

# Unpaid minimum entitlements for WA employees

## A Circle Green Community Legal claim guide

### Introduction

This claim guide is for state or national system employees in Western Australia who wish to make a claim for unpaid minimum entitlements.

There are two systems of employment law in Western Australia: a state system and a national system. If you are unsure which system you fall under, please see our publication: [“Q&A: State or national for WA employees”](#).

The information below has been written to assist you with the practical process of making a claim for unpaid minimum entitlements.

If you need legal advice before making a claim, you can [submit an application for advice to us here](#) or see our [private solicitors list here](#).

This claim guide is provided as general information only and is not intended to be a substitute for legal advice. By using the information on this page, you agree to our full [disclaimer](#).

### Key terms used

This information resource uses a number of key terms. You can click on our glossary in a new window and read what the key term means. See our glossary here: <https://circlegreen.org.au/resource/glossary-workplace-law/>

We encourage you to read this claim guide from start to finish. If you are looking for a specific piece of information, you can click on any heading below to skip to that section:

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## Overview

Minimum entitlements are entitlements an employee has under an industrial instrument or legislation including:

- an award;
- an industrial agreement;
- the *Long Service Leave Act 1958* (WA);
- the *Industrial Relations Act 1979* (WA);
- the *Minimum Conditions of Employment Act 1993* (WA);
- the *Fair Work Act 2009* (Cth); or
- any other industrial instrument.

It can be difficult to work out where your entitlement comes from. The below table is a guide for where some minimum entitlements may come from.

Entitlement	National system	State system
<b>Minimum wages</b>	<i>Fair Work Act 2009</i> (Cth) Modern Award Enterprise Agreement	<i>Minimum Conditions of Employment Act 1993</i> (WA) State award Industrial agreement
<b>Overtime</b>	Modern Award Enterprise Agreement	State award Industrial agreement
<b>Penalty rates</b>	Modern Award Enterprise Agreement	State award Industrial agreement
<b>Allowances</b>	Modern Award Enterprise Agreement	State award Industrial agreement
<b>Annual leave</b>	<i>Fair Work Act 2009</i> (Cth) Modern Award Enterprise Agreement	<i>Minimum Conditions of Employment Act 1993</i> (WA) State award Industrial agreement
<b>Personal/carers leave</b>	<i>Fair Work Act 2009</i> (Cth) Modern Award Enterprise Agreement	<i>Minimum Conditions of Employment Act 1993</i> (WA) State award Industrial agreement

Entitlement	National system	State system
<b>Long service leave</b>	<i>Long Service Leave Act 1958 (WA)</i> <i>Local Government (Long Service Leave) Regulations 1977 (WA)</i> <i>Construction Industry Portable Paid Long Service Leave Act 1985 (WA)</i> <i>Long Service Leave (Commonwealth Employees) Act 1976 (Cth)</i> Modern Award Enterprise Agreement	<i>Long Service Leave Act 1958 (WA)</i> <i>Local Government (Long Service Leave) Regulations 1977 (WA)</i> <i>Construction Industry Portable Paid Long Service Leave Act 1985 (WA)</i> State award Industrial agreement
<b>Compassionate leave</b>	<i>Fair Work Act 2009 (Cth)</i> Modern Award Enterprise Agreement	<i>Minimum Conditions of Employment Act 1993 (WA)</i> State award Industrial agreement
<b>Parental leave</b>	<i>Fair Work Act 2009 (Cth)</i> Modern Award Enterprise Agreement	<i>Minimum Conditions of Employment Act 1993 (WA) / Fair Work Act 2009 (Cth)</i> State general order State award Industrial agreement
<b>Community service leave</b>	<i>Fair Work Act 2009 (Cth)</i> Modern Award Enterprise Agreement	<i>Minimum Conditions of Employment Act 1993 (WA)</i> State award Industrial agreement
<b>Notice of termination</b>	<i>Fair Work Act 2009 (Cth)</i> Modern Award Enterprise Agreement	<i>Minimum Conditions of Employment Act 1993 (WA)</i> State award State general order Industrial agreement
<b>Redundancy pay</b>	<i>Fair Work Act 2009 (Cth)</i> Modern Award Enterprise Agreement	<i>Minimum Conditions of Employment Act 1993 (WA)</i> – job interview leave General order – redundancy pay State award Industrial agreement

## Eligibility

To make a claim for unpaid minimum entitlements in the IMC, you must:

1. be or have been an employee;
2. be seeking to be paid an entitlement under one of the following:
  - a state or federal award;
  - a state or federal industrial agreement;
  - the *Long Service Leave Act 1958 (WA)*;
  - the *Industrial Relations Act 1979 (WA)*;
  - the *Minimum Conditions of Employment Act 1993 (WA)*; or
  - the *Fair Work Act 2009 (Cth)*.

