

**BENCHBOOK**

**WAGE RECOVERY PROCESSES**

**IN THE**

**QUEENSLAND INDUSTRIAL RELATIONS  
COMMISSION; INDUSTRIAL MAGISTRATES  
COURT OF QUEENSLAND; and MAGISTRATES  
COURT OF QUEENSLAND**

***FAIR WORK ACT 2009 (CTH)***  
***INDUSTRIAL RELATIONS ACT 2016 (QLD)***  
***MAGISTRATES COURT ACT 1921 (QLD)***

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## CHAPTER 1 – INTRODUCTION TO WAGE THEFT AND WAGE RECOVERY PROCEEDINGS

### 1.1. Background

On 14 September 2021, the Queensland Parliament passed the *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020 (Wage Theft Act)*.

The Wage Theft Act provides for the Industrial Magistrates Court to hear wage recovery claims of unpaid amounts for employees in the Queensland industrial relations system<sup>1</sup> (e.g., public sector and other employees to which the *Industrial Relations Act 2016 (Qld)* applies) and fair work claims (including fair work small claims) for employees in the national workplace relations system<sup>2</sup> (e.g., private sector employees).

In order to provide a quick, simple, and low-cost wage recovery pathway designed to be accessible to self-represented litigants, the *Industrial Relations (Tribunals) Rules 2011 (Qld)* has the potential for parties to conduct proceedings informally and without being bound by the rules of evidence and procedure, depending upon the type and amount of the claim, if an offence is alleged, if pecuniary penalties are sought or if the parties consent.<sup>3</sup>

By the time parties reach the Industrial Magistrates Court, they may have already participated in or been offered an opportunity to conciliate. The Industrial Registrar (the Registrar) may refer parties to conciliation in the first instance, with the aim of resolving the matter or narrowing the issues in dispute prior to an Industrial Magistrates Court hearing the matter. Conciliation of a fair work claim or an unpaid amount claim will be conducted by a member of the Queensland Industrial Relations Commission (**QIRC**).

A party to a matter referred to conciliation may elect not to participate in the conciliation process. The party must notify the Registrar of this in accordance with the provisions of the *Industrial Relations Act 2016 (IR Act)*.

If the matter is not resolved at conciliation, the Industrial Registrar will notify the relevant Industrial Magistrates Court and refer the matter for hearing by the relevant Industrial Magistrates Court.<sup>4</sup> If the claim was originally filed at the QIRC, it will be referred to the Brisbane Magistrates Court to determine the relevant Magistrates Court. A Magistrates' Court Registrar (who is distinct from the Industrial Registrar) will in turn inform the Industrial Magistrates Court of this.

The wage recovery provisions of the Wage Theft Act commenced on 1 March 2021.

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<sup>1</sup> *Industrial Relations Act 2016 (Qld)* Chapter 11 Division 5A ss 547A – 547I.

<sup>2</sup> *Industrial Relations Act 2016 (Qld)* Chapter 11 Division 4 s 507A – 507J

<sup>3</sup> *Industrial Relations Act 2016 (Qld)* s 531 (if under \$50,000 or not for an offence), if parties elect under r 123R *Industrial Relations (Tribunals) Rules 2011 (Qld)*; or *Fair Work Act 2009 (Cth)* s 548 (small claims procedure in certain circumstances).

<sup>4</sup> *Industrial Relations (Tribunals) Rules 2011 (Qld)* r 123U.

The Wage Theft Act also introduced criminal penalties for the deliberate underpayment of an employee's workplace entitlements (wage theft) through amendments to the *Criminal Code Act 1899 (Qld)* (**Criminal Code**). The criminal sanctions for wage theft commenced on 14 September 2020.

## **WAGE RECOVERY ACTION**

### **1.2. Legislative scheme – civil remedy**

The Industrial Magistrates Court has jurisdiction throughout Queensland to exercise powers conferred on, or jurisdiction given to, Industrial Magistrates by the IR Act or another Act.<sup>5</sup>

The Industrial Magistrates Court is constituted by a Magistrate sitting alone. Any Queensland Magistrate or acting Magistrate may sit as an Industrial Magistrate.<sup>6</sup>

The Industrial Magistrates Court has jurisdiction<sup>7</sup> to hear and decide proceedings about:

- an offence under the IR Act (unless otherwise specified by a provision);
- a claim for wages;
- a claim for damages suffered by an employee because of the failure of the employer to pay the employee's wages;
- a claim for a repayment fee received by a private employment agent;
- a claim for damages for contravention of an agreement made under an industrial instrument; and
- a claim for unpaid wages arising from contracted work under Chapter 9, Division 2 of the IR Act.

The Wage Theft Act also amended the IR Act to utilise the jurisdiction of the Industrial Magistrates Court to hear and determine claims for work-related entitlements arising in the national workplace relations system under the *Fair Work Act 2009 (Cth)* (**FW Act**), in addition to claims for work related entitlements arising in the Queensland industrial relations system under the IR Act.

The Industrial Magistrates Court may hear wage recovery claims arising from breaches of the following laws or industrial instruments:

- FW Act;
- IR Act;
- modern awards, enterprise bargaining agreements and other registered agreements made under either the Queensland industrial relations system (i.e. the IR Act) or the national workplace relations system (i.e. the FW Act); and
- determinations of the QIRC or Fair Work Commission (**FWC**)

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<sup>5</sup> *Industrial Relations Act 2016 (Qld)* s 506(1)(a).

<sup>6</sup> *Industrial Relations Act 2016 (Qld)* s 505.

<sup>7</sup> *Industrial Relations Act 2016 (Qld)* s 506.

The *Industrial Relations (Tribunals) Rules 2011* (Qld) and its forms apply to the above types of claims. That is, the relevant forms approved for use under the *Industrial Relations (Tribunals) Rules 2011* (Qld) apply to proceedings for wage recovery (i.e., claims discussed in Chapters 2 to 5 of this benchbook). The *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) and its forms will continue to apply to employment claims (see Chapter 6 of this Benchbook). For prosecutions (discussed in Chapter 7 of this benchbook) or wage theft matters under the Criminal Code the relevant provisions of the Criminal Code and the forms under the *Justices Act 1886* (Qld) apply.

Whilst procedures for employment claims under the *Uniform Civil Procedure Rules 1999* (Qld) have been preserved, these are expected to be less common because the jurisdiction of the Magistrates Court to hear employment claims from national system employees is limited to claims that cannot be brought under s 539 of the FW Act. Similarly, the jurisdiction of the Magistrates Court to hear employment claims from Queensland industrial relations system employees is limited to claims for which the relevant cause of action is not within the jurisdiction of the QIRC.<sup>8</sup> (See Chapter 6 of this benchbook).

The Registrar of the Industrial Magistrates Court is the Industrial Registrar of the Industrial Court of Queensland and QIRC. Registry staff of the Magistrates Court provide assistance to Industrial Magistrates – and the Industrial Magistrates Court may direct that a settlement conference be held by a Registrar of a Magistrates Court<sup>9</sup> – but a Registrar of a Magistrates Court does not have the same powers as the Industrial Registrar.

### 1.2.1 Workplace relations systems

By way of overview, there are four components to the workplace relations system:

- 1) The National Employment Standards and National Minimum Wage Order determined through the Annual Wage Review; or the Queensland Employment Standards and QIRC Minimum Wage General Ruling determined through the State Wage Case (as the case may be) prescribe the minimum wage, conditions and other entitlements for all employees in the national workplace relations system and the Queensland industrial relations system respectively.
- 2) Awards set minimum pay and conditions for an industry or occupation and cover most employees in Australia;

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<sup>8</sup> *Magistrates Court Act 1921* (Qld) s 42B(2).

<sup>9</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123W(5).

- 3) Enterprise agreements or registered agreements, which are negotiated and approved through a formal process, set minimum pay and conditions for a particular workplace;
- 4) Employment contracts may provide additional conditions for an individual employee but cannot reduce or remove minimum entitlements

#### National workplace relations jurisdiction – ‘Fair Work’

There are two workplace relations jurisdictions operating within Queensland.

The national workplace relations system under the FW Act; and the Queensland industrial relations system under the IR Act. The national workplace relations system is sometimes referred to as the ‘Fair Work system’.

The national workplace relations system applies to all private sector employers and employees in Queensland.

Workplace entitlements under the national workplace relations system are provided in the National Employment Standards in the FW Act, modern awards made by the FWC, agreements approved by the FWC, workplace determinations of the FWC, and the national minimum wage order.

#### Queensland industrial relations system

Queensland’s industrial relations jurisdiction covers the State’s public sector and the local government sector, Parents and Citizens’ Associations and a small number of statutory bodies.

Workplace entitlements under the Queensland industrial relations system are provided in the Queensland Employment Standards in the IR Act, modern awards made by the QIRC, agreements certified by the QIRC, workplace determinations of the QIRC, and the Queensland minimum wage general ruling.<sup>10</sup>

### **1.2.2 Industrial instruments**

#### Modern awards

Modern awards in both the national workplace relations system and the Queensland industrial relations system contain terms and conditions of employment including rates of pay and hours of work. The majority of awards pertain to specific industries or occupations.

As at 30 August 2021, there are 122 modern awards in place in the national workplace relations system, which may be found at [Awards | Fair Work Commission \(fwc.gov.au\)](https://www.fwc.gov.au/awards).

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<sup>10</sup> *Industrial Relations Act 2016* (Qld) s 458(2).



As at 30 August 2021, there are 34 modern awards in place in the Queensland industrial relations system, which may be found at [Awards | Queensland Industrial Relations \(qirc.qld.gov.au\)](https://www.qirc.qld.gov.au/awards).

As the awards are varied or replaced from time to time, the above sites also contain links to the historical awards in force at the relevant times of employment.

### Registered agreements

Both the national workplace relations system and the Queensland industrial relations system provide for registered (or certified) workplace agreements. In the national workplace relations system, these agreements are negotiated between the employer and the employees in a particular business, or group of businesses or for a specific project. In the Queensland industrial relations system, a certified agreement is one negotiated between the employer and the relevant union. In the absence of a relevant union the agreement may be made with the relevant employees.

An agreement must be approved by and registered with the FWC (for national workplace relations system employers and employees); and certified by the QIRC (for Queensland industrial relations employers and employees).

Registered agreements in the national workplace relations system may be found at [Enterprise agreements | Fair Work Commission \(fwc.gov.au\)](https://www.fwc.gov.au/enterprise-agreements).

Certified agreements in the Queensland industrial relations system may be found at [Agreements | Queensland Industrial Relations \(qirc.qld.gov.au\)](https://www.qirc.qld.gov.au/agreements).

### Award and agreement free employees

The National Employment Standards and National Minimum Wage Order, or the Queensland Employment Standards and QIRC Minimum Wage General Ruling set a minimum wage and conditions for employment for all employees in the both the national workplace relations system and the Queensland industrial relations system.

In some cases, an employee may not be covered by a modern award or a registered or certified agreement. In these cases, the employment standards and minimum wage order/general ruling pertaining to the relevant jurisdiction will apply. Both jurisdictions provide that a modern award or registered or certified agreement will not provide for entitlements that are less than the relevant employment standards and minimum wage.

### Minimum Wage

Where a national system employee is not covered by an award or agreement, their minimum wage is set by the national minimum wage order, which is determined by the FWC Expert Panel in the Annual Wage Review (**AWR**). The AWR decision and order is operative from the 1 July each year.

The AWR decision and order is available at [Annual wage reviews | Fair Work Commission \(fwc.gov.au\)](https://www.fwc.gov.au/annual-wage-reviews).

Where a Queensland industrial relations system employee is not covered by an award or agreement, their minimum wage is set by the Queensland Minimum Wage General Ruling. This General Ruling is determined by a full bench of the QIRC through the annual State Wage Case (**SWC**). The AWR decision and order is operative from the 1 September each year.

The Queensland SWC decision and general ruling is available at [State wage cases | Queensland Industrial Relations \(qirc.qld.gov.au\)](https://www.qirc.qld.gov.au/state-wage-cases).

### Employment Standards

#### *National Employment Standards*

The National Employment Standards are found in Part 2-2 of the FW Act.<sup>11</sup> The national minimum wage and the National Employment Standards make up the minimum entitlements for employees in the national workplace relations jurisdiction. An award, employment contract, enterprise agreement or other registered agreement cannot provide for conditions that are less than the national minimum wage or the National Employment Standards, nor can those instruments exclude these standards.<sup>12</sup> The 11 National Employment Standards are

1. maximum weekly hours;
2. requests for flexible working arrangements;
3. offers and requests to convert from casual to permanent employment;
4. parental leave and related entitlements;
5. annual leave;
6. personal/carer's leave, compassionate leave and unpaid family and domestic violence leave;
7. community service leave;
8. long service leave;<sup>13</sup>
9. public holidays;

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<sup>11</sup> *Fair Work Act 2009* (Cth) s 61.

<sup>12</sup> *Fair Work Act 2009* (Cth) ss 55, 56, 306.

<sup>13</sup> Section 113 of the *Fair Work Act 2009* (Cth) preserves the application of State or Territory legislation that deals with long service leave (with limited exceptions). The Queensland Employment Standards provides for an employee's entitlement to long service leave in Chapter 2, Part 3, Division 9 of the *Industrial Relations Act 2016*. Section 8 of the *Industrial Relations Act 2016* provides that a national system employee is an employee for the purposes of Chapter 2, Part 3, Division 9.

10. notice of termination and redundancy pay;
11. Fair Work Information Statement and Casual Employment Information Statement.

Casual employees only get some national employment standard entitlements.

Further information on the national minimum wage and national employment standards is available at [National Employment Standards - Fair Work Ombudsman](#)

#### *Queensland Employment Standards*

The Queensland Employment Standards are found in Chapter 2, Part 3 of the IR Act. Similar to the National Employment Standards, the Queensland Employment Standards and the Queensland Minimum Wage General Ruling make up the minimum entitlements for employees in the Queensland industrial relations jurisdiction. A state jurisdiction award, employment contract, or certified agreement cannot provide for conditions that are less than the Queensland minimum wage or the Queensland Employment Standards, nor can those instruments exclude these standards. The Queensland Employment Standards are:

1. entitlement to the minimum wage;
2. maximum weekly hours;
3. flexible working arrangements;
4. annual leave;
5. personal leave (including sick leave, carer's leave, bereavement leave, compassionate leave, and cultural leave);
6. domestic and family violence leave;
7. parental leave;
8. long service leave;
9. public holidays;
10. emergency service leave;
11. jury service leave;
12. notice of termination and redundancy pay; and
13. the provision of information statements to a new employee.

Further information on the Queensland minimum wage and employment standards is available at [Awards and wages | Employment and jobs | Queensland Government \(www.qld.gov.au/jobs/entitlements/wages\)](http://www.qld.gov.au/jobs/entitlements/wages)

## **WAGE THEFT**

### **1.3. Legislative scheme – criminal sanctions**

The Wage Theft Act amendments defined the right of an employee to be paid an entitlement in relation to the performance of work as a form of special property. The Wage Theft Act amended the definition of ‘stealing’ under s 391 of the Criminal Code to provide that an amount of an employee’s lawful work entitlements is a thing capable of being stolen. The amendments to the Criminal Code passed with the Wage Theft Act also provide that conversion of the unpaid amount to the offender’s own use occurs when the amount is due to be paid to the employee (or other person on the employee’s behalf) under an Act, industrial instrument, or agreement, but is not paid.<sup>14</sup>

The Wage Theft Act also amended the Criminal Code to provide for a maximum of 10 years’ imprisonment for employers found to be stealing from their employees.

The existing Criminal Code offences of fraud (s 408C) and fraudulent falsification of records (s 430) are also applicable to conduct constituting wage theft. The Wage Theft Act amended the Criminal Code to provide that the maximum penalty for fraud will be 14 years imprisonment where the offender is or was an employer of the victim.

The amendments to the maximum penalties for the offences of stealing or fraud by an employer to an employee are consistent with the maximum penalties that currently apply to an employee who commits the same offence against their employer.

### **1.4. What is wage theft?**

‘*Wage theft*’ refers to the deliberate withholding of an amount payable to an employee by their employer in relation to the performance of work. The Criminal Code does not define ‘an amount payable to an employee in relation to the performance of work’, as the term is intended to capture wage theft arising through under- or non-payment of a broad range of workplace entitlements, including but not limited to:

- unpaid hours or underpayment of hours;
- unpaid penalty rates;
- unreasonable deductions;
- unpaid superannuation contributions;
- withholding entitlements;

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<sup>14</sup> *Criminal Code Act 1899* (Qld) s 391(6A), (7).

- underpayment through intentionally misclassifying a worker including incorrect award, incorrect classification, by 'sham contracting' or the misuse of the Australian Business Numbers; and
- authorised deductions that have not been applied as agreed.

An employee who believes they have been a victim of deliberate wage theft may report the conduct to the Queensland Police Service for investigation.

## CHAPTER 2 – WAGE RECOVERY

### 2.1 What is wage recovery?

'Wage recovery' is the process by which an employee can recover their unpaid entitlements (in either the national workplace relations system or the Queensland industrial relations system) through a court or tribunal.

There are various legislative pathways by which an employee can make a claim for unpaid entitlements.

The intention of the Wage Theft Act is **for the Industrial Magistrates Court to be the preferred pathway for wage recovery claims**, due to its jurisdiction to hear claims arising from instruments in either the national workplace relations system or Queensland's industrial relations system (as well as criminal matters).

A list of wage recovery claims that may be made in each court are as follows:

#### Industrial Magistrates Court

- Fair work claim (FW Act, s 539) (a fair work claim is detailed at Chapters 2.1 and 2.2 of this benchbook);
- Application for unpaid wages, tool allowance, unauthorised deductions made by an apprentice, trainee, employee, employee organisation or other authorised person acting for the employee (IR Act, s 379);
- Application for community service leave (including long service leave, jury service leave, or emergency service leave) by national system employee (IR Act, s 379);
- Application for unpaid superannuation made by an employee, employee organisation or an inspector (IR Act, s 396);
- Application for unpaid wages and superannuation by an employee, an employee organisation, an authorised person acting for the employee, or an inspector (IR Act, s 476) – Note: application is made to the QIRC and may be remitted to the Industrial Magistrates Court.

- Application for recovery of unpaid wages by an outworker (IR Act, s 386);
- Application for repayment of fees from a private employment agent by a work seeker, model, performer, or inspector (IR Act, s 402).

#### Magistrates Court

- Fair work claim (FW Act, s 539);
- Employment claim (*Magistrates Court Act 1921* (Qld), s 42B).

#### Queensland Industrial Relations Commission

- Application for unpaid wages and superannuation of no more than \$50,000 by an employee, an employee organisation, an authorised person acting for the employee, or an inspector (IR Act, s 475 and 476 (application made under s 475 by a person specified in s 476));
- Application for long service leave, jury service leave, or emergency service leave by national system employee (IR Act, s 475 and 476 (application made under s 475 by a person specified in s 476));
- Application for repayment of fees from a private employment agent by a work seeker, model, performer, or inspector (IR Act, s 403);
- Application for payment instead of taking long service leave (IR Act, s 475 and 476 (application made under s 475 by a person specified in s 476), s 110);
- Application for recovery of unpaid wages of no more than \$50,000 by an outworker (IR Act, s 386).

The hearing of certain claims in the QIRC may be remitted to an Industrial Magistrate by a QIRC Presidential member.

## **2.2 Who may make an order for wage recovery?**

An order for wage recovery may be made by a Magistrate, Industrial Magistrate, or Commissioner of the QIRC. The power under which an order for wage recovery may be made, and who may make it, is contingent on the type of application for recovery giving rise to the order.

## **'FAIR WORK' CLAIMS**

### **2.3 What is a fair work claim?**

A fair work claim refers to an application for orders in relation to a contravention of a civil remedy provision under s 539 of the FW Act. Core civil remedy provisions under s 539 include provisions relating to contraventions of entitlements to national employment standards under the FW Act and contraventions of a '*fair work instrument*' which includes a federal modern award, enterprise agreement, workplace determination or order of the FWC.<sup>15</sup> An FWC order includes the national minimum wage order.

### **2.4 What is a fair work small claim?**

A '*fair work small claim*' is a type of fair work claim. A fair work small claim refers to an application for orders in relation to a contravention of a civil remedy provision under s 539 of the FW Act, where the applicant has indicated that the application is to be heard using the small claims procedure under s 548 of the FW Act. A relevant court, either a Magistrates Court, Industrial Magistrates Court, or the Federal Circuit Court, may hear a small claim proceeding.<sup>16</sup>

In a fair work small claim proceeding, a relevant court may not award an amount of more than \$100,000, or a higher amount if one is so prescribed by the *Fair Work Regulations 2009*.<sup>17</sup> In these matters, a relevant court is not required to be bound by any rules of evidence and procedure and as such, proceedings may be conducted in an informal manner, and without regard to legal forms and technicalities.<sup>18</sup>

A party to a small claim proceeding may only have access to legal representation with the leave of the relevant court.<sup>19</sup> Representation in small claims proceedings is further discussed in paragraph 2.7.

A party to a small claim proceeding may only be represented by an industrial organisation with the leave of the relevant court.<sup>20</sup> However, paragraph 2.6 outlines when an industrial organisation may bring a claim directly on behalf of an employee.

### **2.5 Jurisdiction (*Fair Work Act 2009 (Cth)*, ss 539, 548)**

Section 545(3) of the FW Act vests jurisdiction in eligible State and Territory courts to hear and determine applications for orders in relation to contraventions of civil remedy provisions (a 'fair work' claim) made under s 539.

