HOW TO RUN YOUR OWN COURT CASE

A practical guide
to representing yourself in
Australian courts and tribunals

{NON-CRIMINAL CASES}

Nadine Behan

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Note for the reader
While every effort has been made to make the information contained in this book as up to date and accurate as possible to reflect the laws and the legal system of Australia as at August 2008, its contents are not intended as legal advice. Use it as a guide only and be sure to obtain legal advice for your specific legal problem.

10 Preparing your case part 1

There are many ways to prepare a case. What follows is one practical method that gives you the information you need while at the same time building your skills. It is divided into three parts.

This chapter deals with the early stages of litigation; that is, the preparation of the claim, the defence and the conference. Use this chapter in conjunction with chapter 11 to understand the requirements of these early stages of your litigation while you are collecting your evidence and researching the law.

The claim

The claim must be accurate and complete and contain sufficient information to enable you to establish your case at the hearing. If it misses important elements or details it may be difficult to raise them later and you could lose your case unnecessarily. The better the claim, the more likely you will settle the case at an early stage or win at the hearing.

To make an application or claim, you first need to know where, what and how to claim. Use the services already mentioned in chapter 6 'Where to go for help' for the necessary information and advice. Check also with the registry of the court or tribunal and with any brochures, fact sheets or information kits available about lodging a claim.

The claim can usually be started in the state or territory where you or the other party live or where the dispute occurred. Under certain circumstances it can be transferred elsewhere.

There may be strict time limits for commencing your legal action. This is called its **limitation date** or **limitation period** and is usually measured in years or months from the date the cause of the action arose. It may be as much as five or seven years or as little as six months and can prevent you from lodging a claim if you leave it too late. If you suspect that your dispute may be out of time to make a claim, get legal advice immediately about the limitation date.

Sometimes, but not often, you may have a choice of where to start the claim, for example a local court or a specialist tribunal. Although tribunals tend to be informal and less costly, get advice about the best choice for your case.

Be sure that the court or tribunal you use is the right one. Check with the website or registry that it has the **jurisdiction**, or powers, to deal with your kind of dispute and to give you the remedy you are seeking.

CASE STUDY **MURRAY'S BOARDER**

When Murray's lodger finally moved out, she left behind a legacy of unpaid rent along with bills for her share of the electricity and telephone and a vandalised bedroom. To Murray's surprise, he discovered he couldn't pursue the debt in the local Tenancy Tribunal, as technically a lodger isn't a tenant. Luckily, Murray checked with the tribunal before lodging the claim and was advised to use the Small Claims Court instead. As his claim was for under $10 000, which was the allowable money limit for the Small Claims Court, Murray lodged his claim without a hitch and saved himself the wasted time and effort of a wrong claim in a wrong court.

Be sure too that you have the correct details of the other party, especially their right name and right address. Check your records and update any changes in details. An error with this simple information can result in lengthy delays or your claim being rejected.

{ ***Golden Rule of Litigation:*** *KEEP ACCURATE RECORDS* }

There are various names for the claim, depending on the type of case and the particular court or tribunal involved. It might be called an **application** or a **statement of claim**, an ordinary or special claim, a claim for liquidated damages or perhaps some other name. If it is an appeal of a government decision it might be called an **application for review**.

With some claims you need only to provide the parties' details, a brief explanation of the problem and the amount of money being claimed or the order being sought. With others you might need to set out all the material facts necessary to establish your case. If your application is an appeal against a government decision, you will need to give details of the government decision and an explanation of why you think the decision is wrong. You might also need to attach a copy of the government decision as well as any documents that support your explanation.

The claim may be a simple form with clear questions about the information that's required. Or it may be a specific format legal document that you must draft yourself. Other legal documents might also need to be included with the claim. A Family Law claim, for instance, may need to be accompanied by an **affidavit**. Chapter 11 helps you with drafting legal documents.