- Another industrial law or instrument

If you are seeking to be paid an entitlement that is in your employment contract, you cannot make that claim to the IMC. Please see our publications, [Claim Guide: Breach of Contract for WA employees](#) and [Claim Guide: Denial of Contractual Benefits for WA employees](#) for more information.

## Assistance from Wageline or the Fair Work Ombudsman

This claim guide is designed to assist you to make a claim independently. However, many unpaid entitlement claims come within the area of responsibility of the Fair Work Ombudsman (**FWO**) or the Department of Mines, Industry Regulation and Safety - Wageline service.

These services may be able to assist you to write a letter to your employer requesting payment and, in some circumstances, may be able to assist you in a court action to recover your unpaid entitlements.

To seek assistance, you should call Wageline if you are a state system employee and FWO if you are a national system employee. Contact details are at the bottom of this claim guide.

## Pre-claim process

### Work out where the entitlement comes from

If you signed a written contract, you should have been given a copy which should may whether you are covered by an award or industrial agreement.

If you don't remember signing anything when you began employment, you need to find out what kind of arrangement covers your employment, or which law sets out the entitlement you are seeking to recover.

You can call Wageline if you are employed in the state system or the FWO if you are employed in the national system. They should be able to tell you:

- whether you are covered by an award or industrial agreement;
- whether the award or agreement is state or federal;
- the name of the award or agreement; and
- the name of the law or other instrument which sets out the entitlement you are seeking to recover.

Wageline or FWO may also be able to send you a copy of any award which applies to your employment.

### Calculate the underpayment/non-payment

You can then calculate the amount of your unpaid entitlement. You can do this by comparing the amount which you should have been paid (**lawful entitlement**) with the amount which was actually paid to you by your employer (**amount paid to you**). The amount paid to you should be set out in your payslip(s).

The general calculation is as follows:

$$\text{Lawful entitlement} - \text{amount paid to you} = \text{unpaid entitlement}$$

To calculate unpaid wages:

Hours worked x the rate of pay on your pay slip (amount paid to you)

Hours worked x the statutory rate (lawful entitlement)

Lawful entitlement – amount paid to you = unpaid entitlement

To calculate unpaid long service leave:

The number of hours of long service leave you are entitled to (determined under Long Service Leave Act 1958 (WA) by the amount of continuous service you have completed) x the rate of pay on your pay slip = unpaid entitlement

## **Approach your employer to demand payment**

Taking formal legal action can be time-consuming and stressful. For this reason, it is worthwhile trying to resolve a dispute out of court and without having to commence legal action.

You should consider approaching your employer informally to:

- make them aware that you believe you have not been paid correctly;
- give them a copy of your calculations; and
- give them an opportunity to review those calculations.

Your employer may agree with you and pay you the outstanding amount.

## **Sending a letter of demand**

If your employer disagrees with you, or you don't feel comfortable informally approaching your employer you may wish to put your concerns in writing by sending a letter of demand.

In the letter you can

- state that you believe that you have been underpaid the amount you calculated;
- ask the employer to pay you the outstanding amount; and
- inform the employer you may commence legal proceedings if the outstanding amount is not paid within a particular time frame. For example you might ask that the outstanding amount be paid within 14 days of the date of the letter.

This letter serves two purposes. First, it may result in your employer paying you the amount owed. Second, it shows that you attempted to recover the amounts owed, which may be helpful if you need to proceed to a court process.

Remember to date and keep a copy of the letter for yourself.

A sample demand letter is available at the end of this guide.

## **Commence a claim**

If your employer does not respond to your demand for payment or does not respond favorably, you may consider commencing a claim in the IMC.

## Time limit

You must submit your claim to the IMC within **6 years** of when the entitlement should have been paid to you. However, it is generally preferable to submit your claim in a timely fashion, as its more likely that evidence will be available.