<sup>15</sup> *Fair Work Act 2009 (Cth)* s 12.

<sup>16</sup> *Fair Work Act 2009 (Cth)* s 548(1)(a).

<sup>17</sup> *Fair Work Act 2009 (Cth)* s 548(2).

<sup>18</sup> *Fair Work Act 2009 (Cth)* s 548(3).

<sup>19</sup> *Fair Work Act 2009 (Cth)* s 548(5).

<sup>20</sup> *Fair Work Act 2009 (Cth)* s 548(8); *Fair Work Regulations 2009 (Cth)* reg 4.01(4).

Under s 12 of the FW Act, a Magistrates Court, which includes a court constituted by an Industrial Magistrate (an Industrial Magistrates Court), is an eligible State court. There is no monetary limit on jurisdiction imposed.

While the Magistrates Court may hear a fair work claim, it is expected that the Industrial Magistrates Court will be the preferred forum for such claims, particularly as there is no filing fee. As any Queensland Magistrate or acting Magistrate may sit as an Industrial Magistrate,<sup>21</sup> the main impact will be at the registry and appellate level.

The Industrial Magistrates Court is established as a court of record under s 503 of the IR Act. The IR Act also does not impose a monetary limit on the jurisdiction of the Industrial Magistrates Court. The Magistrates Courts of Queensland are continued as formerly established courts of record under s 22 of the *Justices Act 1886* (Qld).

## 2.6 Where can a fair work claim be made?

A 'fair work claim' may be made in the Industrial Magistrates Court or in the Magistrates Court.<sup>22</sup>

## 2.7 What is a simplified procedure?

Simplified procedures are that the Court:

- is not bound by laws of evidence or procedure;
- may act in an informal manner; and
- may act without regard to legal forms and technicalities.

Simplified procedures may be elected for a fair work small claim. To elect to use simplified proceedings in a fair work small claim, the applicant must indicate that they want the small claims procedure to apply to the proceeding.<sup>23</sup> However, simplified procedures do not apply if a pecuniary penalty is claimed.<sup>24</sup>

For fair work small claims brought in the Industrial Magistrates Court, the application form (Form 90 – Fair Work Claim) includes a box that may be marked if the applicant elects to have the proceedings dealt with under the Court's small claims procedures.

Simplified procedures are not available for fair work claims over the small claim threshold of \$100,000.<sup>25</sup>

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<sup>21</sup> *Industrial Relations Act 2016* (Qld) s 505.

<sup>22</sup> *Fair Work Act 2009* (Cth) s 548(1)(a).

<sup>23</sup> *Fair Work Act 2009* (Cth) s 548(1)(c), *Fair Work Regulations 2009* (Cth) r 4.01(1).

<sup>24</sup> *Fair Work Act 2009* (Cth) s 548(1)(a).

<sup>25</sup> *Fair Work Act 2009* (Cth) s 551.



## 2.8 Who may make a fair work claim?

Persons employed in the national workplace relations system may make a fair work claim in either a Magistrates Court or in the Industrial Magistrates Court.

An application in the Magistrates Court for a fair work claim may also be made by:

- an employee organisation acting for an employee affected by a contravention, and who is entitled to be represented by that organisation; or
- a person authorised by an eligible employee to make an application acting on the employee's behalf.

In the Industrial Magistrates Court, in addition to the relevant employee, an application for a fair work claim may be made by:

- an employee organisation acting for an employee affected by a contravention, and who is entitled to be represented by that organisation; or
- a person authorised by an eligible employee to make an application acting on the employee's behalf.

## 2.9 Representation

In a fair work claim in the Magistrates Court, a party may be represented by a lawyer or a relevant organisation. With leave of the court, a party may also be represented by another person.

A party to a small claim proceeding may only be represented by an industrial organisation with the leave of the relevant court.<sup>26</sup> Paragraph 2.8 outlines when an industrial organization may bring a claim directly on behalf of an employee.

In a fair work claim in the Industrial Magistrates Court, a party may be represented by a lawyer, only if all parties consent or by leave of the Court.<sup>27</sup> A party may be represented by an agent appointed in writing, or an industrial organisation.<sup>28</sup>

In a fair work small claim, a party may only have access to legal representation with the leave of the relevant court.<sup>29</sup>

In a fair work small claim proceeding in the Industrial Magistrates Court, a party may be represented by an official of an industrial organisation;<sup>30</sup> or by an industrial organisation

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<sup>26</sup> *Fair Work Act 2009* (Cth) s 548(8); *Fair Work Regulations 2009* (Cth) reg 4.01(4).

<sup>27</sup> *Fair Work Act 2009* (Cth) s 548; *Industrial Relations Act 2016* (Qld) s 530(1)(e).

<sup>28</sup> *Industrial Relations Act 2016* (Qld) ss 529, 507J.

<sup>29</sup> *Fair Work Act 2009* (Cth) s 548(5).

<sup>30</sup> *Industrial Relations Act 2016* (Qld) s 507J.

with the leave of the relevant court.<sup>31</sup>

Unless a specific provision (above) applies, a party to a proceeding may be represented by lawyer, agent or, if the party is an organisation or association, an officer or member of the organisation or association.<sup>32</sup>

A schedule of representation rights in various proceedings is included at Appendix A to this benchbook.

Even if not binding, the approach and considerations cited in *Fitzgerald v Woolworths Limited*<sup>33</sup> in relation to the grant of leave are not without influence.<sup>34</sup> In that case, it was held that legal representation may extend not only to advocacy in a conference or hearing but also to some other aspects of the matter including listings and the preparation of submissions.

For matters in the Magistrates Court at least, the grant or extent of leave may also depend upon whether the activities would constitute an offence pursuant to section 24 of the *Legal Profession Act 2007* (LPA) (for example, cross-examination).<sup>35</sup>

## 2.10 What orders may be made?

The Industrial Magistrates Court may make an order for an employer to pay an amount to an employee, or on behalf of an employee, if the court is satisfied that the employer was required to pay the amount under a fair work instrument, and that the employer has contravened a civil remedy provision by failing to pay the amount.<sup>36</sup>

## 2.11 Enforcement of orders

Orders for the recovery of an amount awarded by the Industrial Magistrates Court may be recovered as a debt on filing of a certificate issued by the Industrial Registrar or the Registrar of the Magistrates Court in a court of competent jurisdiction in an action for recovery of the debt.<sup>37</sup> The order evidenced by the filed certificate is then enforceable as an order made by the court in which the certificate was filed.<sup>38</sup>

Orders for the recovery of an amount awarded by the Magistrates Court may be recovered against specific property if the order states this expressly;<sup>39</sup> or if an enforcement warrant is granted from an enforcement hearing application.<sup>40</sup> If the order

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<sup>31</sup> *Fair Work Act 2009* (Cth) s 548(8); *Fair Work Regulations 2009* (Cth) reg 4.01(4).

<sup>32</sup> *Industrial Relations (Tribunals) Rules 2016* (Qld) r 124.

<sup>33</sup> *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797, [54].

<sup>34</sup> *Kilby v Harrison; Saxon Energy Services Australia Pty Ltd v Harrison* [2019] ICQ 21.

<sup>35</sup> *Naskam Security v Retail Developments* (unreported, Magistrate Callaghan, M16/20, 26 June 2010).

<sup>36</sup> *Fair Work Act 2009* (Cth) s 545(3).

<sup>37</sup> *Industrial Relations Act 2016* (Qld) s 546.

<sup>38</sup> *Industrial Relations Act 2016* (Qld) s 546(3).

<sup>39</sup> *Justices Act 1886* (Qld) s 161.

<sup>40</sup> *Uniform Civil Procedure Rules 1999*, Chapter 19.

is to be enforced in another court, the enforcement creditor is to file a sealed copy of the judgment in the preferred courthouse and apply for an enforcement hearing in the relevant court.<sup>41</sup>

An application to the Magistrates Court or Industrial Magistrates Court for enforcement of a judgment or money order may be made within 6 years after the day the order was made, or later with leave of the court.<sup>42</sup>

## 2.12 Limits to monetary compensation

There is no statutory limit to the sum that a relevant court may award in a fair work claim, other than in a fair work small claim. A relevant court hearing a fair work small claim may not award more than \$100,000 (or a higher amount prescribed by the *Fair Work Regulations 2009* (Cth)).<sup>43</sup>

## 2.13 Time limit

A relevant court must not make an order in relation to an underpayment that relates to a period that is more than six (6) years before the proceedings concerned commenced.<sup>44</sup>

## 2.14 Penalties

If satisfied that a person has contravened a civil remedy provision, the relevant court may order a person to pay a pecuniary penalty that the relevant court considers is appropriate. An order to pay a pecuniary penalty may be made on application by the plaintiff.<sup>45</sup> However, a pecuniary penalty cannot be applied for during simplified procedures.<sup>46</sup>

The maximum pecuniary penalty that may be ordered is dependent on the particular civil remedy provision to which the proceeding relates. Column 4 of s 539 of the FW Act sets out the corresponding maximum penalties for each civil remedy provision.

If a person is an individual, the court may order payment of a pecuniary penalty of no more than the maximum number of penalty units set out in Column 4 of s 539. If the person is a body corporate, the court may order payment of a pecuniary penalty of no more than five times the relevant number of penalty units applicable to the contravention.<sup>47</sup>

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<sup>41</sup> *Uniform Civil Procedure Rules 1999* (Qld) rr 802, 807.

<sup>42</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 799; *Industrial Relations Act* (Qld) s 544(2)-(3).

<sup>43</sup> *Fair Work Act 2009* (Cth) s 548(2).

<sup>44</sup> *Fair Work Act 2009* (Cth) s 545(5).

<sup>45</sup> *Fair Work Act 2009* (Cth) s 546(1).

<sup>46</sup> *Fair Work Act 2009* (Cth) s 548(1)(a).

<sup>47</sup> *Fair Work Act 2009* (Cth) s 546(2).

The court may order that the penalty sum be paid to a person, an organisation, or the Commonwealth.<sup>48</sup> A penalty sum is ordinarily to be awarded to the successful applicant,<sup>49</sup> or otherwise to the initiating party<sup>50</sup> or the organisation on whose behalf the initiating party has acted.<sup>51</sup> Where a successful applicant brings a proceeding on their own behalf, the court should exercise the discretion under s 546(3) of the FW Act to make any penalty payable to the individual applicant.<sup>52</sup> Where a successful applicant has brought the proceeding on behalf of an organisation (e.g. a union) for the benefit of the organisation and the organisation has borne the costs of the proceeding, the penalty should be made payable to the organisation.<sup>53</sup>

Parties may make submissions in respect of the quantum of penalties, including in respect of proposed agreed penalties, for which it is desirable for the court to accept the parties' proposed agreement should it be satisfied that the agreed penalties are appropriate.<sup>54</sup>

The primary purpose of a pecuniary penalty for a civil remedy contravention is deterrence.<sup>55</sup> The quantum of the penalty should reflect the nature, quality and duration of the contravening conduct, as well as the need for specific and/or general deterrence with regard to the particular circumstances of the matter.

A penalty which is ordered against a respondent for multiple proven contraventions should reflect the totality of the offending conduct, in order to ensure proportionality between the contravention and penalty, and to prevent the imposition of a penalty that would be crushing or oppressive to the respondent.<sup>56</sup> One way the totality principle can be given effect is to determine what is an appropriate total penalty and then divide that penalty by the number of offences to produce a penalty for each separate offence.<sup>57</sup> An alternative method involves the determination of appropriate penalties for each contravention, followed by consideration of the aggregate figure with a view to ensuring that the penalty is an appropriate response to the conduct which led to the breaches.<sup>58</sup>

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<sup>48</sup> *Fair Work Act 2009* (Cth) s 546(3).

<sup>49</sup> *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4 at [101].

<sup>50</sup> *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* [2008] FCAFC 170; 171 FCR 357 at [44].

<sup>51</sup> *Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553; 37 FCR 216 at 223-4.

<sup>52</sup> *Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)* [2016] FCA 244 at [44].

<sup>53</sup> *Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553; 37 FCR 216 at 223-4.

<sup>54</sup> *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482.

<sup>55</sup> *Ibid* at [55]; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 249 FCR 458 at [90].

<sup>56</sup> *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 at [30].

<sup>57</sup> *CPSU v Telstra Corporation Limited* [2001] FCA 1364; (2001) 108 IR 228 at 230 [7].

<sup>58</sup> *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 53; *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65 at [145].

The following considerations may be relevant in determining if a penalty should be imposed, and if so, the amount of the penalty:

- the nature and extent of the conduct which led to the breaches;
- the circumstances in which the conduct took place;
- the nature and extent of any loss and damage sustained as a result of the breaches;
- whether there had been similar previous conduct by the respondent;
- whether the breaches were properly distinct or arose out of the one course of conduct;
- the size of the business enterprise involved;
- whether or not the breaches were deliberate;
- whether senior management were involved in the breaches;
- whether the party committing the breach had taken corrective action;
- whether the party committing the breach had cooperated with the enforcement authorities;
- the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- the need for specific and general deterrence.<sup>59</sup>

The weight which should be given to the above factors will vary depending on the circumstances of the case and is a matter for the court's discretion.

Capacity of a respondent to satisfy a judgment debt is a relevant factor, however it is less relevant than general deterrence.<sup>60</sup> In considering the appropriate penalty (if any) for a proven contravention by a corporation which is, or may be placed in liquidation, it is a matter for the court's discretion to determine whether it is satisfied that the imposition of a penalty is still capable of having a deterrent effect, whether specific or general.<sup>61</sup>

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<sup>59</sup> *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7.

<sup>60</sup> *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70; 168 FCR 383 at [69]; *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown* [2017] FCA 1301 at [107].

<sup>61</sup> *Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)* [2016] FCA 244 at [19].

Regarding the need for general and/or specific deterrence in calculation of quantum of penalties, courts have given consideration to the following factors:

a. *The nature of the industry in which the contraventions occurred*

Evidence indicating a substantial problem with compliance may be a significant and weighty consideration, particularly where the question of general deterrence arises in the context of an industry with a vulnerable workforce (characteristics of which may include youth, transience, low levels of English-language proficiency, and a high proportion of casual workers). The potential for exploitation of such a workforce, combined with the workers weak bargaining position and limited ability to complain or seek rectification, requires penalties of a scale that will help to deter the relevant respondent/s and other employers in the industry.<sup>62</sup> General deterrence is of particular importance in such circumstances, and may warrant the imposition of significant penalties despite a comparatively low value of the entitlements for which recovery is sought.<sup>63</sup>

b. *Why the contraventions occurred*

The reasons why the contravening conduct occurred should be given significant weight. Contravening conduct which has been deliberately pursued may increase the need for specific deterrence, such as where the offending conduct is systemic; forms part of the respondent's business model; or involves fraud or attempted concealment of the contravention/s.<sup>64</sup> Conversely, the court may reduce a penalty where the contravention occurred due to genuine mistake.<sup>65</sup>

c. *Contrition and corrective action*

In considering the need for specific deterrence, the court may take into account whether a respondent has shown contrition for its contravening conduct and whether corrective action was taken by the respondent. The making of payments to an applicant to rectify a contravention or pursuant to a court order may not be conduct regarded by the court as contrition.<sup>66</sup> Remorse may be evidenced by a respondent's actions to prevent further contraventions (e.g., audits),<sup>67</sup> admissions of the contravention/s at an early stage of the proceedings and agreement on appropriate penalties,<sup>68</sup> and cooperation with workplace authorities on becoming aware of the contravention/s.<sup>69</sup>

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<sup>62</sup> *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown* [2017] FCA 1301 at [134].

<sup>63</sup> *Fair Work Ombudsman v Hu (No 3)* [2020] FCA 936

<sup>64</sup> *Fair Work Ombudsman v HSCC Pty Ltd* [2020] FCA 655.

<sup>65</sup> *Australia Education Union v Yooralla (No.2)* [2020] FCCA 1659 at [69].

<sup>66</sup> *Ibid* at [55].

<sup>67</sup> *Ibid* at [57].

<sup>68</sup> *Fair Work Ombudsman v Hu (No 3)* [2020] FCA 936 at [16].

<sup>69</sup> *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 at [26].

## 2.15 Orders for costs

The court may only order a party to pay costs incurred by another party to the proceedings if the court is satisfied that the party instituted proceedings vexatiously or without reasonable cause; that the party's unreasonable act or omission caused the other party to incur the costs; or that the party unreasonably refused to participate in a matter before the relevant court and the matter arise from the same facts as the proceedings.<sup>70</sup>

## 2.16 Procedures for commencing a wage recovery

### 2.16.1 Starting a fair work claim

In the Industrial Magistrates Court, a fair work claim is commenced by filing the approved form (Form 90) in the industrial registry by hand, by post, or by email. The approved form may also be filed in a registry of a Magistrates Court.<sup>71</sup> An application filed in the registry of a Magistrates Court must be forwarded by the registry to the industrial registry as soon as practicable.<sup>72</sup>

The application does not need to be witnessed by a Justice of the Peace.<sup>73</sup> There is no fee attached to the filing of the approved form (Form 90).

If a proceeding for a fair work claim has been commenced in the Brisbane Industrial Magistrates Court, the Court may order that the proceeding be transferred to another Industrial Magistrates Court if satisfied that the claim could be dealt with more fairly or conveniently. The Industrial Magistrates Court may make such an order on its own initiative or on application by a party to the proceeding.<sup>74</sup>

For fair work claims in an Industrial Magistrates Court, the Court may make a directions order about the conduct of the proceeding on its own initiative or on request of a party to the proceeding.<sup>75</sup>

If brought in the Magistrates Court instead, a fair work claim is commenced by filing the approved form (Form 2 –UCPR) in the registry of a Magistrates Court. A fee applies to the filing of the approved form.

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<sup>70</sup> *Fair Work Act 2009* (Cwth) s 570(2).

<sup>71</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123P(1).

<sup>72</sup> *Ibid* r 123P(2).

<sup>73</sup> *Ibid* r 123O.

<sup>74</sup> *Ibid* r 123Q.

<sup>75</sup> *Ibid*, r 113.

## 2.16.2 Conciliation and settlement conferences

### Conciliation

Prior to the fair work claim being heard in the Industrial Magistrates Court, parties may be referred by the Industrial Registrar to participate in voluntary conciliation.<sup>76</sup> The conciliation for wage recovery matters will be conducted by a Member of the QIRC.

A party who does not wish to participate in conciliation must inform the Industrial Registrar as soon as practicable and before the conciliation conference begins.<sup>77</sup> Once an objection to conciliate is received, the Industrial Registrar notifies the relevant Industrial Magistrates Court that the conciliation is not proceeding and refers the matter for hearing by an Industrial Magistrate.<sup>78</sup>

If a conciliation conference is conducted, a conciliation certificate must be filed with the Industrial Registrar and a copy given to the parties.<sup>79</sup>

If the parties reach an agreement in conciliation, the conciliator must ensure that the agreement is recorded in writing and signed by each party.<sup>80</sup> Unless the parties otherwise agree, the agreement must be placed in a sealed container (e.g. an envelope); marked with the file number and the text '*Not to be opened without an order of an Industrial Magistrates Court*'; and given to the Industrial Registrar who then posts the conciliation agreement and conciliation certificate to the Industrial Magistrates Court where the matter was originally filed.<sup>81</sup>

Once the conciliation certificate has been filed with the Registrar, a party may apply to the Industrial Magistrates Court for an order giving effect to an agreement reached in conciliation, and the Court may make any such order considered appropriate in the circumstances.<sup>82</sup>

If a conciliation is unsuccessful, the Industrial Registrar notifies the relevant Industrial Magistrates Court that the conciliation has been unsuccessful and refers the matter for hearing by an Industrial Magistrate.

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<sup>76</sup> *Industrial Relations Act 2016* (Qld) s 507C(2).

<sup>77</sup> *Industrial Relations Act 2016* (Qld) s 507C(4).

<sup>78</sup> *Industrial Relations Act 2016* (Qld) s 507C(5).

<sup>79</sup> *Industrial Relations Act 2016* (Qld) s 507F(1); *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123S(1).

<sup>80</sup> *Industrial Relations Act 2016* (Qld) s 507G.

<sup>81</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123T.

<sup>82</sup> *Industrial Relations Act 2016* (Qld) s 507H.



Unless the parties agree otherwise, evidence of anything said or done during the conciliation process of a fair work claim will be inadmissible at the hearing of the claim, or anywhere else (excluding a proceeding founded on fraud alleged to be related to the conciliation process).<sup>83</sup>

A fair work claim commenced in the Magistrates Court has no access to conciliation conducted by members of the QIRC.

### Settlement conferences

Conciliation is not a feature of fair work claim proceedings in the Magistrates Court. However, under r 523 of the UCPR the Magistrates Court may direct that a settlement conference be held.

For a fair work claim being heard in the Industrial Magistrates Court, an Industrial Magistrate may direct that a settlement conference be held at any time after commencement of the proceeding.<sup>84</sup> For claims where the parties have previously been referred to conciliation, the Industrial Magistrate may only make such a direction if a party elected not to participate in conciliation, or if the conciliation has finished.<sup>85</sup>

Once a settlement conference is held, the Industrial Magistrates Court may direct that further conferences be held.<sup>86</sup> The Industrial Magistrates Court may also direct that the settlement conference be held by a Registrar of the Magistrates Court,<sup>87</sup> and once held, the Registrar may then make recommendations to the Industrial Magistrates Court about the conduct of the proceeding, including the holding of any further settlement conference.<sup>88</sup>

This is akin to the Settlement Conferences that the Registrar conducts under Rule 523 of the UCPR for employment claims, but the Magistrates Court Registrar has more limited powers to make orders and directions in respect of fair work claims as they do not constitute a court.