If the claim is a form that you fill out, you may need to pick up the form from the registry of the court or tribunal or have it posted to you. Or else you may be able to complete and lodge it online, or download it and fill out a printed copy and lodge it manually. In any event, you must read the form very carefully. Make sure you comply with any requirements, for instance about the use of black ink, block letters and ruling out empty spaces on

the form. If you are lodging an online application, be sure you make the correct selections and enter all details accurately.

Before filling out the claim or completing it online, follow these important steps:

Compile a **chronology** of your dispute, listing the relevant events in date order. This will help you pinpoint relevant facts and dates and simplify the dispute in your mind.

Research the available remedies for your case and determine exactly what it is you want to claim. Be specific: what outcomes do you want from the decision-maker? It might be a sum of money. Or it might be an order ending or varying an agreement. It might be an order giving you certain rights, like a parenting order concerning your children. The order might contain certain conditions. Or, if you are appealing a government decision you may want the decision set aside.

Check on the claim form or at the website or with registry staff what else can be claimed. For example, can you claim the cost of the filing fee? Can you claim interest? If so, from what date and at what rate? If you're on a low income, check whether the filing fee can be waived; that is, whether you can be exempt from paying it.

Next, look at the legal requirements of your case and make a list of the legal elements necessary to establish your claim. These include the relevant sections of applicable legislation and, if the case involves an agreement made between the parties, the terms and conditions of this agreement. It may also include relevant cases. Use chapter 6 'Where to go for help' to obtain legal advice and chapter 11 'Preparing your case part 2' for researching the law.

From the chronology make a list of the relevant facts and, alongside each fact, list in brackets the evidence you have or will need to confirm the fact. You will need evidence to verify the basic facts of the case as well as any fact that is in dispute and that you need to establish your case. For evidence that you need but don't have, set about collecting it as soon as possible. Chapter 11

will help you with collecting your evidence. From this list, mark down on your list of legal requirements which facts, with which evidence, fulfil which legal requirements.

If you are aware of the substance of the other party's case, also make a list of its elements. Exactly what are they contesting? Do they have a different version of the facts? If so, what evidence are they using to support this? Are they claiming that the facts don't satisfy the legal requirements? Are they interpreting the law differently?

Using your lists, now outline the argument of your case, explaining why you should get what you want. Set out the law and the facts and show how the facts, as confirmed by your evidence, fulfil the legal requirements and thereby establish your claim.

Also, include in your argument reasons why the other party's case should fail. For example, the evidence or the law doesn't support their case, their evidence is inadequate to prove their facts, your evidence is better than theirs. Give details.

Now, briefly summarise your case in three or four sentences.

Finally, express your case in a nutshell. In one or two sentences, what are the issues? What is its essence?

Opposite is a simple example to get you started.

These steps take considerable time and energy, but they are vital. In chapter 12 'Preparing your case part 3' you will build on these lists to form an outline for your presentation at the hearing. Put the effort into these lists now and you'll find your case will become manageable and easier than you expected.

Use the information you have compiled so far to assess whether your claim is a valid one and to identify its strengths and weaknesses. This will assist you to separate your feelings of grievance from the legal matters. If your case is a poor one or you think you may have no case at all, get legal advice to confirm this. It's much better to discover now rather than later if your claim has no chance. Should you proceed, you would risk having costs awarded against you.

CASE STUDY **JED'S DEBT CLAIM**

Jed had an agreement with a builder to renovate his back verandah. He paid the first instalment for materials but the builder never returned to start the work. Now he wants his money back.

His chronology would include the date he contacted and negotiated with the builder, the date they both signed the agreement, the date he paid the money and the dates of any attempts he made to contact the builder as well as the date of any letter of demand he sent.

Jed has researched the appropriate tribunal that will deal with his claim and the remedies available. He wants a refund of his money plus the cost of lodging the claim plus interest calculated according to the rate fixed by the tribunal.