## Costs

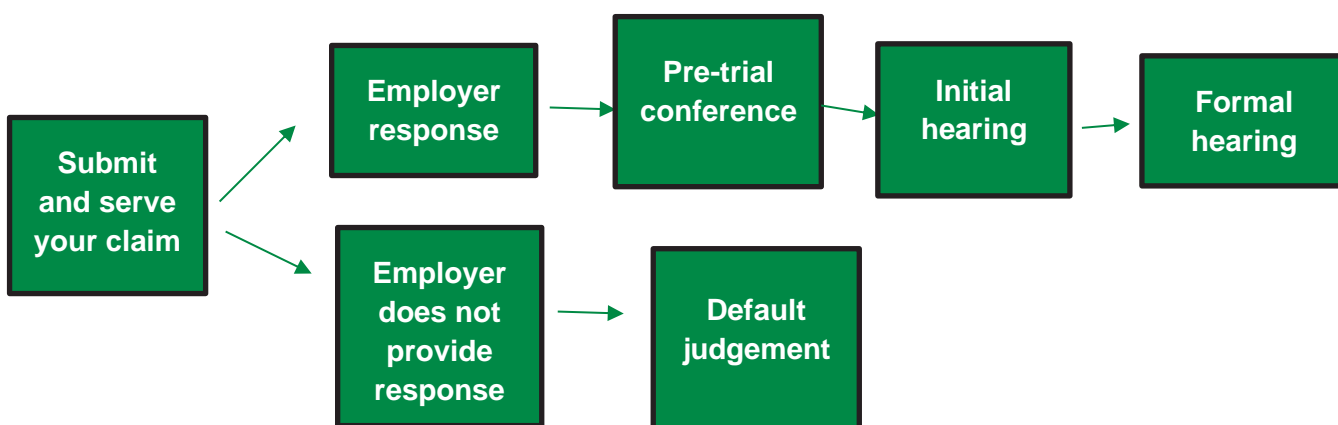
You are required to pay a fee to make this claim to the IMC. You need to pay this fee when you submit your claim to the IMC. Information about fees can be found here: <https://www.imc.wa.gov.au/index.php/headingfeesandcharges>

Generally, you and your former employer will each pay your own legal costs. There can be exceptions where a claim is made or defended frivolously, vexatiously or without merit.

## Representation

You do not necessarily need representation, but you can choose to be represented if you wish. Representation can include a union representative or a lawyer. If you elect to use the small claims procedure, you will need permission to be represented.

## Claim process



## Submitting a claim

To make a claim for unpaid minimum entitlements, you must complete a Form 1.1, 1.2 and 1.3 and Form 2 and provide it to the IMC within the time limit. The forms can be found here: [Applications & Forms \(imc.wa.gov.au\)](https://www.imc.wa.gov.au)

You are the 'claimant' and your employer is the 'respondent' on these forms. You should include your full name on the forms.

You will also need to download the Form 2 – Response, as you must provide this to your employer for them to use in responding to your claim.

If you are a national system employee and you are claiming an amount of no more than \$100,000, you may wish to use the Small Claims procedure under section 548(1) of the FW Act applies by ticking 'yes' in the relevant box on Forms 1.1, 1.2 and 1.3.

You can provide your claim to the IMC either:

- in person at Level 17, 111 St Georges Terrace, Perth WA 6000; or

- by pre-paid post to Industrial Magistrates Court Registry, Locked Bag 1, Cloisters Square, Perth, WA, 6850. Note that if lodging by post, you will need to pay the filing fee by credit card or cheque; or
- by facsimile to (08) 9420 4500; or
- electronically by emailing it as a PDF attachment to:

[electroniclodgementIMC@wairc.wa.gov.au](mailto:electroniclodgementIMC@wairc.wa.gov.au)

The Registry will process the Form 1.2 and 1.3 and return them to you. The forms will be stamped with a matter number. If lodging electronically, a number is automatically generated, together with the Court seal. For assistance with submitting your claim, contact the Industrial Magistrates Court Registry on (08) 9420 4467.

## Serve your claim

Once you have lodged your claim forms with the IMC, you will need to deliver your claim to your employer. This is called “serving” your employer. The table below is a guide, but there are different rules for service, depending on the nature of the employer. If you are unsure, you can call the IMC registry to ask.