In a settlement conference for a fair work claim held by the Industrial Magistrates Court, the parties may be represented by a lawyer with the consent of all parties or by leave of the Court.<sup>89</sup> A party may still be represented by an agent appointed in writing, or an industrial organisation.<sup>90</sup> In a settlement conference for a fair work small claim held by

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<sup>83</sup> *Industrial Relations Act 2016* (Qld) s 507I.

<sup>84</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123W(1).

<sup>85</sup> *Ibid* r 123W(2).

<sup>86</sup> *Ibid* r 123X(3).

<sup>87</sup> *Ibid* r 123W(5).

<sup>88</sup> *Ibid* r 123X(4).

<sup>89</sup> *Fair Work Act 2009* (Cth) s 548; *Industrial Relations Act 2016* (Qld) s 530(1)(e).

<sup>90</sup> *Industrial Relations Act 2016* (Qld) ss 529, 507J.

the Industrial Magistrates Court, a party may only have access to legal representation with the leave of the Court,<sup>91</sup> and may be represented by an official of an industrial organisation or by an industrial organisation with the leave of the Court.<sup>92</sup>

If the settlement conference is being held by a Registrar of the Magistrates Court, the Registrar may give leave for a party to be legally represented, though any legal representation allowed by a Registrar of a Magistrates Court would not extend beyond the settlement conference.

If the Industrial Magistrates Court holds a settlement conference, the Court may consider any matter that may help dispose of the proceeding, including but not limited to: the possibility of settling the proceeding without a hearing; the simplification of the issues; and the possibility of obtaining admissions that may facilitate a hearing or reduce costs.<sup>93</sup> At a settlement conference, parties may sign a memorandum of the conference's results, including any admissions made by the parties,<sup>94</sup> and the Court may make any necessary orders to give effect to such a memorandum.<sup>95</sup> The Industrial Magistrates Court must record any formal orders it makes at a settlement conference, but must not otherwise keep a record of anything discussed at the conference.<sup>96</sup>

If the Industrial Magistrates Court directs a party to attend a settlement conference and the party fails to attend, the Court may make the following orders (if satisfied that the party who failed to attend was given notice of the date, time, and place of the conference):

- If the party is the applicant, the Industrial Magistrates Court may stay or dismiss the proceeding; or
- If the party is a respondent and the relevant claim discloses a sufficient cause of action, the Industrial Magistrates Court may decide the proceeding by making an order or decision considered appropriate by the Court.<sup>97</sup>

If a matter is not settled in conference, standard practice is for a directions hearing to be held, where the Industrial Magistrate may then make directions for any further conferences to be held.

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<sup>91</sup> *Fair Work Act 2009* (Cth) s 548(5).

<sup>92</sup> *Fair Work Act 2009* (Cth) s 548(8); *Fair Work Regulations 2009* (Cth) r 4.01(4); *Industrial Relations Act 2016* (Qld) s 507J.

<sup>93</sup> *Ibid* r 123W(3).

<sup>94</sup> *Ibid* r 123X(6).

<sup>95</sup> *Ibid* r 123X(8).

<sup>96</sup> *Ibid* r 123X(9).

<sup>97</sup> *Ibid* r 123Y(2).

### 2.16.3 Hearing of fair work claims

A proceeding for a fair work claim in the Industrial Magistrates Court is to be heard in accordance with the *Industrial Relations (Tribunals) Rules* (Qld) r 123Z. This rule provides that:

- The Industrial Magistrates Court may hear the proceeding in private, and must make a record of the evidence given; and
- Parties must ensure that all documents directly relevant to the proceeding are available at the hearing.

If the Industrial Magistrates Court hears and determines a proceeding for a fair work claim, the Court must give a copy of the order endorsing the decision to the industrial registry, as well as to the parties,<sup>98</sup> as soon as practicable after the order is endorsed.<sup>99</sup>

### 2.16.4 Appeals of fair work claims

A decision of the Industrial Magistrates Court about a fair work claim may be appealed to the Industrial Court of Queensland, or to the Federal Court of Australia.<sup>100</sup> The Industrial Court may: dismiss the appeal; allow the appeal, set it aside and substitute with another decision; allow the appeal and amend the decision; or the matter can be remitted.<sup>101</sup> Appeals to the Industrial Court must be made within 21 days from the date the decision was released and be made in accordance with the rules.<sup>102</sup>

A decision of the Industrial Court of Queensland about a fair work claim may be appealed to the Federal Court of Australia.<sup>103</sup> Appeals to the Federal Court of Australia must be filed and served within 28 days of the decision.<sup>104</sup> The FW Act does not limit the Federal Court's powers under sections 21 to 23 of the *Federal Court of Australia Act 1976* (Cth).<sup>105</sup>

A decision of a Magistrates Court about a fair work claim may be appealed to the District Court of Queensland, or to the Federal Court of Australia.<sup>106</sup> A decision of the District Court of Queensland about a fair work claim may be appealed to the Federal Court of Australia.<sup>107</sup>

<sup>98</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123Z(3).

<sup>99</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123ZA.

<sup>100</sup> *Fair Work Act 2009* (Cth) ss 565(1), 565(1A)(a); *Industrial Relations Act* (Qld) s 556.

<sup>101</sup> *Industrial Relations Act* (Qld) s 558.

<sup>102</sup> *Industrial Relations Act* (Qld) s 564; *Industrial Relations (Tribunals) Rules 2011* r 144.

<sup>103</sup> *Fair Work Act 2009* (Cth) s 565(1B).

<sup>104</sup> *Federal Court Rules 2011* (Cth) r 36.03.

<sup>105</sup> *Fair Work Act 2009* (Cth) s 564.

<sup>106</sup> *Fair Work Act 2009* (Cth) ss 565(1), 565(1A)(a); *Magistrates Court Act 1921* (Qld) s 45.

<sup>107</sup> *Fair Work Act 2009* (Cth) s 565(1B).

### 2.16.5 Forms

- Fair work claim in the Industrial Magistrates Court – Form 90 available on the QIRC website
- Response to claim or application – Form 91 available on the QIRC website
- Further particulars of the claim – Form 92 available on the QIRC website
- Application in existing proceedings – Form 93 available on the QIRC website
- Affidavit – Form 94 available on the QIRC website
- Certificate of Exhibit to Affidavit – Form 94A available on the QIRC website
- Amended application – Form 95 available on the QIRC website
- Memorandum of Agreement of Settlement Conference – Form 96 available on the QIRC website
- Recommendations following settlement conference – Form 97 available on the QIRC website
- Request for Consent Order – Form 98 available on the QIRC website
- Certificate of amount to be paid under order – Form 99 available on the QIRC website
- Order – Form 99A available on the QIRC website
- Request to discontinue proceedings – Form 100 available on the QIRC website
- Fair work claim in Magistrates Court – Form 2 (UCPR) available on the Queensland Courts website

### 2.16.6 Practice Directions

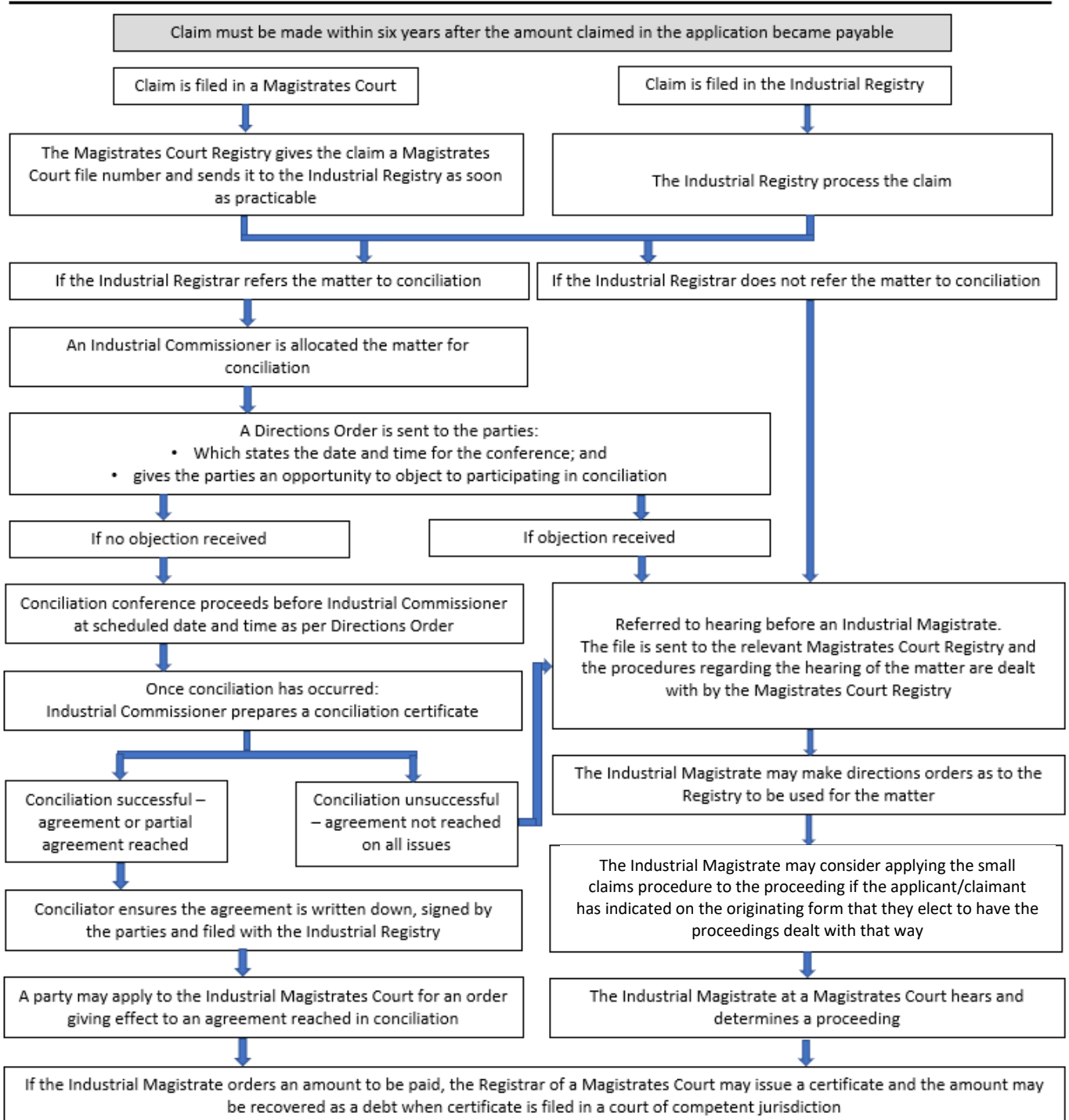
There are no specific practice directions at this time.

2.16.8 A flowchart to illustrate the steps of a fair work claim.

i. Fair work claim in the Industrial Magistrates Court

**Fair Work Claim – Form 90 – Industrial Magistrates Court**

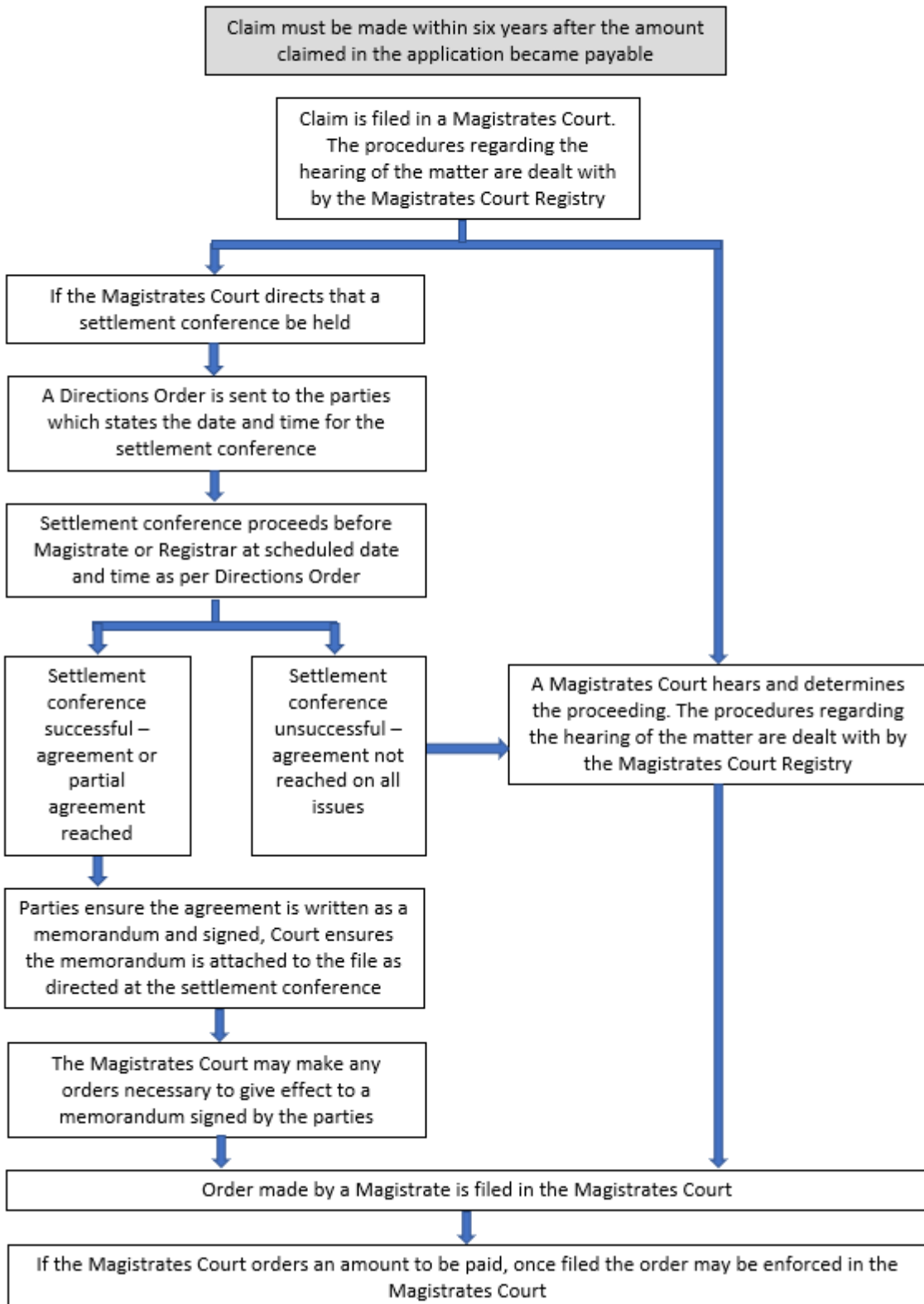
*Fair Work Act 2009 (Cth), Chapter 4, Part 4-1;  
Industrial Relations Act 2016 (Qld), Chapter 11, Part 3, Division 4; and  
Industrial Relations (Tribunals) Rules 2011 (Qld), rule 123P*



ii. Fair work claim in the Magistrates Court

### Fair Work Claim – Form 2 (UCPR) Magistrates Court

*Fair Work Act 2009 (Cth) Chapter 4, Part 4-1;  
Uniform Civil Procedure Rules 1999 (Qld)*



## CHAPTER 3 – WAGE RECOVERY - QUEENSLAND INDUSTRIAL RELATIONS SYSTEM CLAIMS

### 3.1 Wage recovery claims in the Industrial Magistrates Court

The Industrial Magistrates Court is empowered to hear matters relating to various types of underpayment and non-payments. These actions are either civil or quasi-criminal matters. The actions that may be commenced under IR Act include an unpaid amount claim under ss 379, 386, 396 and 402. Actions may be commenced in the Industrial Magistrates Court under s 539 of the FW Act. An Industrial Magistrates Court may also hear a claim for damages suffered by an employee because of the employer failing to pay the employee's wages.<sup>108</sup>

Further detail is provided in Chapters 5 and 7 of this benchbook.

### 3.2 Wage recovery claims in the Queensland Industrial Relations Commission

The QIRC is empowered to hear matters relating to underpayment and non-payment of wages under ss 386, 403, 110 and 475 of the IR Act. Matters under ss 475, 476 and 403 may be referred by a presidential member to an Industrial Magistrate to be heard and determined as if brought before the QIRC and a decision made in relation to the matter is taken to be an order of the QIRC.

Further detail is provided in Chapter 4 of this benchbook.

### 3.3 Wage recovery claims in the Magistrates Court

An employment claim may be made in the Magistrates Court. An employment claim is a claim an employee can make to recover monies arising out of a breach of contract with an employer. An employment claim is commenced under s 42B of the *Magistrates Court Act 1921* (Qld) and excludes those claims that may otherwise be made under s 539 of the FW Act or claims that may be otherwise made under the IR Act.

Further detail in relation to employment claims is provided in Chapter 6 of this benchbook.

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<sup>108</sup> *Industrial Relations Act 2016* (Qld) s 506(1)(b)(iii).

## CHAPTER 4 – WAGE RECOVERY – UNPAID WAGES MATTERS IN THE QIRC

### 4.1 Jurisdiction (*Industrial Relations Act 2016* (Qld) ss 386, 403, 475, 476)

The QIRC has the jurisdiction under the IR Act to hear and determine applications for orders in relation to the following methods of recovery for unpaid wages claims:

- recovery of unpaid wages from the apparent employer of an outworker (i.e. a person engaged, for someone else's calling or business, in or about a private residence or other premises that are not necessarily business or commercial premises, to (a) pack, process, or work on articles or material; or (b) carry out clerical work<sup>109</sup>)(section 386);
- recovery of unpaid wages, superannuation contributions, unpaid tool allowance & unauthorised deductions (ss 475 and 476); and
- repayment of fees from a private employment agent (section 403).

### 4.2 Limits to monetary compensation

The IR Act permits applications for recovery of unpaid wages of up to \$50,000 to be heard before the QIRC.<sup>110</sup> Applications for the recovery of fees received by a private employment agent for up to \$20,000 may be heard before the QIRC.<sup>111</sup> Applications for larger sums may be heard by an Industrial Magistrates Court.<sup>112</sup>

### 4.3 Time limit

Actions for recovery of unpaid wages or entitlements,<sup>113</sup> unlawful private employment agent fees,<sup>114</sup> or wages payable to an outworker,<sup>115</sup> must be commenced within six years after the amount claimed became payable.

### 4.4 What are unpaid wages?

Unpaid wages under s 475 of the IR Act may include:

- an employee's unpaid wages (including an amount payable to an employee for: work performed or to be performed; a public holiday; leave entitlements;

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<sup>109</sup> *Industrial Relations Act 2016* (Qld) s 386.

<sup>110</sup> *Industrial Relations Act 2016* (Qld) ss 386(2)(a), 476(1).

<sup>111</sup> *Industrial Relations Act 2016* (Qld) s 403(2).

<sup>112</sup> *Industrial Relations Act 2016* (Qld) ss 386(2)(b).

<sup>113</sup> *Industrial Relations Act 2016* (Qld) s 476(4).

<sup>114</sup> *Industrial Relations Act 2016* (Qld) s 403(4).

<sup>115</sup> *Industrial Relations Act 2016* (Qld) s 386(4).



- termination of employment; a salary; or other amount payable from wages for the employee with the employee's written consent);
- unpaid superannuation contributions;
  - an apprentice's unpaid tool allowance; or
  - remuneration lost by an apprentice or trainee because an employer failed to pay prescribed wages until lawful suspension or the training agreement is cancelled (this may be brought about by an unlawful termination of employment, suspension, or stand down).

Unpaid wages under s 386 of the IR Act may include unpaid wages payable to an outworker, or unpaid superannuation contributions.

Unpaid amount claims under s 403 of the IR Act may include the repayment of fees received by a private employment agent in contravention of s 400 of the IR Act.

#### **4.5 Where can a claim for recovery of unpaid wages be made?**

A claim for recovery of unpaid wages may be made to the QIRC. However, a presidential member may remit an application under ss 475 and 476 or s 403 to an Industrial Magistrates Court for hearing if the presidential members considers the application could be more conveniently heard by a Magistrate. Once referred, the Industrial Magistrate may hear and decide the application as if it was made before the QIRC, and a decision is considered to be a decision of the QIRC.<sup>116</sup>

The application must be made in the approved form (Form 15 or Form 18) and filed in the Industrial Registry.

The *Industrial Relations (Tribunals) Rules 2011* (Qld) apply for the matter. The UCPR does not have application.

#### **4.6 Who can make a claim for unpaid wages?**

A claim for unpaid wages may be made by:

- a national system employee (for recovery of community service leave entitlements under the FW Act only);<sup>117</sup>

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<sup>116</sup> *Industrial Relations Act 2016* (Qld) ss 475, 404.

<sup>117</sup> *Industrial Relations Act 2016* (Qld) s 476(2)(b).