The legal requirements of Jed's claim are the clauses of the agreement that relate to the responsibilities of the builder to do the work within a specified time, and also clauses relating to any breach of the agreement. The requirements also include provisions of relevant legislation relating to this type of agreement. In Jed's state, the consumer legislation allows the particular tribunal to make an order for the refund of his money plus the cost of the filing fee plus interest.

Jed's list of facts and evidence would include the actual agreement and the date it was signed, any plans prepared for the work, details of the payment Jed made to the builder (including receipts), printouts of any emails he sent the builder asking him to get started on the work, photographs of the verandah and copies of any letters he sent the builder, including the letter of demand.

As far as Jed knows, the substance of the builder's case seems to be, 'yeah, yeah, I'll get to it'. That is, no case.

The argument for Jed's case is:

- the parties signed an agreement on 10 June 2008. Under clause 4 of that agreement Jed would pay four instalments of $4000. Under clause 2 the builder would renovate the verandah according to the plans. According to clause 6 the builder would start work within six weeks of the first instalment and would complete the work within two months of the start date. Clause 15 of the written agreement provides for a full refund of the money where the builder breaches clause 6;
- on the same day Jed paid the builder $4000 and received a receipt;
- it is now October and, as the photographs show, no work has begun;
- under section 21 of the *Consumer Act* the consumer tribunal has power to order a refund of money plus the filing fee plus interest;
- under the clauses of the contract, Jed is clearly entitled to a refund of his money;
- Jed has tried contacting the builder on a number of occasions and received no reply to his letter of demand. The builder has provided no reasons for his breach and has made no attempt to rectify the situation.

A summary of Jed's case would be that he entered an agreement with a builder to renovate his verandah and paid the first instalment of $4000. The agreement entitled Jed to a return of his money if the work wasn't started within six weeks after the payment. The work was never started.

In a nutshell, Jed paid $4000 and signed an agreement, which was breached. The clauses of the agreement entitle Jed to the return of his money.

CASE STUDY **ROBBIE GETS REAL**

Robbie was missing his children terribly. He had originally agreed with his ex-wife to flexible arrangements regarding the children. Things seemed to work well at first with the children spending alternate weekends with Robbie.

Now 12 months down the track, Robbie was often missing out. He was doing all the right things, but there was always a problem when he rang about picking up the kids. At first he was agreeable if it didn't suit his ex-wife's other arrangements. But Robbie couldn't help feeling his ex-wife was making life difficult for him and he was seeing his children less and less.

Robbie wanted to apply to the Family Court to have the matter sorted out and the alternate weekend arrangement formalised. At first he felt uncertain about whether he would be successful and he wasn't confident at all about taking the matter to court.

After getting some legal advice and examining what he could offer his children, Robbie decided that he wanted to and could provide more than just alternate weekends. He had changed jobs recently and was no longer travelling regularly. His new home had plenty of room for the children and his mother lived nearby and was active in their lives.

Robbie applied to the Family Court to have his dispute regarding the children mediated. When this was not successful, Robbie proceeded to have the matter heard by the court. He asked for an order giving him every weekend with the children as well as special occasions and half the school holidays.

Instead of settling for fighting for alternate weekends, Robbie was changing the dispute into a claim for what he was needing. Robbie went ahead with the application, provided appropriate evidence of his changed circumstances, and at the hearing Robbie got what he asked for.

Once you are confident you have a case, check from your research whether the remedy you're seeking is justified. Do you have legitimate grounds for claiming what you're claiming?

Now realistically assess whether you can ask for more as Robbie did in the case study on the previous page. Ask yourself again, what fair result can you seek in order to feel satisfied. Remember, you won't get what you don't ask for.

Now draft your claim from your lists. Make it straightforward and clear. Be sure to include all the requirements and, if you're claiming a sum of money, include all the amounts of money you're claiming and can claim, and itemise each amount. Check that your calculations are correct.