<b>Timeframe to serve your claim</b>	You will usually have 30 days to deliver the Form 1.3 to your employer.
<b>What to serve on your employer</b>	You will need to serve the Form 1.3 along with any printout or information attached
<b>Who to serve the claim on</b>	The form should be served on someone senior such as a Director, Manager or Company Secretary.
<b>How to serve the claim</b>	Either:  You (or another person) can either deliver the claim to the employer’s registered business address; or  by pre-paid post.
<b>Where to serve the claim</b>	You will need to serve the Form 1.3 at your employer’s registered business address.  You should check the company details and address of the employer with the Australian Securities and Investments Commission (ASIC) as this may be used by the Court as evidence if your employer does not respond to your claim.  ASIC business name search: <a href="https://asic.gov.au/online-services/search-asic-s-registers/">https://asic.gov.au/online-services/search-asic-s-registers/</a>

If you are having difficulty serving your employer or if you are unsure about how to serve your particular employer, you can contact the Clerk to the Industrial Magistrate for assistance on (08) 9420 4467.



## Complete an affidavit of service

After serving Form 1.3 on your employer, you must lodge the affidavit of service at the IMC Registry stating that you have served your claim on your employer.

<b>Timeframe to lodge</b>	You should try to lodge the affidavit of service as soon as possible after serving the claim.
<b>What form to use</b>	Either: <ul style="list-style-type: none"><li>• a Form 3 if your employer is not a corporation;</li><li>• a Form 4 if your employer is a public authority;</li><li>• a Form 5 if your employer is a corporation and you served Form 1.3 other than in accordance with section 109X of the Corporations Act 2001 (Cth); or</li><li>• a Form 5.1 if your employer is a company and you served Form 1.3 in accordance with section 109X of the Corporations Act 2001 (Cth).</li></ul>
<b>What to include in the affidavit of service</b>	You state: <ul style="list-style-type: none"><li>• that you served the employer with the claim; and</li><li>• the time and place of service and the manner in which you served the claim, as set out in the form.</li></ul>
<b>Signing the affidavit of service</b>	You must sign the affidavit in the presence of an appropriate witness. The following people can witness an affidavit: <ul style="list-style-type: none"><li>• a Justice of the Peace;</li><li>• an experienced lawyer unless they helped prepare the affidavit, or are involved in the proceedings for which the affidavit is to be used;</li><li>• a public notary within the meaning of the <i>Public Notaries Act 1979</i> (WA); or</li><li>• a registrar or Clerk of a Court, or any mining Registrar appointed under the <i>Mining Act 1978</i> (WA).</li></ul>

## Employer's response

Whether your employer has to lodge a response to your claim will depend if they consent to the IMC making the final orders you are seeking.

If your employer consents, you do not need to appear before the IMC and the IMC will then make the orders in your absence and your claim will be finalised.

If your employer does not consent to the final orders sought in your claim, your employer must lodge a response to your claim with the IMC explaining why it disagrees with your claim or parts of your claim.

The time in which your employer must lodge a response depends on the employer's address for service. If your employer's address for service is:

- less than 1,000 km from Perth, your employer has 21 days in which to lodge a response; or
- more than 1,000 km from Perth, your employer has 28 days within which to lodge a response.

Your employer then has a further 14 days after lodging a response in which to serve its response on you.

## Default judgement (if applicable)

If your employer does not lodge a response to your claim within the appropriate time, you can apply to the Court for a default judgment in your favour against your employer.

A default judgment is where the Court makes a judgment order without the parties going through the full hearing process.

To do this, you need to:

- complete Form 6 - Application, which is lodged in the same way as your claim and served on your employer in the same way. A lodgement fee applies; and
- complete and lodge Form 7 – Affidavit in the same way as you did after you served your claim.

If your employer does not respond to this within 14 days, the Court will set a date for the hearing to make a default judgment. It is important to be aware that this does not necessarily mean that the claim is finally determined, as your employer can apply to the Court to have the default judgment set aside within 14 days of the judgment being made.

Information on forms and fees can be found here: <https://www.imc.wa.gov.au/>

## Pre-trial conference

If your employer has lodged their response to your claim, the Clerk of the IMC will list the matter for a pre-trial conference.

### What is a pre-trial conference?

<b>Purpose</b>	The purpose of the pre-trial conference is to allow you and your employer to sit down together with the Clerk to discuss the claim and to try and resolve it without the need for a hearing.
<b>Facilitator</b>	A Clerk of the IMC will run the pre-trial conference.
<b>Date and Time</b>	You will be advised in writing of the date and time of the conference.
<b>Location</b>	The pre-trial conference is usually held at the IMC, 111 St Georges Terrace Perth 6000.
<b>Attendance</b>	Both you and the employer is required to attend the pre-trial conference.
<b>Additional information</b>	The Clerk of the IMC may request additional information in respect of your claim. If this happens, any information will need to be served on the respondent, together with an affidavit. This is generally done in the same way as how you started your claim.
<b>Confidentiality</b>	The pre-trial conference is confidential.
<b>Transcripts</b>	Transcripts are not taken at the pre-trial conference. Orders may be made to program your claim to a formal hearing if the claim does not settle.