- employees of the Queensland public sector, local government and employers declared not to be national system employees (see Schedule 5 of the *Industrial Relations Regulations 2018* (Qld));<sup>118</sup>

*(Note: a claim for occupational superannuation may only be made by an eligible employee<sup>119</sup> on whose behalf an employer is required to contribute to an approved superannuation fund.)*

- an employee organisation or an authorised person acting for the employee;<sup>120</sup>
- an outworker,<sup>121</sup> or an employee organisation representing an outworker;<sup>122</sup>
- an apprentice or trainee;<sup>123</sup>
- a person looking for work, model or performer (for a claim for repayment of a private employment agent fee),<sup>124</sup> an employee organisation or an authorised person acting for the claimant;
- an Inspector (*note: an inspector may make a claim for unpaid wages for an employee, outworker, apprentice, or trainee; and for a claimant seeking repayment of a private employment agent fee*).<sup>125</sup>

A person cannot make a claim under ss 386, 403 or 475 if an application has been made under ss 379 or 396 for the same matter.

#### 4.7 Representation

A person who is a party to proceedings, or permitted to appear, may be represented by:

- an agent appointed in writing; or
- if the party or person is an organisation, an officer or member of the organisation.<sup>126</sup>

Legal representation in the QIRC is allowed if all parties consent; or if the QIRC gives leave.<sup>127</sup> However, for proceedings under ss 403 and 475, legal representation is specifically excluded.<sup>128</sup> Even if not binding, the approach and considerations cited in

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<sup>118</sup> Ibid.

<sup>119</sup> *Industrial Relations Act 2016* (Qld) Sch 5.

<sup>120</sup> *Industrial Relations Act 2016* (Qld) s 476(2)(c)-(d).

<sup>121</sup> *Industrial Relations Act 2016* (Qld) s 386(3).

<sup>122</sup> *Industrial Relations Act 2016* (Qld) s 386(b).

<sup>123</sup> *Industrial Relations Act 2016* (Qld) s 476(b).

<sup>124</sup> *Industrial Relations Act 2016* (Qld) s 403(a)-(c).

<sup>125</sup> *Industrial Relations Act 2016* (Qld) ss 386(3)(c), 403(3)(d), 476(2)(a),(e).

<sup>126</sup> *Industrial Relations Act 2016* (Qld) s 529.

<sup>127</sup> *Industrial Relations Act 2016* (Qld) s 530(1)(d).

<sup>128</sup> *Industrial Relations Act 2016* (Qld) s 530(2)(b); *Mason v Paroo Shire Council* [2021] QIRC 316

*Fitzgerald v Woolworths Limited*<sup>129</sup> in relation to the grant of leave are not without influence.<sup>130</sup> In that case, it was held that legal representation may extend not only to advocacy in a conference or hearing but also to some other aspects of the matter including listings and the preparation of submissions.

#### 4.8 What orders may be made?

##### Recovery of unpaid wages (Form 15)

For recovery of unpaid wages and superannuation commenced under ss 475 and 476 of the IR Act, the QIRC:

- must order the employer to pay the employee the amount that the QIRC finds to be payable and unpaid to the employee for the six (6) years before the date of the application (plus an appropriate sum to make up for foregone superannuation contributions);<sup>131</sup>
- may make an order for the payment despite an express or implied provision of an agreement to the contrary;<sup>132</sup> and
- may order the payment to be made on the terms the QIRC considers appropriate.<sup>133</sup>

The QIRC may apply conditions on the order for payment of superannuation contributions, including to the approved fund if still employed, or to the approved fund; to a complying fund; or to a superannuation fund nominated by the employee or to an eligible rollover fund.<sup>134</sup> If the amount is less than the total benefits that may revert to the employee under the *Superannuation Industry (Supervision) Act 1993* (Cth), the payment may be made to the employee.<sup>135</sup>

##### Recovery of unpaid wages and superannuation from apparent employer (outworkers) under s 386 of the IR Act (Form 15)

The QIRC must order the apparent employer pay wages or superannuation found to be unpaid unless:

- the work was not done; or
- the amount claimed is not correct; or
- the amount claimed has already been paid.<sup>136</sup>

<sup>129</sup> *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 at [54].

<sup>130</sup> *Kilby v Harrison; Saxon Energy Services Australia Pty Ltd v Harrison* [2019] ICQ 21.

<sup>131</sup> *Industrial Relations Act 2016* (Qld) s 477(1)(a).

<sup>132</sup> *Industrial Relations Act 2016* (Qld) s 477(1)(b).

<sup>133</sup> *Industrial Relations Act 2016* (Qld) s 477(1)(c).

<sup>134</sup> *Industrial Relations Act 2016* (Qld) s 477(2).

<sup>135</sup> *Ibid.*

<sup>136</sup> *Industrial Relations Act 2016* (Qld) s 386(5).

The QIRC may order the payment of an amount that they are satisfied is payable if the original amount sought is not correct.<sup>137</sup>

An order for unpaid superannuation contributions must require the amount to be paid to:

- an approved superannuation fund; or
- a complying superannuation fund; or
- superannuation fund nominated by the outworker; or
- an eligible rollover fund.<sup>138</sup>

If the sum is less than the amount of total benefits that may revert to an employee under the *Superannuation Industry (Supervision) Act 1993* (Cth), the payment may be made to the outworker.<sup>139</sup>

#### Repayment of fees from private employment agent (Form 18)

For applications under s 403 for recovery of fees received by a private employment agent in contravention of s 400(1) or (2) of the IR Act, the QIRC must order the private employment agent to repay the fee to the claimant, unless:

- the fee has already been repaid to the claimant, or
- the private employment agent is not liable to repay the fee to the claimant under an existing order under ss 401 or 405.<sup>140</sup>

The QIRC may make an order for the repayment despite an express or implied provision of an agreement to the contrary,<sup>141</sup> order the repayment to be made on the terms the QIRC considers appropriate,<sup>142</sup> and order a party to pay costs to another party in an amount assessed by the QIRC.<sup>143</sup>

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<sup>137</sup> *Industrial Relations Act 2016* (Qld) s 386(6).

<sup>138</sup> *Industrial Relations Act 2016* (Qld) s 386(7).

<sup>139</sup> *Industrial Relations Act 2016* (Qld) s 386(7)(e).

<sup>140</sup> *Industrial Relations Act 2016* (Qld) s 405(a).

<sup>141</sup> *Industrial Relations Act 2016* (Qld) s 405(b).

<sup>142</sup> *Industrial Relations Act 2016* (Qld) s 405(c).

<sup>143</sup> *Industrial Relations Act 2016* (Qld) s 405(d).

### Proportionate payment of long service leave (Form 14)

The QIRC may make an order that an employer pay to an employee an amount proportionate to the employee's long service leave entitlement in certain circumstances.<sup>144</sup>

Section 95(2) of the IR Act provides for the entitlement of an employee (other than a seasonal employee) to long service leave after 10 years' continuous service. An employee who has completed at least seven years continuous service is entitled to a proportionate payment for long service leave on termination of the employee's service.<sup>145</sup> An employee may also be entitled to a proportionate payment for long service leave prior to completion of 10 years continuous service in certain circumstances, being:

- the employee's service is terminated because of the employee's death; or
- the employee terminates the service because of their illness, or a domestic or other pressing necessity; or
- the employer dismisses the employee because of the employee's illness; or
- the employer dismisses the employee for another reason other than the employee's conduct, capacity or performance; or
- the employer unfairly dismisses the employee; or
- the termination of the employee's service was due to the passing of time and the employee had a reasonable expectation that their employment with the employer would continue until the employee had completed at least 10 years continuous service, and the employee was prepared to continue the employment with the employer.<sup>146</sup>

### Payment in lieu of long service leave (Form 13)

An employee may be paid for all or part of entitlement to long service leave instead of taking the leave where such a payment is authorised by a relevant industrial instrument and the employee has entered into a signed agreement with their employer for the payment to be made.<sup>147</sup> If the payment has not been made in accordance with the industrial instrument and as agreed by the parties, the employee may make an application to the QIRC for payment.<sup>148</sup>

If no relevant industrial instrument provides for payment in lieu of long service leave, the QIRC may order payment on application by the employee and only if satisfied that

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<sup>144</sup> *Industrial Relations Act 2016* (Qld) ss 95, 475, 476.

<sup>145</sup> *Industrial Relations Act 2016* (Qld) s 95(3).

<sup>146</sup> *Industrial Relations Act 2016* (Qld) s 95(4).

<sup>147</sup> *Industrial Relations Act 2016* (Qld) s 110(2).

<sup>148</sup> *Industrial Relations Act 2016* (Qld) ss 475, 476, 110.

the payment should be made on compassionate grounds, or grounds of financial hardship.<sup>149</sup>

#### 4.9 Enforcement of orders

A default order based on s 161 of the *Justices Act 1886* (Qld) cannot be sought to enforce an order of the QIRC in respect of a s 386 or s 475 application. Instead, recovery of amounts ordered by the QIRC is provided for by s 546 of the IR Act. This section allows the Registrar to issue a certificate under the seal of the QIRC which states the amount payable, who is to pay it, to whom it is payable, and any conditions of the payment.

The amount may be recovered in proceedings as for a debt. The certificate can be filed in a court of competent jurisdiction and the order is enforceable as an order of that court. See Chapter 2.9 of this benchbook.

For the purposes of s 546, the ‘*registrar*’ includes the Registrar of the Magistrates Court in respect of an order made by an Industrial Magistrate on remission from the QIRC.<sup>150</sup>

#### 4.10 Penalties

If satisfied that a person has contravened a civil remedy provision, the QIRC may order a person to pay a pecuniary penalty that the QIRC considers appropriate.<sup>151</sup> An order to pay a pecuniary penalty may be made on application by the plaintiff.<sup>152</sup> Such an application must be made within six years of when the alleged contravention occurred.<sup>153</sup>

The maximum pecuniary penalty that may be ordered is depended on the particular civil remedy provision to which the proceeding relates.<sup>154</sup> Schedule 3 of the IR Act sets out the corresponding maximum penalties for each civil penalty provision.

The QIRC may order that the penalty be paid to a person, an organisation, or the State,<sup>155</sup> and may be recovered as a debt.<sup>156</sup> A penalty sum is ordinarily to be awarded to the successful applicant,<sup>157</sup> or otherwise to the initiating party<sup>158</sup> or the organisation on whose behalf the initiating party has acted.<sup>159</sup> Where a successful applicant brings a proceeding on their own behalf, the court should exercise the discretion under s 576 of

<sup>149</sup> *Industrial Relations Act 2016* (Qld) s 110(3)-(4).

<sup>150</sup> *Industrial Relations Act 2016* (Qld) s 475, 546(5)(b).

<sup>151</sup> *Industrial Relations Act 2016* (Qld) s 574.

<sup>152</sup> *Industrial Relations Act 2016* (Qld) ss 572, Schedule 3.

<sup>153</sup> *Industrial Relations Act 2016* (Qld) s 573.

<sup>154</sup> *Industrial Relations Act 2016* (Qld) s 575

<sup>155</sup> *Industrial Relations Act 2016* (Qld) s 576.

<sup>156</sup> *Industrial Relations Act 2016* (Qld) s 577.

<sup>157</sup> *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4 at [101].

<sup>158</sup> *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* [2008] FCAFC 170; 171 FCR 357 at [44].

<sup>159</sup> *Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553; 37 FCR 216 at 223-4.

the IR Act to make any penalty payable to the individual applicant.<sup>160</sup> Where a successful applicant has brought the proceeding on behalf of an organisation (e.g. a union) for the benefit of the organisation and the organisation has borne the costs of the proceeding, the penalty should be made payable to the organisation.<sup>161</sup>

Parties may make submissions in respect of the quantum of penalties, including in respect of proposed agreed penalties, for which it is desirable for the QIRC to accept the parties' proposed agreement should it be satisfied that the agreed penalties are appropriate.<sup>162</sup>

The primary purpose of a pecuniary penalty for a civil remedy contravention is deterrence.<sup>163</sup> The quantum of the penalty should reflect the nature, quality and duration of the contravening conduct, as well as the need for specific and/or general deterrence with regard to the particular circumstances of the matter.

A penalty which is ordered against a respondent for multiple proven contraventions should reflect the totality of the offending conduct, in order to ensure proportionality between the contravention and penalty, and to prevent the imposition of a penalty that would be crushing or oppressive to the respondent.<sup>164</sup> One way the totality principle can be given effect is to determine what is an appropriate total penalty and then divide that penalty by the number of offences to produce a penalty for each separate offence.<sup>165</sup> An alternative method involves the determination of appropriate penalties for each contravention, followed by consideration of the aggregate figure with a view to ensuring that the penalty is an appropriate response to the conduct which led to the breaches.<sup>166</sup>

The following considerations may be relevant in determining if a penalty should be imposed, and if so, the amount of the penalty:

- the nature and extent of the conduct which led to the breaches;
- the circumstances in which the conduct took place;
- the nature and extent of any loss and damage sustained as a result of the breaches;
- whether there had been similar previous conduct by the respondent;
- whether the breaches were properly distinct or arose out of the one course

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<sup>160</sup> *Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)* [2016] FCA 244 at [44].

<sup>161</sup> *Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553; 37 FCR 216 at 223-4.

<sup>162</sup> *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482.

<sup>163</sup> *Ibid* at [55]; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 249 FCR 458 at [90].

<sup>164</sup> *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 at [30].

<sup>165</sup> *CPSU v Telstra Corporation Limited* [2001] FCA 1364; (2001) 108 IR 228 at 230 [7].

<sup>166</sup> *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at [53]; *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65 at [145].

of conduct;

- the size of the business enterprise involved;
- whether or not the breaches were deliberate;
- whether senior management were involved in the breaches;
- whether the party committing the breach had taken corrective action;
- whether the party committing the breach had cooperated with the enforcement authorities;
- the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- the need for specific and general deterrence.<sup>167</sup>

The weight which should be given to the above factors will vary depending on the circumstances of the case and is a matter for the QIRC's discretion.

Capacity of a respondent to satisfy a judgment debt is a relevant factor, however it is less relevant than general deterrence.<sup>168</sup> In considering the appropriate penalty (if any) for a proven contravention by a corporation which is, or may be placed in liquidation, it is a matter for the QIRC's discretion to determine whether it is satisfied that the imposition of a penalty is still capable of having a deterrent effect, whether specific or general.<sup>169</sup>

Regarding the need for general and/or specific deterrence in calculation of quantum of penalties, courts have given consideration to the following factors:

a. *The nature of the industry in which the contraventions occurred*

Evidence indicating a substantial problem with compliance may be a significant and weighty consideration, particularly where the question of general deterrence arises in the context of an industry with a vulnerable workforce (characteristics of which may include youth, transience, low levels of English-language proficiency, and a high proportion of casual workers). The potential for exploitation of such a workforce, combined with the workers weak bargaining position and limited ability to complain or seek rectification, requires penalties of a scale that will help to deter the relevant respondent/s and other employers in the industry.<sup>170</sup>

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<sup>167</sup> *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7.

<sup>168</sup> *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70; 168 FCR 383 at [69]; *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown* [2017] FCA 1301 at [107].

<sup>169</sup> *Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)* [2016] FCA 244 at [19].

<sup>170</sup> *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown* [2017] FCA 1301 at [134].



General deterrence is of particular importance in such circumstances, and may warrant the imposition of significant penalties despite a comparatively low value of the entitlements for which recovery is sought.<sup>171</sup>

b. *Why the contraventions occurred*

The reasons why the contravening conduct occurred should be given significant weight. Contravening conduct which has been deliberately pursued may increase the need for specific deterrence, such as where the offending conduct is systemic; forms part of the respondent's business model; or involves fraud or attempted concealment of the contravention/s.<sup>172</sup> Conversely, the court may reduce a penalty where the contravention occurred due to genuine mistake.<sup>173</sup>

c. *Contrition and corrective action*

In considering the need for specific deterrence, the court may take into account whether a respondent has shown contrition for its contravening conduct and whether corrective action was taken by the respondent. The making of payments to an applicant to rectify a contravention or pursuant to a court order may not be conduct regarded by the court as contrition.<sup>174</sup> Remorse may be evidenced by a respondent's actions to prevent further contraventions (e.g., audits),<sup>175</sup> admissions of the contravention/s at an early stage of the proceedings and agreement on appropriate penalties,<sup>176</sup> and cooperation with workplace authorities on becoming aware of the contravention/s.<sup>177</sup>

#### 4.11 Costs

There are no fees in relation to lodgement of an application under ss 386, 403 or 475 or 476 of the IR Act in the QIRC.

Parties will generally bear their own costs in proceedings for unpaid amount claims under ss 386 or 476 in the QIRC. The QIRC may order a party to a proceeding to pay costs incurred by another party if the QIRC is satisfied that:

- the party made or responded to the application vexatiously or without reasonable cause; or
- it would have been reasonably apparent that the application or response had no reasonable prospect of success.

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<sup>171</sup> *Fair Work Ombudsman v Hu* (No 3) [2020] FCA 936

<sup>172</sup> *Fair Work Ombudsman v HSCC Pty Ltd* [2020] FCA 655.

<sup>173</sup> *Australia Education Union v Yooralla (No.2)* [2020] FCCA 1659 at [69].

<sup>174</sup> *Ibid* at [55].

<sup>175</sup> *Ibid* at [57].

<sup>176</sup> *Fair Work Ombudsman v Hu* (No 3) [2020] FCA 936 at [16].

<sup>177</sup> *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 at [26].

The QIRC may only make a costs order on application by a party to the proceeding.<sup>178</sup>

For claims made under s 403, section 545 of the IR Act allows the QIRC, on application by a party to the proceeding, to order a party to the proceeding pay costs incurred by another party if the QIRC is satisfied that:

- the party made or responded to the application vexatiously or without reasonable cause, or
- it would have been reasonably apparent that the application or response had no reasonable prospect of success.

The QIRC may order a representative of a party to pay costs incurred by another party if satisfied the representative caused the costs to be incurred:

- because they encouraged the represented party to start, continue or respond to the proceeding with no reasonable prospect of success; or
- because of an unreasonable act or omission in connection with the conduct or continuation of the proceeding.

The QIRC may order a party to pay another party an amount reasonably payable to a person who is not a lawyer, for representing the other party.

## 4.12 Procedures

### 4.12.1 Conciliation

Parties to an unpaid wages claim commenced under ss 386 or 475 and 476 of the IR Act may participate in voluntary conciliation prior to the claim being heard in the QIRC.<sup>179</sup>

Chapter 11, Part 5, Division 5A of the IR Act sets out how these unpaid wages claims can be conciliated. Conciliation is intended to enable the parties to reach agreement on as many matters as possible, to reduce the scope of the matters at issue and to achieve a timely, cost-effective, proportionate and agreed resolution if possible.

#### Who conciliates the claim?

Each Industrial Commissioner is a conciliator for unpaid amount claims.<sup>180</sup>

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<sup>178</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123ZC.

<sup>179</sup> *Industrial Relations Act 2016* (Qld) ss 547B-547C.

<sup>180</sup> *Industrial Relations Act 2016* (Qld) s 547D.

### Procedure for conciliation process

If made, a referral of a matter to conciliation must be made as soon as practicable after the proceeding has started, but before the claim is heard, and preferably before a party to the claim files a defence to the claim.<sup>181</sup> The conciliator determines the procedure.<sup>182</sup>

The Industrial Registrar may, of their own initiative, or on application by a party or the conciliator, give directions about the procedure to be used for the conciliation conference.<sup>183</sup>

### Conciliation Certificates

As soon as practicable after the conclusion of conciliation, the conciliator must file a conciliation certificate with the Industrial Registry.<sup>184</sup>

The conciliation certificate must be in the approved form and must not comment about the extent of a party's participation, but may state that a party did not attend conciliation. A copy must be given to the parties.<sup>185</sup>

Unless the parties otherwise agree, the conciliator must ensure that an agreement reached in the conciliation process is retained confidentially by the Registrar. Agreements may only be subsequently accessed by an order of an Industrial Magistrate or the QIRC.<sup>186</sup>

### Conciliation Agreement

If the parties agree on a resolution of all or part of a claim, the agreement must be written down and signed by or for each party.<sup>187</sup>

After a conciliator's certificate about the conciliation process is filed with the Registrar, a party to an unpaid amount claim may apply to the QIRC for the claim for an order giving effect to an agreement reached in a conciliation process.<sup>188</sup>

The QIRC may make any order giving effect to an agreement reached in a conciliation process that it considers appropriate in the circumstances.<sup>189</sup>

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<sup>181</sup> *Industrial Relations Act 2016* (Qld) s 547C(3).

<sup>182</sup> *Industrial Relations Act 2016* (Qld) s 547E(1).

<sup>183</sup> *Industrial Relations Act 2016* (Qld) s 547E(2).

<sup>184</sup> *Industrial Relations Act 2016* (Qld) s 547F.

<sup>185</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123S.

<sup>186</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123T.

<sup>187</sup> *Industrial Relations Act 2016* (Qld) s 547G.

<sup>188</sup> *Industrial Relations Act 2016* (Qld) s 547H.

<sup>189</sup> *Industrial Relations Act 2016* (Qld) s 547F(3).