Check on the claim form or at the website or with registry staff how many extra copies of the claim you must provide when you **file** the claim; that is, when you lodge it. Often three are needed because once they're stamped, one is given back to you, one is kept by the registry for use by the court or tribunal, and one is for the other party.

Check also whether the registry will serve the copy on the other party or whether you must attend to that. If it is your job, check whether posting it or faxing it is allowed or whether it has to be served in person.

If you wish to change or add to your claim or application after you have lodged it, you may need to prepare a new amended version and necessary copies, to be lodged and provided to the court or tribunal and the other party. Depending on the stage your case has reached, you may need to get permission from the court or tribunal to lodge an amended claim or else agreement from the other party. Check with the registry or the website of the court or tribunal.

STEPS FOR PREPARING THE CLAIM

- prepare a chronology;
- determine exactly what you will claim;
- list the legal requirements necessary to establish your claim;
- list the relevant facts then list the evidence you have or can get to confirm the facts;
- on the list of legal requirements, mark down which facts, with which evidence, fulfil the requirements;
- list the elements of the other party's case;
- using your lists and by applying the facts to the law, outline the arguments of your case. Include why the other party's case should fail;
- summarise your case in three or four sentences;
- condense the summary to one or two sentences. What is your case, in a nutshell?

CHECKLIST FOR PREPARING THE CLAIM

- is your claim accurate and complete? Does it contain sufficient information to enable you to establish your case at the hearing?
- are the details of the other party correct?
- is it within its limitation period?
- does the court or tribunal you are using have the jurisdiction to deal with your kind of dispute?
- can you claim the cost of the filing fee? Can you claim interest? If so, at what rate and for what period? Is waiver of the filing fee available?
- are your money calculations correct?
- do you need to include other documents with your claim, for example, an affidavit?
- do you need to lodge extra copies of the claim? If so, how many?
- do you need to serve the claim on the other party?

The defence

If you have received a claim against you, the first rule is don't panic.

The next rule is the same as the first. Calm down.

There's no point taking this claim personally. Really, it is just business. Whether it's family law, an insurance claim, neighbourhood dispute or some other civil matter, it is just the business of people adjusting their legal entitlements against one another. Being angry or upset about it isn't productive. It will damage your ability to fight the claim systematically.

{ ***Golden Rule of Litigation:*** GET RID OF THE EMOTION }

Next, examine the claim very carefully. What exactly do they want? What exactly are they asserting? How do they intend to justify it?

Remember that the pressure is on the other party, the plaintiff, to prove their case, not on you. After all, they have issued the claim. So they must back it up adequately and if they cannot, the claim fails. The only pressure that is on you as respondent is to show how the plaintiff's case is not adequately established.

The claim will contain important information for you about what to do next and how to do it. For example, if the claim is in a higher court or tribunal like the Supreme Court you may need to **enter an appearance**. This is a form you lodge within a specified time. It acknowledges that you are the respondent and gives your address for service of documents.

The claim will also give you a time limit for lodging your defence. If you wish to defend the matter, be sure to obey this time limit. If you don't lodge your defence in time you run the risk of the plaintiff applying for **default judgment** against you, and without further warning or chance to respond, you may find yourself being held liable for the claim.

If this happens to you and you have good reason for not lodging the defence in time, you may be able to apply to have the judgment set aside and then continue with lodging your defence. But be warned: courts and tribunals do not take kindly to applications of this type and will not grant them except for the most compelling reasons.

{ ***Golden Rule of Litigation:***
OBEY THE TIME LIMITS FOR LODGING DOCUMENTS }

The defence is your formal response to the claim. It notifies the other party and the court or tribunal that you are challenging the claim. If you put the time and effort in now to construct a strong defence, your case will proceed more smoothly and your chances of success will improve. If you miss important issues or details, it may be difficult or useless to try to raise them later on. Also, the better and more complete your defence, the more likely your opponent will withdraw the claim or try to settle the case out of court.

