Amended' and underlining all amendments made. You may file your amended document with the Court in one of the following ways:

1. If the Application/Response has not yet been served on the other party, you may file the amended document with an accompanying letter stating that the Application/Response has not been served on the other party.
2. With the written consent of the other party. Please attach written consent when filing the document.
3. By obtaining an order of the Court. You may alert the Magistrate to the fact that you wish to amend the document when you attend the Directions Hearing.

The Plaintiff is required to amend their Application if the Defendant indicates in their Response that the employer has been incorrectly identified.

APPLICATION FOR ORDER IN DEFAULT OF RESPONSE

Once 21 days from the date of service (see section "Serving the Small Claims Application form") has passed, you can contact the Court to see if a Response has been filed. If a Response has not been filed, you may apply for an Order in Default of Response (also known as 'judgement', or a 'default order'), which is an order of the Court stating that the Defendant owes the amount of the claim you are seeking, plus applicable costs and interest.

There are a number of forms required to apply for an Order in Default of Defence:

- Form 4A Overarching Obligations certificate
- Form 4B Proper Basis certificate
- Application for Order in Default of Response
- Affidavit of Verification
- Affidavit of Service (if not already filed)
- ASIC search print out (if your claim is against a company)

Please see the Magistrates' Court Ready Reckoner for the relevant filing fee.

If you are posting the application, you may attach a bank cheque/money order for the applicable amount made payable to the Magistrates' Court of Victoria.

A Magistrate will review the documentation and if satisfied, will make an order.

The Plaintiff may serve a copy of the order on the Defendant and enter into negotiations for payment. If negotiations are not successful, or the Plaintiff does not wish to enter negotiations, the Plaintiff may apply to the Court to enforce the order, eg. applying for a warrant to seize property.

PREHEARING CONFERENCE

A Prehearing Conference is similar to a mediation, and is conducted by a Registrar of the Court in a prehearing conference room.

It provides the parties with the opportunity to have facilitated discussions to see if the matter can be settled without having to be booked in for a Contested Hearing.

All discussions that take place are confidential and are not reported back to the Court.

MEDIATION

A Mediation is conducted by a Judicial Registrar of the Court in a court room.

It provides the parties with the opportunity to have facilitated discussions to see if the matter can be settled without having to be booked in for a Contested Hearing.

All discussions that take place are confidential and are not reported back to the Court.

The fee for a mediation is shared between the parties. See the Magistrates' Court Ready Reckoner for the fee.

CONTESTED HEARING

A Contested Hearing is a full hearing of the matter where parties may call witnesses and present evidence in support of their respective claims. At the conclusion of a Contested Hearing, the Magistrate will make a decision as to whose claim is upheld, and may award costs.

A Contested Hearing generally follows a particular format:

1. Preliminary discussions
2. The Plaintiff opens their case and presents their evidence. They may call witnesses and hand up documentation, and the Defendant has the chance to ask questions of the witnesses (cross-examination). The Plaintiff may enter the witness box and give evidence and the Defendant may then cross-examine them. The Plaintiff closes their case.
3. The Defendant opens their case and presents their evidence. They may call witnesses and hand up documentation, and the Plaintiff has the chance to cross-examine the witnesses. The Defendant (or Director of Defendant company) may enter the witness box and give evidence and the Plaintiff may then cross-examine them. The Defendant closes their case.
4. Parties may make final submissions to the Magistrate.
5. The Magistrate will deliver a decision. In some instances, the Magistrate may defer delivering their decision to another day.

COSTS

Costs are not ordinarily awarded to a successful party against an unsuccessful party in relation to Small Claims in the Industrial Division, due to section 570 of the *Fair Work Act 2009*. The usual position is that legal costs may be ordered only if the Court is satisfied that the proceeding was instituted vexatiously or without reasonable cause or that a party acted unreasonably by doing or not doing something that has resulted in the other party incurring unnecessary costs.

A successful party to an Industrial Proceeding is ordinarily entitled to disbursements, that is, the proper out of pocket costs associated with bringing their claim in court such as filing/application fees and fees for service of court documents.

CONTACT

Industrial Division Registrar
Melbourne Magistrates Court
GPO Box 882
233 William St
Melbourne VIC 3000
Ph: 9628 7704
Fax: 9628 7826
E: mmcworkcoverindustrialcourts@justice.vic.gov.au

USEFUL WEBSITES

www.magistratescourt.vic.gov.au

Website of the Magistrates Court of Victoria. Here you may find information about the Industrial Division and forms.

www.fairwork.gov.au

Website of the Fair Work Ombudsman. An information gateway to information and advice about Australia's workplace rights and rules, including awards and national employment standards. Here you may find contact details for the Ombudsman and a pay calculator.

www.asic.gov.au

Website of Australian Securities and Investments Commission. Here you may purchase a company search.

www.austlii.edu.au

Website of Australasian Legal Information Institute. Here you may find applicable legislation such as the Fair Work Act 2009 and the Magistrates Court General Civil Procedure Rules 2010.

www.liv.asn.au

Website of the Law Institute of Victoria. Here you may find their online referral service which enables you to find a lawyer or legal centre in your area.

www.fwc.gov.au

Website of the Fair Work Commission. Please contact them for enquiries about unfair dismissal.

www.ato.gov.au

Website of the Australian Taxation Office. Please contact them for enquiries about pursuing unpaid superannuation.