#### 4.12.2 Hearing of unpaid amount claims not referred to conciliation

If the Industrial Registrar does not refer an unpaid amount claim to conciliation, or a party does not wish to participate in conciliation (after notifying the Registrar in writing before the conciliation conference starts<sup>190</sup>), the Registrar must:

- notify the QIRC that the conciliation will not proceed and the reason, and
- refer the matter for hearing.<sup>191</sup>

#### Simplified Procedures

The QIRC may hear claims for ‘relevant amounts’ (i.e. claims under s 386 for \$50,000 or less and all claims under s 475 and not claims for offences<sup>192</sup>) informally. Under the simplified procedures, the QIRC is not bound by the rules of evidence and may inform itself in the way it considers appropriate in the exercise of its jurisdiction.<sup>193</sup>

Parties to claims that are not for ‘relevant amounts’ may elect to use all or part of the simplified procedures by agreement in writing.<sup>194</sup> The agreement must be filed in the Industrial Registry.<sup>195</sup> For civil penalty proceedings predicated on a contravention, the common law privilege against self-exposure to penalty is still applicable but can potentially be waived.<sup>196</sup>

In proceedings for ‘relevant amounts’, if parties do not elect to apply the simplified procedures, the QIRC may still inform itself in the way it considers appropriate in the exercise of its jurisdiction and will not be bound by the rules of evidence.<sup>197</sup>

#### 4.12.3 Appeals

A decision of the QIRC may be appealed to the Industrial Court of Queensland.<sup>198</sup> The Industrial Court may:

- dismiss the appeal;
- allow the appeal and set aside the decision and substitute another decision;
- allow the appeal and amend the decision; or
- allow the appeal, suspend the operation of the decision and remit the matter, with or without directions, to the QIRC or an Industrial Magistrates Court to act according to law.<sup>199</sup>

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<sup>190</sup> *Industrial Relations Act 2016* (Qld) ss 507C(4), 547C(4).

<sup>191</sup> *Industrial Relations Act 2016* (Qld) s 547C(5).

<sup>192</sup> *Industrial Relations Act 2016* (Qld) s 531(6).

<sup>193</sup> *Industrial Relations Act 2016* (Qld) s 531(2).

<sup>194</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123R.

<sup>195</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123R(3)(b).

<sup>196</sup> See discussion by M Pearce SC, *Waiver of Penalty Privilege in Civil Penalty Proceedings* (2021) 95 ALJ 695.

<sup>197</sup> *Industrial Relations Act 2016* (Qld) s 531(2).

<sup>198</sup> *Industrial Relations Act 2016* (Qld) s 557.

<sup>199</sup> *Industrial Relations Act* (Qld) s 558.

#### 4.12.4 Forms

The proceedings must be commenced by application as detailed in Rule 8 of the *Industrial Relations (Tribunals) Rules 2011* (Qld).

The relevant forms are:

- Application for proportionate payment of long service leave – Form 14 on QIRC website
- Application to Recover Unpaid Wages, Superannuation Contributions, Etc - Form 15 on the QIRC website
- Application to recover fee from private employment agent – Form 18 on the QIRC website

#### 4.12.5 Practice Directions

Relevant practice directions include:

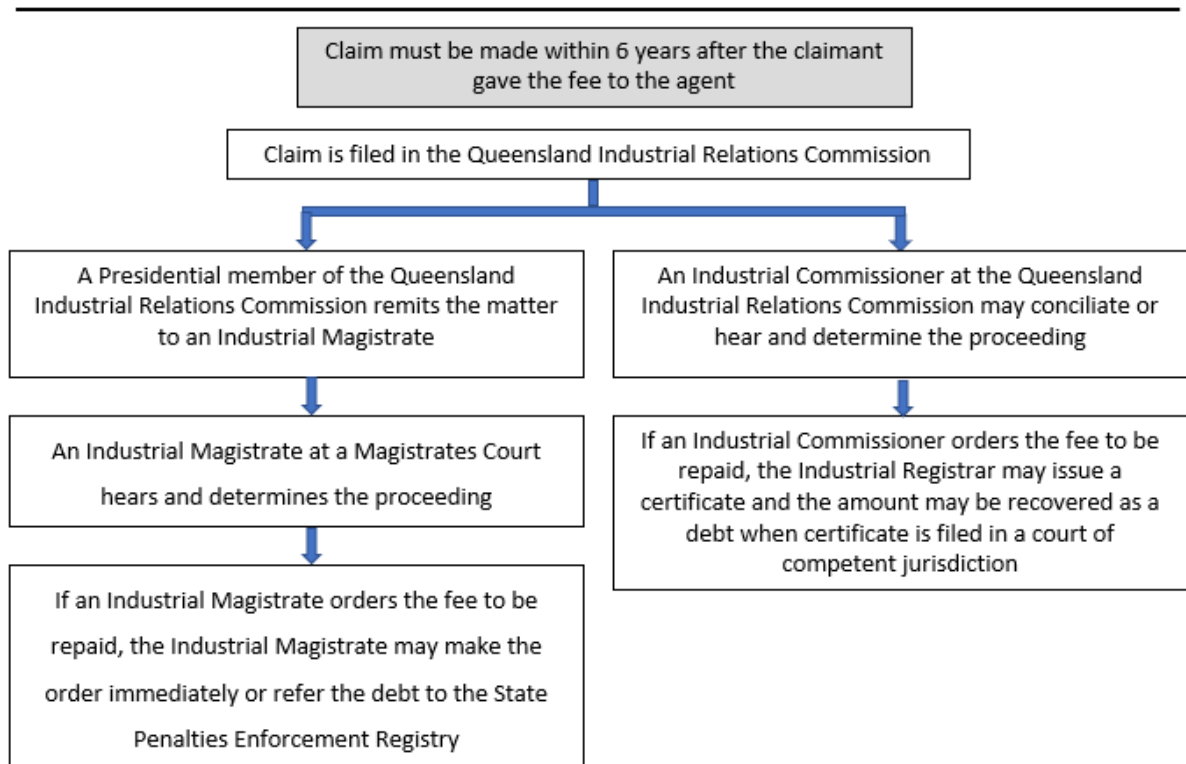
- PD 3 of 2021 - [Electronic Filing and Hard Copies of Documents](#)
- PD 8 of 2021 - [Taking Evidence by Telephone or Video Link](#) (Download the application for a [video link form](#))
- PD 10 of 2021 - [Interpreters](#)

#### 4.12.6 Flowcharts

- i) **Claim for repayment of fee from private employment agent (s 403) in the Queensland Industrial Relations Commission**

### **Claim for repayment of fee from private employment agent – Form 18 Queensland Industrial Relations Commission**

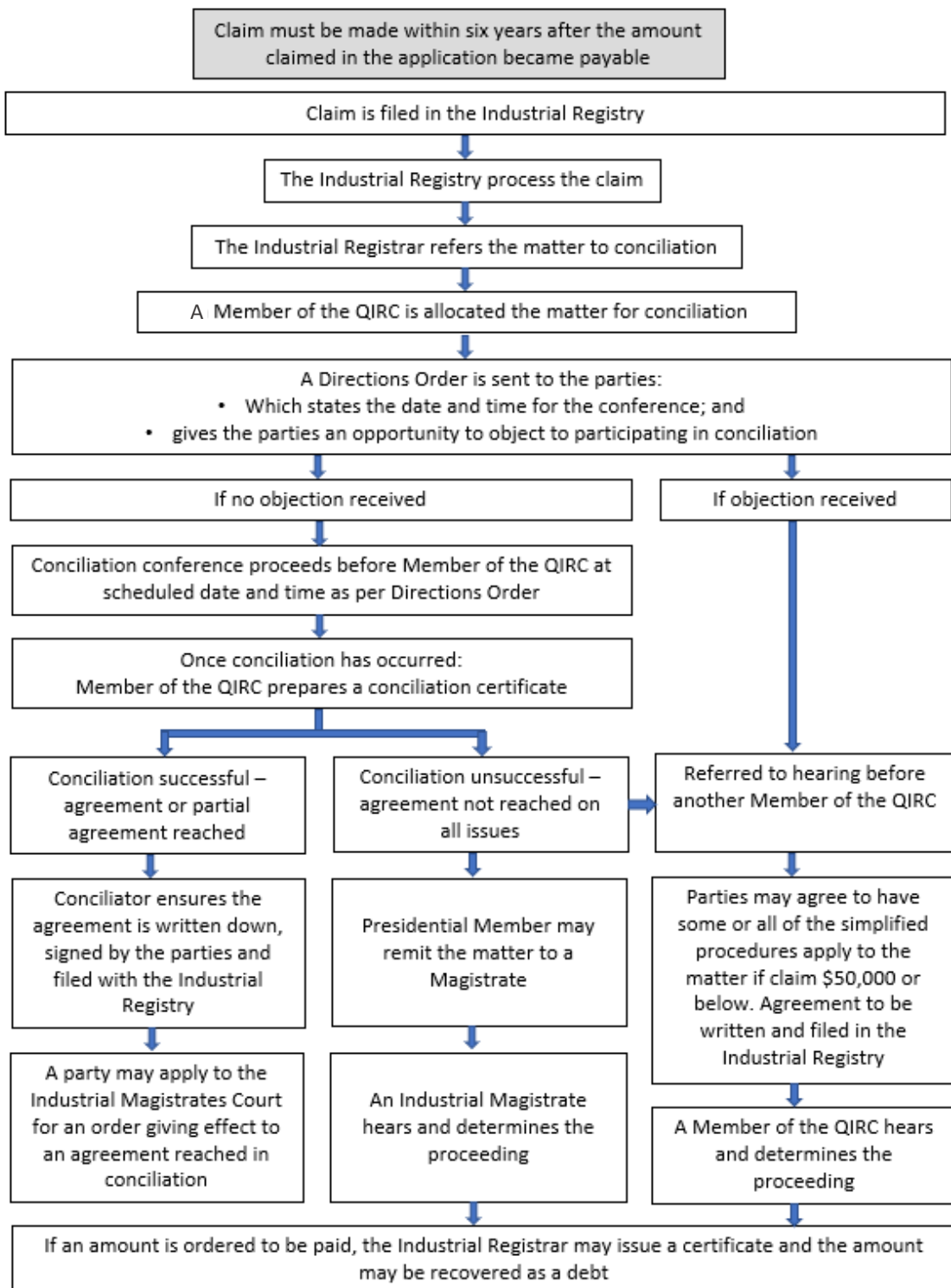
*Industrial Relations Act 2016 (Qld) s 403; and  
Industrial Relations (Tribunals) Rules 2011 (Qld) Pt 2*



ii) Unpaid amount claim (s 386 or 475 and 476) in the Queensland Industrial Relations Commission

**Unpaid amount claim (B Matter in QIRC) – Forms 14 or 15  
Queensland Industrial Relations Commission**

*Industrial Relations Act 2016 (Qld) ss 386, 475, 476, Chapter 11, Pt 5, Div 5A;  
and  
Industrial Relations (Tribunals) Rules 2011 (Qld), Pt 2, Pt 3B*



## CHAPTER 5 – WAGE RECOVERY – UNPAID AMOUNT CLAIMS IN THE (INDUSTRIAL MAGISTRATES COURT

### 5.1 Jurisdiction (*Industrial Relations Act 2016 (Qld) ss 379, 386, 396, 402*)

The Industrial Magistrates Court has jurisdiction to hear and determine application for orders in relation to the following methods of recovery for unpaid amounts:

- Section 379 – Recovery of unpaid wages, tool allowance, unauthorised deductions
- Section 386 – Recovery of unpaid wages from apparent employer i.e. outworker employer
- Section 396 – Recovery of unpaid superannuation contribution
- Section 402 – Repayment of fees from a private employment agent.

An Industrial Magistrates Court may also hear a claim for damages suffered by an employee because of the employer failing to pay the employee's wages.<sup>200</sup>

### 5.2 What is an unpaid amount?

Unpaid amount claims under s 379 of the IR Act may include:

- an employee's unpaid wages; or
- an apprentice's unpaid tool allowance; or
- remuneration lost by an apprentice or trainee because the employer has contravened s 371(2) of the IR Act (i.e. failed to pay prescribed wages until lawful suspension or the training agreement is cancelled (this may be brought about by an unlawful termination of employment, suspension, or stand down)).

Unpaid amounts claims under s 386 of the IR Act include unpaid wages payable to an outworker; or unpaid superannuation contributions.

Unpaid amount claims under s 396 of the IR Act includes unpaid superannuation contributions.

Whilst it is not defined as an 'unpaid amount', a claim under s 402 of the IR Act includes the repayment of fees received by a private employment agent in contravention of s 400 of the IR Act.

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<sup>200</sup> *Industrial Relations Act 2016 (Qld) s 506(1)(b)(iii)*.



### 5.3 Where can a claim for recovery be made?

All unpaid amount claims are commenced in the Industrial Magistrates Court.<sup>201</sup>

A claim must be made in the approved form (Form 68) and filed in the registry of a Magistrates Court.<sup>202</sup>

### 5.4 Who may make a claim for an unpaid amount?

A claim may be made in the Industrial Magistrates Court by:

- A national system employee (for recovery of long service leave, jury service or emergency service leave only).<sup>203</sup> Long service leave, jury service & emergency service leave are 'non-excluded matters'.<sup>204</sup>
- An outworker (means a person engaged, for someone else's calling or business, in or about a private residence or other premises that are not necessarily business or commercial premises, to (a) pack, process, or work on articles or material; or (b) carry out clerical work).<sup>205</sup>
- An apprentice, trainee, employee, employee organisation, or other person acting for the employee.<sup>206</sup>
- A Queensland public sector or local government employee, and employees of employers declared not to be national system employees.<sup>207</sup>
- A work seeker (somebody looking for work), model or performer for claim for repayment of private employment agent fee).<sup>208</sup>
- An Inspector.<sup>209</sup>

*Note: A person cannot make an application under this section if an application has been made under ss 475 or 396 for the same matter.*

### 5.5 Representation

Parties to an unpaid amount claim may only be represented by a lawyer in the Industrial Magistrates Court with leave of the court, or if all parties consent.<sup>210</sup>

A party may be represented by an officer or member of an organisation or an agent

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<sup>201</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 101.

<sup>202</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) rr 102, 123O.

<sup>203</sup> *Industrial Relations Act 2016* (Qld) ss 379, 506.

<sup>204</sup> *Fair Work Act 2009* (Cth) s 27(2).

<sup>205</sup> *Industrial Relations Act 2016* (Qld) s 386.

<sup>206</sup> *Industrial Relations Act 2016* (Qld) s 379.

<sup>207</sup> *Industrial Relations Act 2016* (Qld) ss 379, 396; *Industrial Relations Regulations 2018* (Qld) sch 5.

<sup>208</sup> *Industrial Relations Act 2016* (Qld) s 402.

<sup>209</sup> *Industrial Relations Act 2016* (Qld) ss 379, 386, 396, 402.

<sup>210</sup> *Industrial Relations Act 2016* (Qld) s 530(1)(e).

appointed in writing.<sup>211</sup>

An act required or permitted to be done by party or person in a proceeding may be done by:<sup>212</sup>

- The party or person; or
- the party or person's lawyer or agent; or
- If the party or person is an organisation or association – an officer or member of the organisation or association.

**Note:**

For matters where the Office of Industrial Relations (**OIR**) is the applicant, OIR will often agree to the appearance by a lawyer on the basis that no costs associated with the representation will be claimed against OIR if OIR is unsuccessful.

## 5.6 What orders may be made?

### Recovery of unpaid wages, tool allowance, unauthorised deductions<sup>213</sup>

For recovery of unpaid amounts commenced under s 379 of the IR Act the Industrial Magistrate:

- must order the employer to pay the employee the amount that the Industrial Magistrate finds to be payable and unpaid to the employee for the 6 years before the date of the application;<sup>214</sup>
- may make an order for the payment despite an express or implied provision of a contract, certified agreement, or bargaining award to the contrary<sup>215</sup>; and
- may order the payment to be made on the terms the Industrial Magistrate considers appropriate<sup>216</sup>.

### Recovery of unpaid wages from apparent employer (i.e. outworkers)<sup>217</sup>

The Industrial Magistrate must order the apparent employer pay the wages or superannuation unless the work was:

- not done;
- the amount claimed is not correct; or
- the amount claimed has already been paid.<sup>218</sup>

<sup>211</sup> *Industrial Relations Act 2016* (Qld) s 529.

<sup>212</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 124.

<sup>213</sup> *Industrial Relations Act 2016* (Qld) s 379.

<sup>214</sup> *Industrial Relations Act 2016* (Qld) s 379(4)(a).

<sup>215</sup> *Industrial Relations Act 2016* (Qld) s 379(4)(b).

<sup>216</sup> *Industrial Relations Act 2016* (Qld) s 379(4)(c).

<sup>217</sup> *Industrial Relations Act 2016* (Qld) s 386.

<sup>218</sup> *Industrial Relations Act 2016* (Qld) s 386(5).

The Industrial Magistrate may order the payment of an amount that they are satisfied is payable if the original amount sought is not correct.<sup>219</sup>

An order for unpaid superannuation contributions must require the amount to be paid to:

- an approved superannuation fund; or
- a complying superannuation fund; or
- a superannuation fund nominated by the outworker; or
- an eligible rollover fund or if the sum is less than the amount of total benefits that may revert to an employee under the *Superannuation Industry (Supervision) Act 1993* (Cth) to the outworker.<sup>220</sup>

#### Recovery of unpaid superannuation contribution<sup>221</sup>

For recovery of unpaid superannuation contributions to the approved superannuation fund commenced under s 396 of the IR Act, the Industrial Magistrate:

- must order the employer to pay the employee the amount that the Industrial Magistrate finds to be payable and unpaid to the employee within the six (6) years before the date of the application,<sup>222</sup> and an amount the Industrial Magistrate considers appropriate, based on the return that would have accrued in relation to the contribution had it been properly paid to the fund;<sup>223</sup> and
- may only make an order about the payment of the amount that the QIRC may make under s 477(1) or (2).

*Note: A person cannot make an application under s 396 if an application has been made under s 475 for the same matter.*

#### Repayment of fees from private employment agent<sup>224</sup>

For applications under s 402 for recovery of fees received by a private employment agent in contravention of s 400(1) or (2) of the IR Act, the Industrial Magistrate:

- must order the agent to repay to the claimant the amount the Industrial Magistrate finds to be the fee the agent has received from the claimant in contravention of s 400(1) or (2) if—
  - the fee has not been repaid to the claimant; and

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<sup>219</sup> *Industrial Relations Act 2016* (Qld) s 386(6).

<sup>220</sup> *Industrial Relations Act 2016* (Qld) s 386(7).

<sup>221</sup> *Industrial Relations Act 2016* (Qld) s 396.

<sup>222</sup> *Industrial Relations Act 2016* (Qld) s 396(4)(a).

<sup>223</sup> *Industrial Relations Act 2016* (Qld) s 396(4)(b).

<sup>224</sup> *Industrial Relations Act 2016* (Qld) s 402.

- the agent is not liable to repay the fee to the claimant under an existing order under ss 401 or 405; and
- may make an order for the repayment despite an express or implied provision of an agreement to the contrary; and
- may order the repayment to be made on the terms the Industrial Magistrate considers appropriate; and
- may order one party to pay costs to another party in an amount assessed by the Industrial Magistrate.

*Note: A person cannot make an application under this section if an application has been made under s 403 (i.e. to the QIRC) about the same matter.*

## 5.7 Enforcement of orders

An order made by an Industrial Magistrate for payment by an employer of wages, superannuation etc. is enforceable as an order for payment of monies under the *Justices Act 1886* (Qld).<sup>225</sup>

A default order of levy and distress and/or imprisonment can be made to cover the order.<sup>226</sup>

The Industrial Magistrate also has discretion to give particulars of the order to the Registrar for registration with the State Penalties Enforcement Registry.<sup>227</sup>

## 5.8 Limits to monetary compensation

The IR Act provides for the following limits to monetary compensation for unpaid amount claims commenced in the Industrial Magistrates Court:

- Recovery of unpaid wages, tool allowance, unauthorised deductions (s 379)
  - No more than \$50,000 if using simplified procedures;
  - Otherwise no monetary limitation to the amount that may be claimed or heard.
- Recovery of unpaid wages from apparent employer i.e. outworker employer (s 386)
  - No more than \$50,000 if using simplified procedures;
  - Otherwise no monetary limitation to the amount that may be claimed or heard.
- Recovery of unpaid superannuation contribution (s 396)

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<sup>225</sup> *Industrial Relations Act 2016* (Qld) ss 380(2), 406(2); *Hoey v Cameron*, 137 QGIG 287.

<sup>226</sup> *Justices Act 1886* (Qld) ss 161, 163A; *Kehoe v Moore*, (1977) 96 QGIG 1069; *Palk v Kneevs* (2007) 186 QGIG 700.

<sup>227</sup> *Industrial Relations Act 2016* (Qld) ss 380(5), 406(5); *State Penalties and Enforcement Act 1999* (Qld) s 34.

- No more than \$50,000 if using simplified procedures;
- Otherwise no monetary limitation to the amount that may be claimed or heard.
- Repayment of fees from private employment agent (s 402)
  - No monetary limitation to the amount that may be claimed or heard.

*Note: if application is made under s 402 then it cannot be conciliated by an Industrial Commissioner – see 547B IR Act.*

## 5.9 Time limit

The IR Act provides for the following time limits to commence actions for recovery of unpaid amounts in the Industrial Magistrates Court:

- Recovery of unpaid wages, tool allowance, unauthorised deductions (s 379): within six (6) years after the amount claimed became payable.<sup>228</sup>
- Recovery of unpaid wages from apparent employer i.e. outworker employer (s 386): within six (6) years after the amount claimed became payable.<sup>229</sup>
- Recovery of unpaid superannuation contribution (s 396): within six (6) years after the amount claimed became payable.<sup>230</sup>
- Repayment of fees from private employment agent (s 402): within six (6) years after the claimant gave the agent the fee.<sup>231</sup>

## 5.10 Costs and expenses

Parties will generally bear their own costs in proceedings for unpaid amount claims under ss 379, 386 or 396 in the Industrial Magistrates Court. The Industrial Magistrates Court may order a party to a proceeding to pay costs incurred by another party if the Court is satisfied that:

- the party made or responded to the application vexatiously or without reasonable cause; or
- it would have been reasonably apparent that the application or response had no reasonable prospect of success.