For more information on how to prepare for a negotiation with your employer, you should have a look at our publication, [Q&A: Conciliation conferences for WA employees](#), which covers conciliation conferences and pre-trial conferences.

If the matter cannot be resolved, the Clerk will prepare the matter for a hearing and outline the process to you and the employer. The Clerk will contact you and your employer to request:

- dates you are unavailable for hearing;
- the estimated time required for the hearing; and
- details of any witnesses you will be bringing to the hearing.

## **Formal hearing (arbitration)**

### **What should I do before the formal hearing?**

You should:

- Consider seeking legal advice on the strength of your case;
- Try to negotiate a settlement by writing to your employer (keep evidence of this);
- Keep all papers related to your dispute in one place;
- Keep a copy of letters you send;
- Keep originals of any other documents;
- Keep dated records of telephone conversations with relevant people; and
- Contact witnesses and ask them to swear statutory declarations.

### **How can I prepare for a hearing?**

You can prepare for the hearing by considering the following tips:

- Be familiar with your claim and your evidence so that you can present your claim to the Industrial Magistrate in a clear and concise manner.
- Practice at home with a friend or family member before the hearing day. This may help you to feel more at ease when you have to stand up in Court and tell your story to the Industrial Magistrate.
- Make detailed notes of all the facts of your claim to remind yourself of what you need to say.
- Make sure that these notes include times, dates, places and the names of any people involved.
- Ensure you have everything that you need before you go to Court on the day of the hearing. Remember to bring a pen and paper.
- If you are intending to show documents to the Industrial Magistrate, you will need three copies of each document – one to give to the Industrial Magistrate, one to give your employer and one for yourself. If you are bringing witnesses make sure you have additional copies for them.
- The Court staff will help with administration matters but they cannot give you legal advice.

## What do I do on the day of the hearing?

On the day of your hearing, you should report to the relevant Court and advise the Judicial Support Officer that you have a claim listed for hearing on that day.

Make sure you are on time. If you miss your allotted time the Industrial Magistrate may dismiss your claim.

If you have reached a last-minute agreement with your employer to settle your claim, you should tell the Clerk immediately.

## Court processes

### Witnesses

If you have witnesses to support your claim, they will need to attend Court with you on the day.

You will need to lodge and serve a witness summons at least 14 days before the trial.

The Summons to Witness is lodged in the same manner as the original claim and must be served personally on the witness (Form 22.1).

You must pay the witness' reasonable expenses of attending Court, and also make arrangements to enable the witness to attend Court. You will need to record how this has been done on the Summons to Witness – Proof of Service Copy (Form 22.2).

On the day of the trial, you and your witnesses will need to be prepared to swear an oath or affirm the truth of what you or they (as the case may be) are going to say. Note that it is a criminal offence to deliberately give false evidence in Court.

### Courtroom etiquette

<b>Seating</b>	<p>The Industrial Magistrate will sit behind a high desk at the front of the room and there will be a long table in front of the Industrial Magistrate.</p> <p>You will sit at one end of the table and your employer will sit at the other end, with you both facing the Industrial Magistrate.</p>
<b>Formalities</b>	<p>The proper way to address the Industrial Magistrate is "Your Honour".</p> <p>When the Industrial Magistrate enters or leaves the Courtroom, one of the Court staff will ask everyone to stand up and will then announce when you are allowed to be seated again.</p>
<b>Etiquette</b>	<p>You need to ensure that you behave respectfully and courteously at all times.</p> <p>You should listen very carefully to everything that the Industrial Magistrate says.</p> <p>You should never interrupt someone else who is talking in the Courtroom, even if your employer is saying something that you disagree with. If you wish to speak, you should stand up.</p>

	<p>You may feel upset towards your employer or frustrated by the process but you need to put these feelings aside on the day and focus on remaining calm when explaining your claim and when responding to issues raised by your employer.</p> <p>If you have a mobile telephone, it must be turned off before you go into the Courtroom.</p>
<b>Process</b>	<p>The Industrial Magistrate will probably ask you to go first in explaining your claim before giving your employer the opportunity to respond to what you have said.</p> <p>You do not have to have an opening submission, a brief outline is sufficient. Your employer will be given an opportunity to respond.</p> <p>The Industrial Magistrate will then ask the parties to bring their witnesses and may make some comments about the strength of the claim.</p>
<b>Evidence</b>	<p>If you have evidence that you want to show the Industrial Magistrate or have witnesses who are at Court to testify on your behalf, you should tell the Industrial Magistrate and have a copy of any document to provide the Industrial Magistrate.</p>

## Industrial Magistrate's decision

After all the evidence has been given, the Industrial Magistrate will give a decision on your claim.