The Industrial Magistrates Court may only make a costs order on application by a party to the proceeding.<sup>232</sup>

Costs in relation to claims under s 402 are dealt with above at para 5.6. To the extent an Industrial Magistrate may allow costs in a proceeding under s 402, an Industrial

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<sup>228</sup> *Industrial Relations Act 2016* (Qld) s 379(3).

<sup>229</sup> *Industrial Relations Act 2016* (Qld) s 386(4).

<sup>230</sup> *Industrial Relations Act 2016* (Qld) s 396(3).

<sup>231</sup> *Industrial Relations Act 2016* (Qld) s 402(3).

<sup>232</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123ZC.

Magistrate may allow costs and expenses for a proceeding for a claim under the scale of costs for Magistrates Courts under the UCPR, Sch 2 as if the proceeding were in a Magistrates Court.<sup>233</sup>

Costs in relation to legal representation are dealt with above at paragraph 5.5.

### Filing Fee

There is no filing fee for unpaid amount claims in the Industrial Magistrates Court.

### Witness Expenses

Where an Industrial Magistrate finds in favour of the claimant, witness expenses may be claimed for an employee who was required to be present at court. Where the witness travels long distances, requires accommodation, or suffers loss of wages, additional expenses may be claimed.<sup>234</sup>

## **5.11 Procedures**

For unpaid amount claims in an Industrial Magistrates Court, the Court may make a directions order about the conduct of the proceeding on its own initiative or on request of a party to the proceeding.<sup>235</sup>

### **5.11.1 Conciliation**

Parties to an unpaid amount claim commenced under ss 379, 386 and 396 of the IR Act may be referred by the Industrial Registrar to participate in voluntary conciliation prior to the claim being heard in the Industrial Magistrates Court.<sup>236</sup>

Chapter 11, Part 5, Division 5A of the IR Act sets out how unpaid amount claims can be conciliated. Conciliation is intended to enable the parties to reach agreement on as many matters as possible, reduce the scope of the matters at issue and achieve a timely, cost-effective, proportionate and agreed resolution if possible.

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<sup>233</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 110.

<sup>234</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 110.

<sup>235</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld), r 113.

<sup>236</sup> *Industrial Relations Act 2016* (Qld) s 547C.

### Who conciliates the claim?

Each Industrial Commissioner is a conciliator for unpaid amount claims (i.e. s 379, s 386, s 396).<sup>237</sup>

*Note: s 402 unpaid amount claims cannot be conciliated.*<sup>238</sup>

### Procedure for conciliation process

The conciliator decides the procedure to be used that will, in their opinion, enable them to perform their functions.<sup>239</sup>

The Registrar may, of their own initiative, or on application by a party or the conciliator, give directions about the procedure to be used for the conciliation conference.<sup>240</sup>

### Conciliation certificates

The Industrial Commissioner files the conciliation certificate with the industrial registry as soon as practicable after the conciliation process is finished.<sup>241</sup>

The conciliation certificate must be in the approved form, must not comment about the extent of a party's participation, but may state a party did not attend conciliation. A copy must be given to the parties.<sup>242</sup>

Unless the parties otherwise agree, the conciliator must ensure that an agreement reached in the conciliation process is:

- placed in a sealed container (e.g. an envelope);
- marked with the file number;
- marked 'Not to be opened without an order of an Industrial Magistrates Court'; and
- given to the Registrar.

### Conciliation Agreement

If the parties agree on a resolution of all or part of the claim the agreement must be written down and signed by or for each party.<sup>243</sup>

A party to an unpaid amount claim may apply to the Industrial Magistrates Court for an order giving effect to an agreement reached in a conciliation process.<sup>244</sup>

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<sup>237</sup> *Industrial Relations Act 2016* (Qld) s 547D; *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123M.

<sup>238</sup> *Industrial Relations Act 2016* (Qld) s 547B.

<sup>239</sup> *Industrial Relations Act 2016* (Qld) s 547E(1).

<sup>240</sup> *Industrial Relations Act 2016* (Qld) s 547E(2).

<sup>241</sup> *Industrial Relations Act 2016* (Qld) s 547F.

<sup>242</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123S.

<sup>243</sup> *Industrial Relations Act 2016* (Qld) s 547G.

<sup>244</sup> *Industrial Relations Act 2016* (Qld) s 547H(1).

However, a party may apply for the order only after the conciliator's certificate about the conciliation process is filed with the Registrar.<sup>245</sup>

The Industrial Magistrates Court may make any order giving effect to an agreement reached in a conciliation process that the court considers appropriate in the circumstances.<sup>246</sup>

### 5.11.2 Hearing of unpaid amount claims not referred to or resolved at conciliation

This procedure applies if:

- a party does not wish to participate in conciliation (after notifying the Registrar in writing before the conciliation conference starts);<sup>247</sup>
- if the Registrar decides not to refer the 'relevant claim' (i.e. includes an unpaid amount claim) to conciliation;<sup>248</sup> or
- the conciliation process is finished other than because the parties agree on a resolution to all of the relevant claim.<sup>249</sup>

The Registrar must:

- notify the QIRC that the conciliation is not proceeding and the reason;<sup>250</sup> and
- refer the relevant claim or the unresolved part of the relevant claim for hearing by the Industrial Magistrates Court.<sup>251</sup>

#### Simplified Procedures

Simplified procedures relate to '*relevant amounts*', which include unpaid amount claims under ss 379, 386 and 396 that are \$50,000 or less - but not offences or pecuniary penalties predicated on a contravention.<sup>252</sup>

For other '*relevant claims*' (including unpaid amount claims in the Industrial Magistrates Court),<sup>253</sup> the parties to the proceeding may still agree to the all or part of the simplified procedures applying to proceeding. The agreement must be in writing and filed in the registry.<sup>254</sup>

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<sup>245</sup> *Industrial Relations Act 2016* (Qld) s 547F(2).

<sup>246</sup> *Industrial Relations Act 2016* (Qld) s 547F(3).

<sup>247</sup> *Industrial Relations Act 2016* (Qld) s 547C.

<sup>248</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123U(1)(a).

<sup>249</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123U(1)(b).

<sup>250</sup> *Industrial Relations Act 2016* (Qld) s 547C(5).

<sup>251</sup> *Industrial Relations Act 2016* (Qld) s 547C(5); *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123U(2)(b).

<sup>252</sup> *Industrial Relations Act 2016* (Qld) s 531.

<sup>253</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123N.

<sup>254</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 123R.



The Industrial Magistrates Court may hear the unpaid amount claim using the simplified procedures. The simplified procedures are that the Industrial Magistrates Court is not bound by the laws of evidence and procedure applying to a proceeding in the Industrial Magistrates Court.<sup>255</sup>

The Industrial Magistrates Court must hear and decide the proceedings under the simplified procedures unless it decides this would be an abuse of process.<sup>256</sup>

In proceedings for 'relevant amounts', if parties do not elect to apply the simplified procedures, the Industrial Magistrates Courts may still inform itself in the way it considers appropriate in the exercise of its jurisdiction and will not be bound by the rules of evidence.<sup>257</sup>

Note: The *Industrial Relations (Tribunals) Rules 2011* (Qld) have application for the hearing. The *Uniform Civil Procedure Rules 1999* (Qld) are not used.

### 5.11.3 Appeals

A decision of the Industrial Magistrates Court may be appealed to the Industrial Court of Queensland.<sup>258</sup> The Industrial Court may:

- dismiss the appeal;
- allow the appeal and set aside the decision and substitute another decision;
- allow the appeal and amend the decision; or
- allow the appeal, suspend the operation of the decision and remit the matter, with or without directions, to the QIRC or an Industrial Magistrates Court to act according to law.<sup>259</sup>

An application to the Industrial Court to appeal from a decision of a Magistrate is to be filed in the Magistrates Court at the place where the decision was made.<sup>260</sup> The Registrar of the Magistrates Court is to then provide the application to the Industrial Registrar.<sup>261</sup>

### 5.11.4 Forms

- Claim before an Industrial Magistrate – Form 68 on QIRC website.

### 5.11.5 Practice Directions

There are no specific Practice Directions at this time.

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<sup>255</sup> *Industrial Relations Act 2016* (Qld) s 531(2); *Industrial Relations (Tribunals) Rules 2011* (Qld) s 123R(4).

<sup>256</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) s 123R(6).

<sup>257</sup> *Industrial Relations Act 2016* (Qld) s 531(2).

<sup>258</sup> *Industrial Relations Act 2016* (Qld) s 556.

<sup>259</sup> *Industrial Relations Act* (Qld) s 558.

<sup>260</sup> *Industrial Relations (Tribunals) Rules 2011*, r 144.

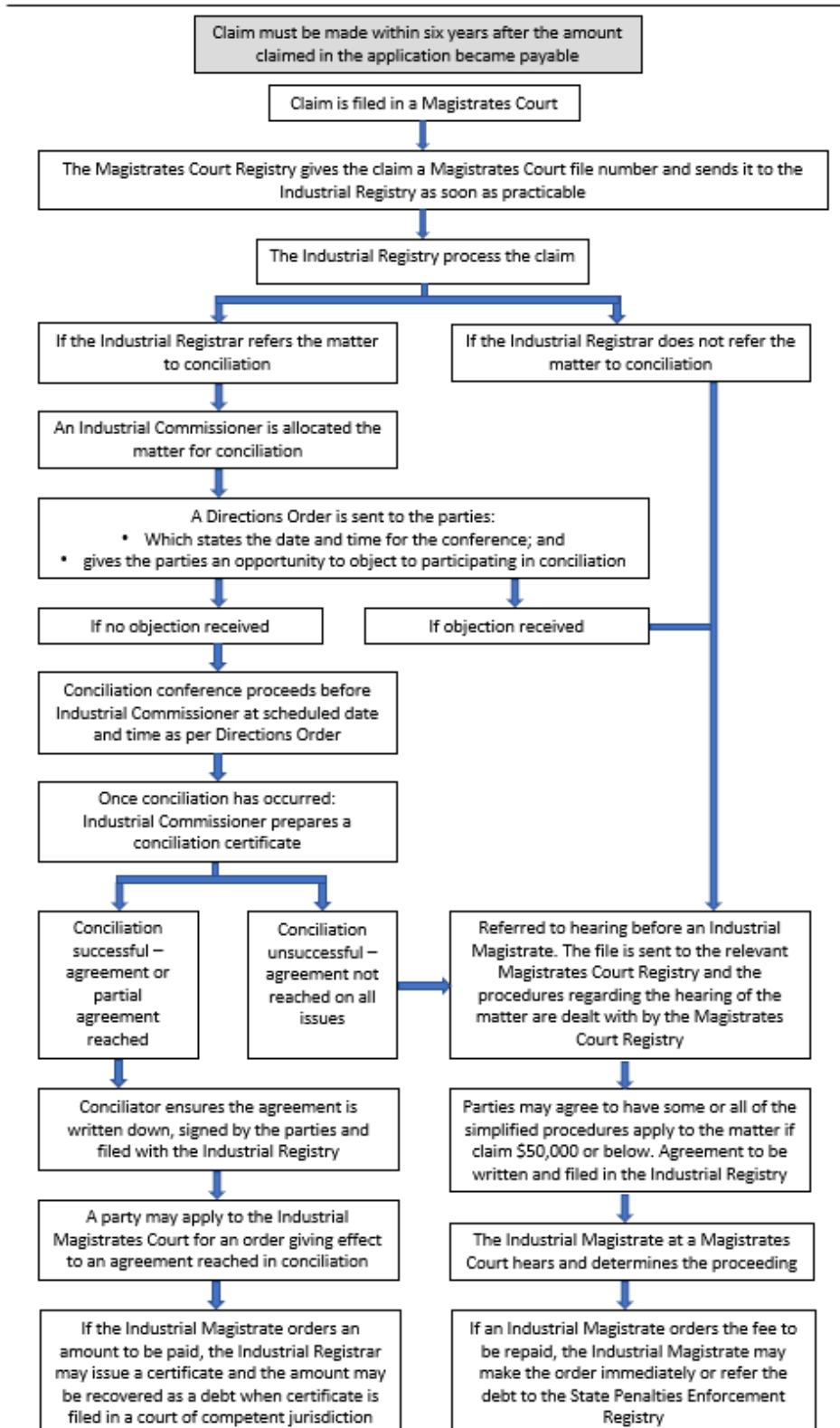
<sup>261</sup> *Ibid*, r 148.

5.11.6 Flowcharts

i. 'Unpaid amount claim' - Industrial Magistrate under the IR Act (s 379, 386 or 396)

**Unpaid amount claim (s 379, 386, 396) – Form 68  
Industrial Magistrates Court**

*Industrial Relations Act 2016 (Qld) s 379, 386, 396, Chapter 11, Pt 5,  
Div 5A; and  
Industrial Relations (Tribunals) Rules 2011 (Qld), Pt 3, Div 1*

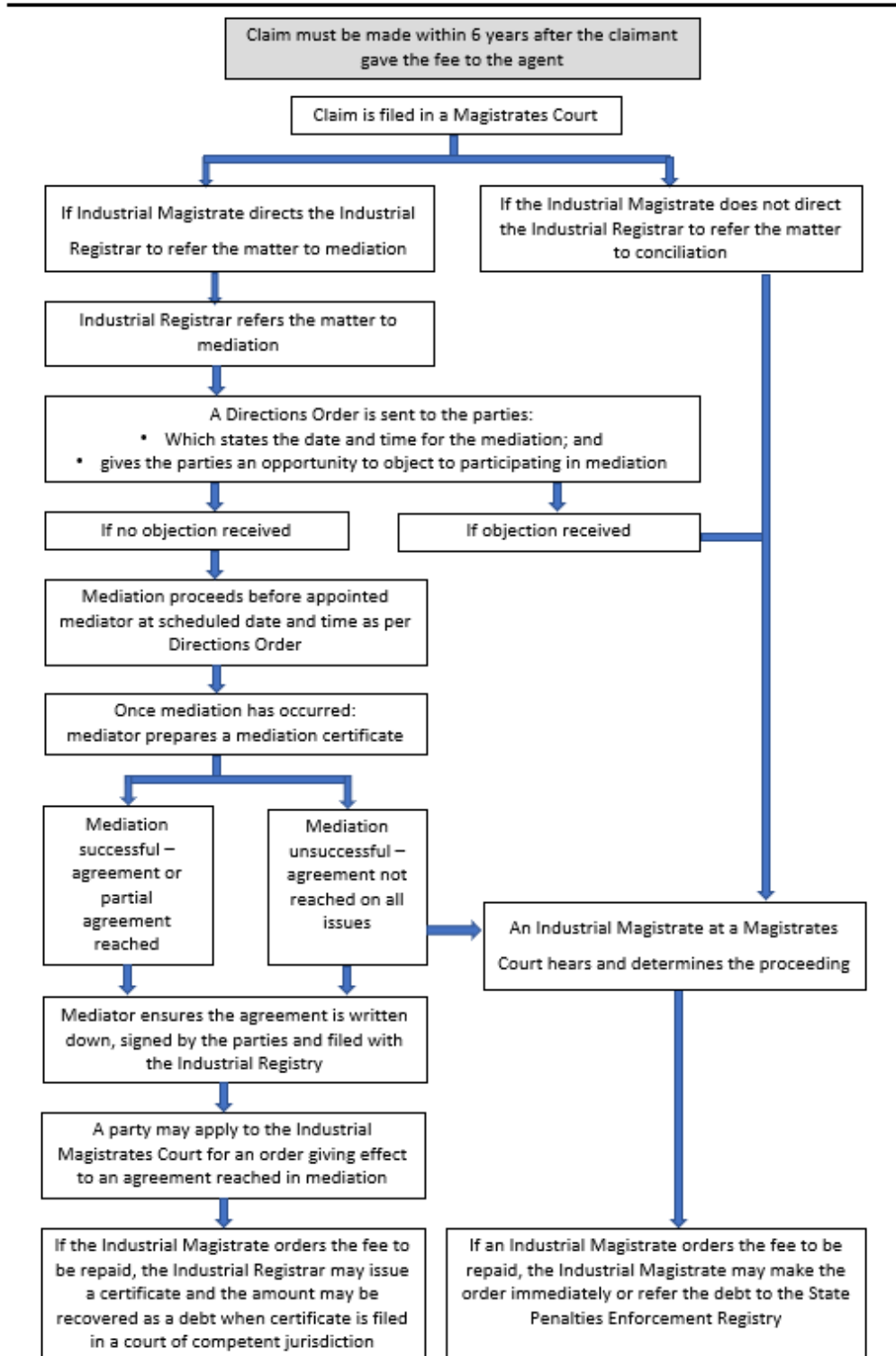


ii. Application made to an Industrial Magistrate for repayment of private employment agent fee under s 402 IR Act

**Claim for repayment of fee from private employment agent –  
Form 68**

**Industrial Magistrates Court**

*Industrial Relations Act 2016 (Qld) s 402; and  
Industrial Relations (Tribunals) Rules 2011 (Qld) Pt 3, Div 1; and  
Uniform Civil Procedure Rules 1999 (Qld) Ch 9, Pt 4*



## CHAPTER 6 - WAGE RECOVERY – EMPLOYMENT CLAIMS IN THE MAGISTRATES COURT

### 6.1 What is an employment claim?

An employment claim is a claim an employee can make under s 42B of the *Magistrates Court Act 1921* (Qld) to recover monies arising out of a breach of contract with an employer.

The jurisdiction of the Magistrates Court to hear employment claims from national system employees is limited to claims that cannot be brought under s 539 of the FW Act.<sup>262</sup> As s 539 provides for the majority of claims arising from a breach of a contract of employment available to national system employees, it is expected that the Magistrates Court will not hear a significant number of employment claims from national system employees.

The jurisdiction of the Magistrates Court to hear employment claims from Queensland industrial relations system employees is also limited to claims for which the relevant cause of action is not within the jurisdiction of the QIRC.<sup>263</sup>

As a result, it is anticipated that the employment claim provisions will no longer be utilised to any great extent.

### 6.2 Jurisdiction (*Magistrates Court Act 1921* (Qld), s 42B)

Employment claims for up to \$150,000 may be made in the Magistrates Court.

If compensation sought in an employment claim is over \$150,000 then that application is made to a District Court.<sup>264</sup> A District Court may hear claims for compensation for between \$150,000 to \$750,000.<sup>265</sup> Amounts greater than \$750,000 are heard by the Supreme Court.

### 6.3 Purpose of employment claims

Section 42A of the *Magistrates Court Act 1921* (Qld) provides that the object of employment claims is to reduce the costs of proceedings brought in a Magistrates Court by low-income employees against employers for breaches of contracts of employment. This object is achieved by:

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<sup>262</sup> *Magistrates Court Act 1921* (Qld) s 42B(3) (as amended by *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld) s 18).

<sup>263</sup> *Magistrates Court Act 1921* (Qld) s 42B(2).

<sup>264</sup> *District Court of Queensland Act 1967* (Qld) s 68(1)(a)(iv).

<sup>265</sup> *Ibid* s 68(2).

- a. prescribing, under s 54, lower court fees for the proceedings;
- b. providing for award of costs in limited circumstances;
- c. allowing parties to be represented, without leave, by relevant organisations; and
- d. providing for compulsory conciliation before the hearing of the proceedings.

#### 6.4 Who may make an employment claim?<sup>266</sup>

A current or past employee of a Queensland industrial relations system employer or a national workplace relations system employer:

- a. Whose annual wages, at the time of the alleged breach of contract, are less than the amount of the high-income threshold under s 333 of the FW Act (\$158,500 as at 1 July 2021);
- b. Whose claim cannot be brought under s 539 of the FW Act; and
- c. Whose cause of action is not within the jurisdiction of the industrial relations commission (meaning that if the employee can make an application under ss 379, 386, 396, 402 and 475 of the IR Act then an employment claim cannot be made).

#### 6.5 Procedures

The procedure for employment claims is provided for at Chapter 13, Part 9, Division 2A of the UCPR. Rules 21-24 also apply to filing an employment claim.

The plaintiff must file an employment claim at a Magistrates Court Registry, in the approved form (Form 2A).

The Magistrates Court may, on application of a party to the proceedings, determine if the claim is or is not an employment claim.<sup>267</sup> For claims that may be brought under the IR Act, if the Court finds that the claim is not an employment claim and the applicant subsequently discontinues the proceeding and starts a proceeding based on the claim in QIRC, the following will apply:

- the period of time elapsed between when the proceeding was started and discontinued in the Magistrates Court will be disregarded for the purposes of time limits under the IR Act; and
- any conciliation of the dispute will be taken to be conciliation by the QIRC.<sup>268</sup>

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<sup>266</sup> *Magistrates Court Act 1921* (Qld) s 42B.

<sup>267</sup> *Magistrates Court Act 1921* (Qld) s 42C.

<sup>268</sup> *Ibid* s 42C(3).

If a Magistrates Court determines under s 42C(1) of the *Magistrates Court Act 1921* (Qld) that a claim is not an employment claim but rather a fair work claim, the provisions of s 42C(3) will not apply.

Rule 522D of the UCPR provides for the suspension of a conciliation while the court determines whether or not a claim is an employment claim.

Rules 522E – 522G of the UCPR provide for the conclusion of conciliations for employment claims, whether by agreement (a record of which is kept sealed and attached to the court file), or abandonment. A certificate of conciliation must be provided by the conciliator to the parties.

All members of the QIRC are appointed as conciliators by the Magistrates Court.

Rules 522H - 522M of the UCPR provide for the hearing of employment claims. Importantly, sub-rule 522K(1) requires the parties to have all relevant documents available at the hearing.

Rule 522NP of the UCPR provides that the following provisions do not apply to an employment claim:

- a. Chapter 6 (pleadings)
- b. Chapter 7, Part 2 (disclosure by parties)
- c. Chapter 9 (ending proceedings early), Parts 2 (summary judgment) and 4 (alternative dispute resolution processes)
- d. Chapter 13 (trials and other hearings), Parts 2 (setting trial dates and related matters) and 6 (decisions on the papers without oral hearing)

## 6.6 Hearing

Employment claims are heard before the Magistrates Court, under the *Magistrates Court Act 1921* (Qld) and the UCPR.

The simplified procedures under r 514 of the UCPR apply to employment claims of not more than \$25,000. The parties to an employment claim over \$25,000 may agree in writing to apply all or part of the simplified procedures to the claim and file the agreement in the registry of the Magistrates Court.<sup>269</sup>

## 6.7 Representation

A claimant may be represented by a lawyer or, by leave of the Court, another person. Section 42ZA of the *Magistrates Courts Act 1921* (Qld) provides that a claimant can also be represented by a relevant employee organisation.

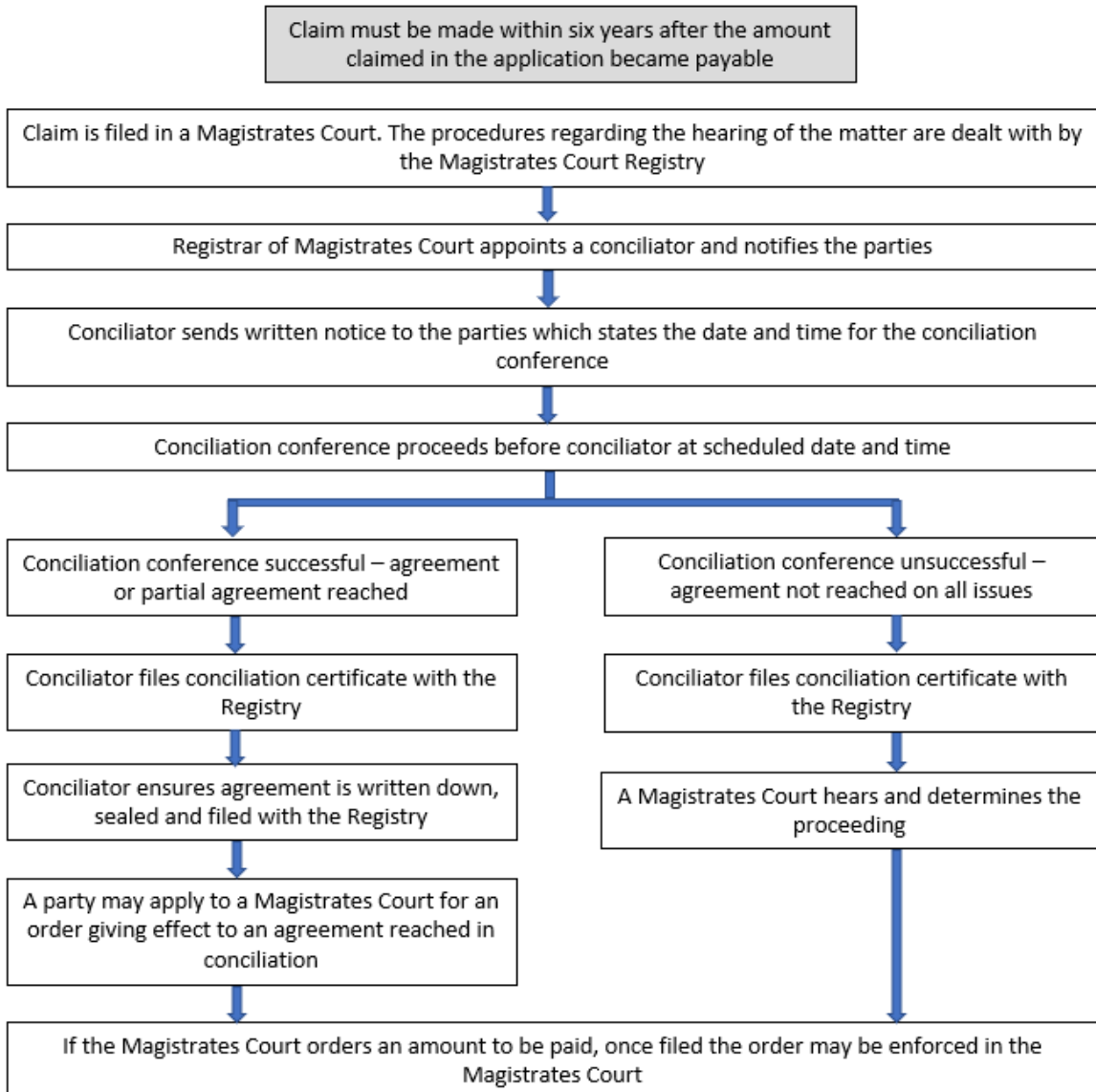
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<sup>269</sup> *Uniform Civil Procedure Rules 1999* (Qld), r 514.

6.8 Flowchart

## Employment claim – Form 2A (UCPR) Magistrates Court

*Magistrates Court Act 1921 (Qld) Pt 5A;  
Uniform Civil Procedure Rules 1999 (Qld) Ch 13, Pt 9, Div 2A*



## CHAPTER 7 – IR ACT PROSECUTIONS IN THE INDUSTRIAL MAGISTRATES COURT

### 7.1 Jurisdiction

The Industrial Magistrates Court has jurisdiction to hear and determine prosecution of offences pertaining to failure to pay entitlements under the IR Act.<sup>270</sup> Prosecution of offences under the Criminal Code are discussed in chapter 8 of this benchbook.

### 7.2 Offences

The offences prosecutable under the IR Act are:

- contravention of an order of the QIRC;
- failure to provide an apprentice's required tools or tool allowance (s 137(4));
- failure to pay occupational superannuation contributions (s 394);
- receipt of unlawful fees from a work seeker by a private employment agent (s 400); and
- failure to pay wages payable to an employee under the IR Act, a relevant industrial instrument or permit (s 928).

### 7.3 Who may prosecute an offence?

Prosecution of an offence may be commenced in the Industrial Magistrates Court by an inspector, or a registered organisation or an officer or member of a registered organisation.<sup>271</sup>

Therefore, it is not necessary to be the victim of an alleged offence to make a complaint. This allows an appointed inspector to make the complaint. The officer making the complaint attends court on the basis as the complainant.

### 7.4 Where can a prosecution be made?

All prosecutions relating to the above offences may be commenced in the Industrial Magistrates Court.<sup>272</sup>

A complaint must be made in the approved form (Form 4 under the *Justices Act 1886* (Qld) (**Justices Act**), witnessed by a Justice of the Peace, and filed in the registry of a Magistrates Court.<sup>273</sup>

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<sup>270</sup> *Industrial Relations Act 2016* (Qld) ss 506(1)(b), 928(6).

<sup>271</sup> *Industrial Relations Act 2016* (Qld) ss 526(b), 527(1)(d).

<sup>272</sup> *Industrial Relations Act 2016* (Qld) ss 137(4),(8), 394(1),(5), 400(1)-(2), 401.

<sup>273</sup> *Justices Act 1886* (Qld) s 53.



A 'public officer' includes an officer or employee of the public service of the State. The advantage of a 'public officer' making the complaint is most notably it allows for matters to proceed *ex-parte* under section 142A of the Justices Act if the defendant does not appear in the court on the summons date.

## 7.5 Representation

Parties to proceedings for prosecution of offences may be represented by a lawyer in the Industrial Magistrates Court.<sup>274</sup> However the person represented cannot be awarded costs of the representation.<sup>275</sup>

An act required or permitted to be done by party or person in a prosecution may be done by:

- the party or person;
- the party or person's lawyer or agent; or
- If the party or person is an organisation, an officer or member of the organisation.<sup>276</sup>

## 7.6 What orders may be made?

### Failure to pay apprentice's tool allowance

Where a defendant is found guilty of breaching s 137(4) of the IR Act, the Industrial Magistrate must (in addition to a penalty the Industrial Magistrate may impose) order the employer to:

- provide the apprentice with the tools required to be provided under the QIRC's order; or
- pay to the Magistrates Court the amount stated in the QIRC's order, or an amount equivalent to the cost of the tools ordered to be provided.<sup>277</sup>

### Failure to pay occupational superannuation contributions

Where a defendant is found guilty of breaching s 394 of the IR Act, the Industrial Magistrate may order payment of superannuation under ss 395-396. This is addressed in more detail in paragraphs 4.8 and 5.6.

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<sup>274</sup> *Industrial Relations Act 2016* (Qld) s 530(1)(e)(iii).

<sup>275</sup> *Industrial Relations Act 2016* (Qld) s 530(6).

<sup>276</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 124.

<sup>277</sup> *Industrial Relations Act 2016* (Qld) s 137(8).

Private employment agent receiving an unlawful fee from a work seeker

Where a defendant is found guilty of breaching s 400 of the IR Act, the Industrial Magistrate must order the agent to repay the received fee to the work seeker unless:

- the fee has already been repaid to the work seeker, or
- an existing order for repayment under ss 402 or 405 is already outstanding.<sup>278</sup>

An order for repayment may also be made if the Industrial Magistrate finds the defendant not guilty of a breach of s 400 but determines on the balance of probabilities that an unlawful fee has been paid by the work seeker to the defendant.<sup>279</sup>

This order is in addition to a penalty the Industrial Magistrate may impose and may be made despite an express or implied provision of an agreement to the contrary and on the terms the Industrial Magistrate considers appropriate.<sup>280</sup>

The Industrial Magistrate may make an order under this section despite an express or implied provision of an agreement to the contrary and on the terms the Industrial Magistrate considers appropriate.<sup>281</sup>

Failure to pay wages payable to an employee under the IR Act, etc

Where a defendant is found guilty of breaching s 928 of the IR Act, the Industrial Magistrate must, in addition to a penalty the Industrial Magistrate may impose, order the defendant to pay the employee the amount the Industrial Magistrate finds to be payable to the employee.<sup>282</sup>

If the Industrial Magistrate does not find the defendant guilty, the Industrial Magistrate may order the defendant to pay the employee the amount the Industrial Magistrate finds, on the balance of probabilities, to be payable to the employee.<sup>283</sup>

These orders may be made despite an express or implied provision of an agreement to the contrary and on the terms the Industrial Magistrate considers appropriate.<sup>284</sup>

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<sup>278</sup> *Industrial Relations Act 2016* (Qld) s 401(2)-(3).

<sup>279</sup> *Industrial Relations Act 2016* (Qld) s 401(4).

<sup>280</sup> *Industrial Relations Act 2016* (Qld) s 401(5).

<sup>281</sup> *Industrial Relations Act 2016* (Qld) s 401(5).

<sup>282</sup> *Industrial Relations Act 2016* (Qld) s 928(6)(a).

<sup>283</sup> *Industrial Relations Act 2016* (Qld) s 928(6)(b).

<sup>284</sup> *Industrial Relations Act 2016* (Qld) s 379(7)(a)-(b).

## 7.7 Enforcement of orders

An order made by an Industrial Magistrate for payment by an employer of wages, superannuation, etc is enforceable as an order for payment of monies under the Justices Act.<sup>285</sup>

A default order of levy and distress and/or imprisonment can be made to cover the order.<sup>286</sup>

An order to pay the other party's expenses, including witness expenses may also be made.<sup>287</sup>

The Industrial Magistrate also has discretion to give particulars of the order to the court Registrar for registration with the State Penalties Enforcement Registry.<sup>288</sup>

## 7.8 Limits to monetary compensation

The IR Act does not provide a limit to monetary compensation for orders that may be made in relation to complaints for prosecution of offences commenced in the Industrial Magistrates Court.

## 7.9 Time Limit

The IR Act provides for the following general time limits to commence prosecutions for offences against the IR Act in the Industrial Magistrates Court:

- within one year after the offence was committed; or
- within six months after the offence comes to the complainant's knowledge but within 18 months after the offence was committed.<sup>289</sup>

However, proceedings for an offence against ss 137, 394 or 928 must be started within six months after the offence comes to the complainant's knowledge but within six (6) years after the offences were committed.<sup>290</sup>

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<sup>285</sup> *Industrial Relations Act 2016* (Qld) ss 380(2), 406(2); *Justices Act 1886* (Qld) Part 6 Div 9; *Hoey v Cameron*, 137 QGIG 287.

<sup>286</sup> *Justices Act 1886* (Qld) ss 161, 163A; *Kehoe v Moore*, (1977) 96 QGIG 1069; *Palk v Kneevess*, (2007) 186 QGIG 700.

<sup>287</sup> *Industrial Relations Act 2016* (Qld) s 541(c).

<sup>288</sup> *Industrial Relations Act 2016* (Qld) ss 380(5), 406(5).

<sup>289</sup> *Industrial Relations Act 2016* (Qld) s 568(1).

<sup>290</sup> *Industrial Relations Act 2016* (Qld) s 568(2).

## 7.10 Penalties and costs

### Penalties

The maximum penalties that may be applied for an individual are:

- for contravention of an order of the QIRC under s 137 to provide required tools, or a tool allowance – 40 penalty units
- for failure to provide superannuation contributions in contravention of s 394 – 40 penalty units
- for demanding or receiving a finder's fee from a work seeker in contravention of s 400 – 16 penalty units, and
- for failure to pay wages in contravention of s 928 – 200 penalty units.

The maximum penalties for a body corporate are five times the above amounts.<sup>291</sup>

### Costs

In proceedings before the Industrial Magistrates Court for the prosecution of an offence, a person represented by a lawyer cannot be awarded costs of the representation.<sup>292</sup>

### Filing Fee

An order can be made for payment of the filing fee (\$101.40 as at 1 June 2021) plus the Appeals Cost Fund Fee (\$3.95 as at 1 June 2021) payable to the clerk of the court.<sup>293</sup>

There is a fee exemption for complaints initiated by the State, but if the court makes an order against the defendant, the court must also order the defendant to pay the filing fee to the clerk of the court.<sup>294</sup>

### Witness Expenses

A Magistrate may allow costs and witness expenses may be claimed for an employee who was required to be present at court. Where the witness travels long distances, requires accommodation, or suffers loss of wages, additional expenses may be claimed.<sup>295</sup>

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<sup>291</sup> *Penalties and Sentences Act 1992* (Qld) s 181B.

<sup>292</sup> *Industrial Relations Act 2016* (Qld) s 530(6).

<sup>293</sup> *Justices Regulation 2014* (Qld) Sch 3 Item 1; *Appeal Cost Fund Regulation 2010* (Qld) Sch 1, Item (c).

<sup>294</sup> *Justices Regulation 2014* (Qld) reg 21.

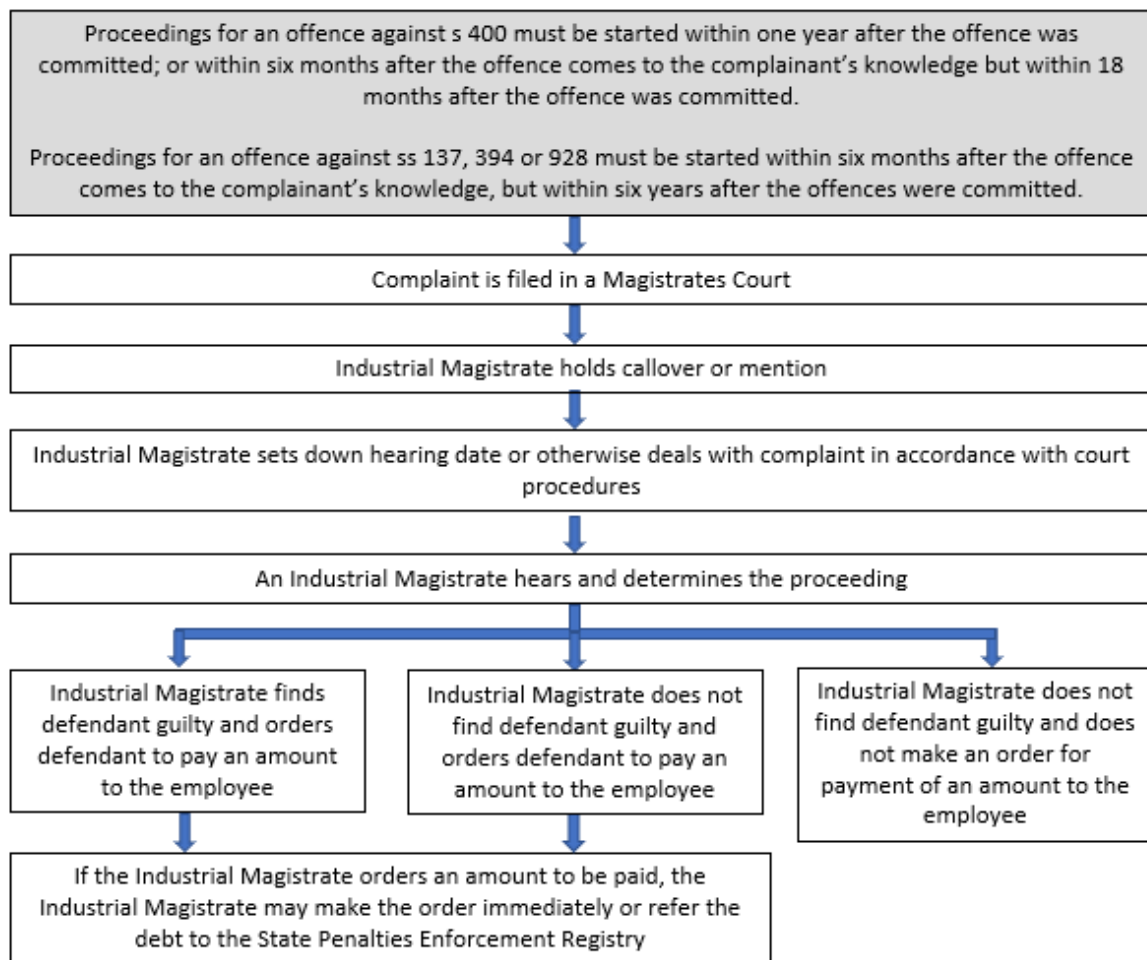
<sup>295</sup> *Industrial Relations (Tribunals) Rules 2011* (Qld) r 110(2).

7.11 Flowchart

## Prosecution of offence against IR Act – Form 04 (*Justices Act 1886*)

### Industrial Magistrates Court

*Industrial Relations Act 2016* (Qld) ss 137, 380, 394, 400, 406, 928;  
*Justices Act 1886* (Qld) Pt 6, Div 9



## CHAPTER 8 – INITIATING FORMS

*Note: Unless stated specified below, the forms approved for use under the Industrial Relations (Tribunals) Rules 2011 (Qld) apply to matters discussed in the below chapters.*

### Chapter 2 Forms (Wage recovery – Fair Work Claims)

Form 2 UCPR                      Claim made in the Magistrates Court

Form 90                              Claim made in the Industrial Magistrates Court

### Chapter 4 Forms (Wage recovery – Unpaid Wages - QIRC)

Form 13                              Application for payment instead of taking long service leave.

Form 14                              Application for proportionate payment of long service leave

Form 15                              Application to recover unpaid wages, superannuation contributions etc.

Form 18                              Application for order for repayment of fee recovered by a private employment agent.

### Chapter 5 Forms (Wage recovery – Unpaid Amount Claims – Industrial Magistrates Court)

Form 68                              Claim made in the Industrial Magistrates Court.

### Chapter 6 Forms (Wage recovery – Employment Claims – Magistrates Court)

Form 2A UCPR                      Employment Claim

### Chapter 7 Forms (Wage recovery – Prosecutions - Industrial Magistrates Court)

Form 04 *Justices Act*      Complaint – general purposes – made and summons

[Forms - Queensland Industrial Relations \(qirc.qld.gov.au\)](http://qirc.qld.gov.au)

[Forms - Queensland Courts - Uniform Civil Procedure Rules 1999](#)

[Forms - Qld Courts - Justices Act](#)

APPENDIX A – WAGE RECOVERY AND LONG SERVICE LEAVE										
Claim/ Application type	Civil penalty	Who can make the claim	Relevant legislation	Limit of claim	Where can claim be filed	Filing fee	Representation at hearing	Conciliation conference	Hearing	Who is the registry
MEC - Magistrates Court Employment Claim <sup>296</sup> [Form 002A - Employment Claim - Magistrates Court - Uniform Civil Procedure Rules 1999 (UCPR)]  [Plaintiff and Defendant]	Nil	<ul style="list-style-type: none"> <li>Employee (earning under the FW Act high income threshold<sup>297</sup>) who is not eligible to make a claim under s 539 of the <i>Fair Work Act 2009</i> (Cth) (FW Act) or relevant provisions of the <i>Industrial Relations Act 2016</i> (IR Act)<sup>298</sup></li> </ul>	<p><b>Magistrates Court Act 1921</b> (MC Act)</p> <ul style="list-style-type: none"> <li>s 42B - Employment Claim - for those whose wages are less than the FW Act high income threshold<sup>299</sup> at time of breach of contract<sup>300</sup></li> <li><i>Uniform Civil Procedure Rules 1999</i> (UCPR) - Chapter 13, Part 9, Division 2A</li> </ul>	<p>Less than \$150,000: Magistrates Court</p> <p>Less than \$150,000: District Court</p> <p>Less than \$750,000: Supreme Court</p>	Magistrates Court Registry	\$64.55	<ul style="list-style-type: none"> <li>Lawyer</li> <li>Another person (by leave of the Court)</li> <li>Relevant organisation<sup>301</sup></li> </ul>	<ul style="list-style-type: none"> <li>All members of the QIRC (appointed as conciliators by Magistrates Court)</li> <li>Conciliation certificate or agreement issued<sup>302</sup></li> </ul>	<p>Heard before Magistrates Court (under the MC Act)</p> <p>[Decisions of Magistrates are appealed to the District Court]</p>	Registry for the Magistrates Court

<sup>296</sup> A claim under s 539 of the FW Act is not an employment claim - see s 42B of the MC Act.