The decision will be in the form of a Court order.

In some cases, the Industrial Magistrate may need more time to consider the issues and may postpone making a decision until a later date (this is called "reserving" the decision).

If you are successful, the Industrial Magistrate will make an order with respect to the amount to be paid. This amount may include an amount for interest.

The decision is usually for immediate payment (note that this may include payment by instalments), but in certain circumstances the Industrial Magistrate may give the employer a period of time by which to pay the amount ordered.

If the Industrial Magistrate "reserves" his or her decision, a Court officer will contact you on a later date to advise you when the decision is ready.

If you are unsuccessful, you may be entitled to appeal the decision. It is recommended

that you seek your own independent advice if this happens.

## Enforcing a court order

If your claim is successful but your employer does not pay you the amount specified in the Court you have a right to enforce payment of the amount (a debt).

The Court order will only be enforced at your request.

You should firstly the Court Registry and tell the Registry Staff that an order was made by the Industrial Magistrate that your employer must pay a certain amount of money by a certain date and

that it has not been done. The Registry will provide you with a copy of an order and should be able to tell you the steps you need to take to enforce the order.

## **Discontinuance**

If you want to discontinue your claim:

- in whole, use Form 18 (Notice of Discontinuance – Whole of Claim); or
- in part, use Form 19 (Notice of Discontinuance – Part of Claim).

The forms can be found here: <https://www.imc.wa.gov.au/index.php/appsandforms>

# Sample Demand Letter

[Remember to keep a copy and to remove all unnecessary information in brackets]

[Employer's name]

[Employer's address]

[Today's date]

Dear [insert employer's name here]

## Unpaid entitlements

I am writing to you in order to attempt to settle my claim for the outstanding entitlements that you owe me.

I have calculated that there is an outstanding amount of \$[insert amount] in respect of [insert outstanding contractual entitlement/s].

I have received legal advice and understand I can make a claim in the Magistrates Court for this outstanding amount.

**[Choose: Please choose between the following 2 sentences and delete the alternative sentence]:**

*Option 1 (include this ONLY IF you intend to do this, otherwise delete this sentence)*

If an agreement is not reached in relation to the above amounts I will commence legal proceedings against you.

**[OR]**

*Option 2 (say this if you are not sure whether you will take court action at this stage)*

To avoid the expense, stress and inconvenience to you of legal proceedings, an agreement in relation to my claim is required.

Please forward the outstanding amount to me within 14 days.

Yours sincerely

**[Insert: your name]**

## Related resources

- [Q&A: Minimum Conditions of Employment for WA Employees](#)
- [Q&A: Conciliation Conferences for WA Employees](#)

### Further information and assistance

#### Circle Green Community Legal

WA employees can request free and confidential legal assistance with employment and workplace discrimination issues from Circle Green Community Legal.

Complete an online request: [circlegreen.org.au/get-help](http://circlegreen.org.au/get-help)

Telephone enquiries: 08 6148 3636 (Please note that we do not provide on demand legal advice)

For further information on our Workplace law services, please visit: [circlegreen.org.au/workplace](http://circlegreen.org.au/workplace)

#### Commissions and Tribunals

##### Industrial Magistrates Court

Phone: 08 9420 4467

Email:

[electroniclodgement@imc.wa.gov.au](mailto:electroniclodgement@imc.wa.gov.au)

(for electronic lodgment only)

Web: <https://www.imc.wa.gov.au/>

#### Government departments & other supports

##### Fair Work Ombudsman

Phone: 13 13 94

Web: [www.fairwork.gov.au](http://www.fairwork.gov.au)

##### Wageline

Phone: 1300 655 266

Web: <https://www.dmirs.wa.gov.au/contactwageline>

#### Disclaimer:

This factsheet only contains general information. This factsheet is not legal advice and should not be relied on as a substitute for legal advice. You may wish to seek advice from a lawyer regarding your own particular circumstances. We are not responsible for any consequences arising from your use of, or reliance on, the information contained in this factsheet.

Further information about our disclaimer and your use of this factsheet can be found here: <https://circlegreen.org.au/disclaimer/>