<sup>297</sup> High income threshold under section 333 of the FW Act as at April 2021 = \$153,600.

<sup>298</sup> Those relevant provisions of the *Industrial Relations Act 2016* (IR Act) being ss 379, 386, 396, 402, 475.

<sup>299</sup> High income threshold under section 333 of the FW Act as at April 2021 = \$153,600.

<sup>300</sup> If compensation sought in an employment claim is over \$150,000, then application is made to the District Court (who can hear claims between \$150,000 to \$750,000).

<sup>301</sup> See s 168 of the IR Act (taken from definition within Schedule 5).

<sup>302</sup> Conciliation certificates (UCPR r 522E) and agreements (UCPR r 522F) are forwarded to the relevant Magistrate Courts registry for their records.

<p><b>FWC - Fair Work Claim</b> [Claim made in the Magistrates Court - <b>Form 2</b> – UCPR]<sup>303</sup></p> <p><b>[Plaintiff and Defendant]</b></p> <p>For further information on the application of simplified procedures to relevant claims, please see paragraph 2.7 of this Benchbook.</p>	<p>Up to 60 penalty units, or 600 penalty units for a serious contravention<sup>304</sup></p>	<ul style="list-style-type: none"> <li>• Employee who is eligible to make a claim under s 539 of FW Act</li> <li>• Employee Organisations and Registered Employee Associations</li> </ul>	<p><b>Magistrates Court Act 1921</b></p> <ul style="list-style-type: none"> <li>• s 15 – prescribed by rules of court</li> <li>• UCPR – r 8</li> </ul> <p><b>Fair Work Act 2009</b></p> <ul style="list-style-type: none"> <li>• s 539 - contravention of a civil remedy provision</li> <li>• s 545(3) – orders to pay an amount that was required to be paid under FW Act or other fair work instruments</li> <li>• s 548 – less than \$100,000 - relevant for those wanting to utilise the small claims procedures<sup>305</sup></li> </ul>	<p>No limit<sup>306</sup></p>	<p>Magistrates Court Registry</p>	<p>Between \$183.20 to \$683.80<sup>307</sup></p>	<ul style="list-style-type: none"> <li>• Lawyer</li> <li>• Another person (by leave of the Court)</li> <li>• Relevant organisation</li> </ul>	<ul style="list-style-type: none"> <li>• No conciliation available</li> <li>• Settlement conference may be available (s 523 UCPR)</li> </ul>	<p>Heard before Magistrates Court (under the MC Act)</p> <p>[Decisions of Magistrates are appealed to the District Court]</p>	<p>Registry for the Magistrates Court</p>
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<sup>303</sup> Claim made under MC Act and UCPR.

<sup>304</sup> Penalty unit value of \$222, applicable per the Commonwealth Notice of Indexation of the Penalty Unit Amount dated 14 May 2020; *Fair Work Act 2009* (Cth) s 539.

<sup>305</sup> Plaintiff must indicate they want the small claims procedure to apply in accordance with regulation 4.01 of the *Fair Work Regulations 2009* (FW Reg).

<sup>306</sup> There is no limit on the amount that can be claimed or heard within Magistrates Court.

<sup>307</sup> Dependent on amount of claim.



<p><b>FWC - Fair Work Claim</b> [Claim made in the Industrial Magistrates Court - <b>Form 90 - Industrial Relations (Tribunals) Rules 2011</b> (IR Rules)]<sup>308</sup></p> <p><b>[Applicant and Respondent]</b></p> <p>For further information on the application of simplified procedures to relevant claims, see paragraph 2.7 of this Benchbook.</p>	<p>Up to 60 penalty units, or 600 penalty units for a serious contravention<sup>309</sup></p>	<ul style="list-style-type: none"> <li>•Employee who is eligible to make a claim under s 539 of FW Act</li> <li>•Employee Organisations and Registered Employee Associations</li> </ul>	<p><b>Industrial Relations Act 2016</b></p> <ul style="list-style-type: none"> <li>• Chapter 11, Part 3 - Industrial Magistrates Court, Part 3B – IR Rules</li> </ul> <p><b>Fair Work Act 2009</b></p> <ul style="list-style-type: none"> <li>• s 539 - contravention of a civil remedy provision</li> <li>• s 545(3) – orders to pay an amount that was required to be paid under FW Act or FW instrument</li> <li>• s 548 – less \$100,000 - relevant for those wanting to utilise the small claims procedures<sup>310</sup></li> </ul>	<p>No limit<sup>311</sup></p>	<p>Industrial Registry or Magistrates Court Registry (on behalf of the Industrial Registry)</p>	<p>Nil</p>	<ul style="list-style-type: none"> <li>• Employee Organisations and Registered Employee Associations<sup>312</sup></li> <li>• Official of an Industrial Organisation for fair work small claim<sup>313</sup></li> <li>• Agent<sup>314</sup></li> <li>• If party or person is organisation – an officer or member of the organisation<sup>315</sup></li> <li>• Lawyer<sup>316</sup></li> <li>• See also rule 124 of IR Rules<sup>317</sup></li> </ul>	<ul style="list-style-type: none"> <li>•Industrial Commissioners of QIRC (s 507D of IR Act)</li> <li>•Conciliation Certificates (s 507F IR Act) issued</li> <li>•Conciliation Agreement (s 547G) issued</li> </ul>	<p>Heard before Industrial Magistrate (under the FW Act)<sup>318</sup></p> <p>[Decisions of Industrial Magistrates are appealed to the Industrial Court]</p>	<p>Industrial Registry regardless of where it is filed.</p> <p>If claim proceeds to a hearing, the relevant Magistrates Court Registry.</p>
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<sup>308</sup> Claim made under s 539 of the FW Act and the IR Rules.

<sup>309</sup> Penalty unit value of \$222, applicable per the Commonwealth Notice of Indexation of the Penalty Unit Amount dated 14 May 2020; *Fair Work Act 2009* (Cth) s 539.

<sup>310</sup> Plaintiff must indicate they want the small claims procedure to apply in accordance with regulation 4.01 of the FW Reg.

<sup>311</sup> There is no limit on the amount that can be claimed or heard within the Magistrates Court.

<sup>312</sup> Under ss 539 and 540 of the FW Act.

<sup>313</sup> Under \$100,000 - s 507J of the IR Act.

<sup>314</sup> If appointment is in writing.

<sup>315</sup> Under s 529 of the IR Rules.

<sup>316</sup> By leave of the Court (s 530 IR Act or s 548 of FW Act); or consent by all parties.

<sup>317</sup> Rule 124 of the IR Rules applies unless the Act, an enabling Act or these rules provide otherwise. Party to proceeding in Industrial Magistrates Court may be represented by lawyer or agent; of if the party is an organisation or association – an officer or member of the organisation or association.

<sup>318</sup> The IR Rules have application for the hearing (not the UCPR).

<p><b>Claim before Industrial Magistrate</b> [Claim made under IR Act- <b>Form 68 – IR Rules</b>]</p> <p><b>[Claimant and Defendant]</b></p> <p>For further information on the application of simplified procedures to relevant claims, see paragraph 5.11.2 of this Benchbook.</p>	<p>Up to 27 penalty units for an individual, up to 135 penalty units for a corporation<sup>319</sup></p>	<ul style="list-style-type: none"> <li>•National System Employee (only for LSL, jury service or emergency service leave)<sup>320</sup></li> <li>•Outworker<sup>321</sup></li> <li>•Apprentice, trainee, employee, employee organisation or other person acting for the employee<sup>322</sup></li> <li>•Public Service Employees<sup>323</sup></li> <li>•Local Government Employees<sup>324</sup></li> <li>•Employees of employers declared not to be NSE<sup>325</sup></li> <li>•Work Seeker (somebody looking for work), model or performer<sup>326</sup></li> <li>•Inspector<sup>327</sup></li> </ul>	<p><b>Industrial Relations Act 2016</b></p> <ul style="list-style-type: none"> <li>• s 379 - unpaid wages, tool allowance, unauthorised deductions<sup>328</sup></li> <li>• s 386 - outworker<sup>329</sup></li> <li>• s 396 - superannuation<sup>330</sup></li> <li>• s 402 – repayment of fees from private employment agent<sup>331</sup></li> <li>• S 476 - unpaid wages and superannuation<sup>332</sup></li> <li>• s 506 - under Magistrates’ jurisdiction</li> </ul> <p><b>NOTE:</b> The enabling Act for the Industrial Magistrates Court is the IR Act - therefore as there is an absence of provisions, the IR Act does not impose a monetary limit on the jurisdiction of the Industrial Magistrates Court.</p>	<p>No limit<sup>333</sup> (See note)</p>	<p>Magistrates Court Registry</p>	<p>Nil</p>	<ul style="list-style-type: none"> <li>•Agent<sup>334</sup></li> <li>•Lawyer<sup>335</sup></li> <li>•See also rule 124 of IR Rules<sup>336</sup></li> </ul>	<ul style="list-style-type: none"> <li>•Industrial Commissioners of QIRC<sup>337</sup></li> <li>•Conciliation Certificates (s 547F) issued</li> <li>•Conciliation Agreements (s 547G)<sup>338</sup></li> <li>•For s 402 claims – see note in column 4)</li> </ul>	<p>Heard before Industrial Magistrate<sup>339</sup></p> <p>[Decisions of Industrial Magistrates are appealed to the Industrial Court]</p>	<p>Magistrates Court Registry</p>
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<sup>319</sup> Penalty unit value of \$137.85 as at 1 July 2021 (Penalties and Sentences Regulation 2015); IR Act, Schedule 3 – contraventions of modern awards or enterprises.

<sup>320</sup> IR Act - s 506 and 376, FW Act - s 27(2).

<sup>321</sup> IR Act - s 386.

<sup>322</sup> IR Act - s 379.

<sup>323</sup> IR Act - ss 379 and 396.

<sup>324</sup> IR Act - ss 379 and 396.

<sup>325</sup> National System Employer - Industrial Relations Regulation 2018 (IR Reg) - Schedule 5 and IR Act ss 376 and 396.

<sup>326</sup> IR Act - s 402.

<sup>327</sup> IR Act - ss 379; 386; 396, 402.

<sup>328</sup> IR Act – s 371 - (no more than \$50,000 if using simplified procedures).

<sup>329</sup> No more than \$50,000 if using simplified procedures.

<sup>330</sup> No more than \$50,000 if using simplified procedures.

<sup>331</sup> If a claim is made under s 402 of the IR Act, then it cannot be conciliated by an Industrial Commissioner (see s 547B of IR Act).

<sup>332</sup> Only on referral from the President of the QIRC and for no more than \$50,000.

<sup>333</sup> There is no limit on the amount that can be claimed or heard within Magistrates Court.

<sup>334</sup> Appointed in writing or if party or person is organisation – an officer or member of the organisation (s 529 IR Act).

<sup>335</sup> By leave of the Court (s 530 IR Act), or consent by all parties.

<sup>336</sup> Rule 124 of the IR Rules applies unless the Act, an enabling Act or these rules provide otherwise. Party to proceeding in Industrial Magistrates Court may be represented by lawyer or agent; of if the party is an organisation or association – an officer or member of the organisation or association.

<sup>337</sup> For claims under ss 379, 386, 396, 476 (s 547D IR Act, r 123M IR Rules).

<sup>338</sup> Must be written down and signed by or for each party. There is no requirement to file the agreement with the Registry.

<sup>339</sup> Under the IR Act - the IR Rules have application for the hearing (not the UCPR).

<p><b>B - Application to recover unpaid wages, super-annuation contributions etc.<sup>340</sup></b></p> <p><b>[Applicant and Respondent]</b></p> <p>For further information on the application of simplified procedures to relevant claims, see paragraph 4.12.2 of this Benchbook.</p>	<p>Up to 27 penalty units for an individual, up to 135 penalty units for a corporation<sup>341</sup></p>	<ul style="list-style-type: none"> <li>• National System Employee (only for LSL, jury service or emergency service leave)<sup>342</sup></li> <li>• Outworker<sup>343</sup></li> <li>• Public Service Employees<sup>344</sup></li> <li>• Local Government Employees<sup>345</sup></li> <li>• Employees of employers declared not to be NSE<sup>346</sup></li> <li>• Apprentice Trainee or employee<sup>347</sup></li> <li>• Employee organisation or authorised person acting for the employee<sup>348</sup></li> <li>• Inspector<sup>349</sup></li> </ul>	<p><b>Industrial Relations Act 2016</b></p> <ul style="list-style-type: none"> <li>• s 386 - Outworker<sup>350</sup></li> <li>• s 475 - unpaid wages and superannuation<sup>351</sup></li> </ul>	<p>Less than \$50,000</p>	<p>Industrial Registry</p>	<p>Nil</p>	<ul style="list-style-type: none"> <li>• No Lawyer<sup>352</sup></li> <li>• See also rule 124 of IR Rules<sup>353</sup></li> </ul>	<ul style="list-style-type: none"> <li>• All Members of QIRC<sup>354</sup></li> <li>• Conciliation Certificate (s547F) issued</li> <li>• Conciliation Agreements (s 547G)<sup>355</sup></li> </ul>	<p>Heard before all Members of the QIRC under the IR Act<sup>356</sup></p> <p>The IR Rules have application for the hearing (not UCPR).</p> <p>[Decisions of Commission are appealed to the Industrial Court]</p>	<p>Industrial Registry</p>
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<sup>340</sup> Made under IR Act to the QIRC.

<sup>341</sup> Penalty unit value of \$137.85 as at 1 July 2021 (Penalties and Sentences Regulation 2015); IR Act, Schedule 3 – contraventions of modern awards or enterprises.

<sup>342</sup> IR Act - s 475, FW Act - s 27(2).

<sup>343</sup> IR Act - s 386.

<sup>344</sup> IR Act - ss 379 and 396.

<sup>345</sup> IR Act - ss 379 and 396.

<sup>346</sup> *Industrial Relations Regulation 2018* (IR Reg); Schedule 5 and IR Act ss 376 and 396.

<sup>347</sup> IR Act - s 475.

<sup>348</sup> IR Act - s 475.

<sup>349</sup> IR Act - ss 379; 386; 396, 402.

<sup>350</sup> No more than \$50,000 if using simplified procedures.

<sup>351</sup> Only on referral from the President of the QIRC and for no more than \$50,000.

<sup>352</sup> If made under s 403, 475 to QIRC or s 404(2), s 475(2) to IMC – (s 530(2)).

<sup>353</sup> Rule 124 of the IR Rules applies unless the Act, an enabling Act or these rules provide otherwise. Party to proceeding in Industrial Magistrates Court may be represented by lawyer or agent; of if the party is an organisation or association – an officer or member of the organisation or association.

<sup>354</sup> For unpaid amount claims made under ss 386, 396 or 475) (see s 547E of the IR Act).

<sup>355</sup> Must be written down and signed by or for each party. There is no requirement to file the agreement with the Registry.

<sup>356</sup> The IR Rules have application for the hearing (not the UCPR).

<p><b>B</b> - Application for order for repayment of fee received by a private employment agent (s 403)<sup>357</sup>  <b>[Form 18 – IR Rules]</b></p> <p><b>[Applicant and Respondent]</b></p>	Nil	<ul style="list-style-type: none"> <li>• Work seeker, model or performer<sup>358</sup></li> <li>• Employee organisation<sup>359</sup></li> <li>• Authorised person acting for the claimant<sup>360</sup></li> <li>• Inspector<sup>361</sup></li> </ul>	<p><b>Industrial Relations Act 2016</b></p> <ul style="list-style-type: none"> <li>• s 403</li> </ul>	Less than \$20,000	Industrial Registry	Nil	<ul style="list-style-type: none"> <li>• Party must not be represented by lawyer in proceedings before the QIRC or IMC under s 403</li> <li>• See also rule 124 of IR Rules<sup>362</sup></li> </ul>	All Members of the QIRC.  No requirement for conciliation certificate or agreement.	<p>Heard before all Members of the QIRC under the IR Act<sup>363</sup></p> <p>[Decisions of Commission are appealed to the Industrial Court]</p>	Industrial Registry
<p><b>EC</b> - Application for payment instead of taking Long Service Leave<sup>364</sup>  <b>[Form 13 – IR Rules]</b></p>	Nil	<ul style="list-style-type: none"> <li>• Public Service Employees</li> <li>• Local Government Employees</li> <li>• Employees of employers declared not to be NSE<sup>365</sup></li> <li>• National System Employee</li> </ul>	<p><b>Industrial Relations Act 2016</b></p> <ul style="list-style-type: none"> <li>• s 110</li> </ul>	No limit	Industrial Registry	Nil	<ul style="list-style-type: none"> <li>• See rule 124 of IR Rules<sup>366</sup></li> </ul>	Not normally conciliated, however all Members of the QIRC may deal with these matters	<p>Heard before all Members of the QIRC under IR Act</p> <p>[Decisions of Commission are appealed to the Industrial Court]</p>	Industrial Registry

<sup>357</sup> Made under the IR Act to the QIRC.

<sup>358</sup> IR Act s 400 – a National System Employee (s403 (3)(a)).

<sup>359</sup> IR Act s 403 (3)(b).

<sup>360</sup> IR Act s 403(3)(c).

<sup>361</sup> IR Act s 403(3)(d).

<sup>362</sup> Rule 124 of the IR Rules applies unless the Act, an enabling Act or these rules provide otherwise. Party to proceeding in Industrial Magistrates Court may be represented by lawyer or agent; of if the party is an organisation or association – an officer or member of the organisation or association.

<sup>363</sup> The QIRC President may remit to an Industrial Magistrate (s 405 IR Act).

<sup>364</sup> Made under the IR Act to the QIRC.

<sup>365</sup> *Industrial Relations Regulation 2018* (IR Reg) - Schedule 5 and IR Act ss 376 and 396.

<sup>366</sup> Rule 124 of the IR Rules applies unless the Act, an enabling Act or these rules provide otherwise. Party to proceeding in Industrial Magistrates Court may be represented by lawyer or agent; of if the party is an organisation or association – an officer or member of the organisation or association.

<p><b>B</b> - Application for proportionate payment of Long Service Leave<sup>367</sup> [Form 14 – IR Rules]  [Applicant and Interested Party]  For further information on the application of simplified procedures to relevant claims, see paragraph 4.12.2 of this Benchbook.</p>	Nil	<ul style="list-style-type: none"> <li>• National System Employee</li> <li>• Public Service Employees</li> <li>• Local Government Employees</li> <li>• Employees of employers declared not to be NSE<sup>368</sup></li> </ul>	<p><b>Industrial Relations Act 2016</b></p> <ul style="list-style-type: none"> <li>• s 475/476 (payable under s95(3))</li> </ul> <p><b>Fair Work Act 2009</b></p> <ul style="list-style-type: none"> <li>• s 27(2)(g) – LSL is a 'non-excluded matter' (see also s 26)</li> </ul>	No limit amount	Industrial Registry	Nil	<ul style="list-style-type: none"> <li>• No Lawyer<sup>369</sup></li> <li>• See also rule 124 of IR Rules<sup>370</sup></li> </ul>	All Members of the QIRC	<p>Heard before all Members of the Commission</p> <p>[Decisions of Commission are appealed to the Industrial Court]</p>	Industrial Registry
<p><b>WRC</b> – request for a conference regarding wage recovery [Informal request - no Form]</p>	Nil	<ul style="list-style-type: none"> <li>• All employees</li> </ul>	<p><b>Industrial Relations Act 2016</b></p>	No limit amount	Industrial Registry	Nil	<ul style="list-style-type: none"> <li>• Normally inspectors</li> </ul>	All Members of the QIRC	Not heard	Industrial Registry

<sup>367</sup> Made under the IR Act to the QIRC.

<sup>368</sup> *Industrial Relations Regulation 2018* (IR Reg) - Schedule 5 and IR Act ss 376 and 396.

<sup>369</sup> If made under s 475 to QIRC or s 475(2) to IMC – (s530(2)).

<sup>370</sup> Rule 124 of the IR Rules applies unless the Act, an enabling Act or these rules provide otherwise. Party to proceeding in Industrial Magistrates Court may be represented by lawyer or agent; of if the party is an organisation or association – an officer or member of the organisation or association.