To begin preparing your defence you will need to compile a number of lists. These lists will form the nuts and bolts of your defence, so attend to them thoroughly. They will also be used later in chapter 12 'Preparing your case part 3' to form the outline for your presentation at the hearing.

First, prepare a chronology of the dispute listing all the relevant events in date order. This will show you the dispute in its entirety and expose any gaps or inconsistencies between the other party's claim and your version of the events.

Your defence must address the claim. So next, make a list of the elements of the claim. This will help you analyse and understand the claim, especially if it's confusing or long-winded.

If you have difficulty understanding exactly what the claim is about because it is pleaded in a short or abbreviated form or it is incomplete or doesn't contain enough factual information, write

as soon as possible to the other party or their lawyer requesting **further and better particulars** of the claim so that you can address the claim properly in your defence. Be specific about the information you are requesting: for example, additional information about a specific aspect of the claim, copies of documents that you don't have that relate to the claim, or details of how the amounts in the claim were calculated. Give a time frame for complying with the request, for example 14 days, and be sure to sign and date the letter and keep a copy for your records.

A letter requesting further and better particulars from the other party may affect the time limit for lodging your defence. Notify the court or tribunal of your request and check regarding the time limit.

Next, get legal advice using chapter 6 'Where to go for help' and do research using the section on 'Legal research' in chapter 11 'Preparing your case part 2', to find out and list the legal requirements of the claim. Identify exactly what the plaintiff must fulfil, legally, to succeed in their case. If the claim involves an agreement made between the parties, the legal requirements will include not only the applicable legislation but also the terms and conditions of that agreement.

Now go through the claim and make a list of all the points in the claim that you challenge. For example, some of the crucial facts might be wrong or missing. Perhaps one or some of the legal requirements have been ignored. Perhaps the law doesn't support the plaintiff's claim in the way that they say it does. If the claim is for money, check that the amounts are itemised. Are they added up correctly? Are the amounts actually claimable? If not, add it to your list.

Using your chronology and any other information you may have, mark on your list of challenges to the claim beside the relevant points any facts you have to support these points, then itemise what evidence you have or can get to verify them. Things like photographs, invoices, quotations, receipts, letters, clauses of

the contract, the lease, or the testimony of witnesses are just some forms of evidence you can use to confirm your facts. Chapter 11 will help you with the facts and the evidence. Set about collecting your evidence as soon as possible.

Next, consider carefully what concrete outcome do you want from this case? Be specific: what outcomes do you want from the decision-maker? Do you want the plaintiff's claim dismissed? Do you want the court or tribunal to make some other specific order? If the claim is for an amount of money, do you want the amount reduced? Do you want to make a claim yourself? Exactly what will mark a satisfactory result for you?

Perhaps you want more than just to defeat the claim. You might find that in defending the claim you can, for the first time, ask for what you've needed all along to finally put this dispute to rest. If so, get legal advice and do research on what other action may be available for your case so that you can make the most of this opportunity in your defence.

As part of your defence to the claim, or in addition to it, you might want to make a claim yourself against the plaintiff. This is called either a **cross-claim** or **counter claim**, depending on whether you are denying their claim completely and making your own claim, or whether you're admitting liability for the claim but asking that the amount claimed be offset by the amount you are now claiming.

Simply speaking, in a cross-claim for example, you might be saying 'no, I am not liable for the $3000 you are claiming, in fact, in this dispute you are liable for $2000'. In a counter claim you might be saying 'yes, I'm liable for that $3000, but in this dispute you also owe me $2000, so I am only liable for a total of $1000'.

Your cross- or counter claim against the plaintiff may not have to relate to the same dispute. It may be able to relate to a different set of facts or a completely different complaint. Check with the court or tribunal about the rules for this.

CASE STUDY **THANH GETS CREATIVE**

Thanh was defending a Family Court application by his ex-wife to have his contact hours with his children reduced. The application was based on allegations about him that were untrue.

At first Thanh felt ill-prepared and on the defensive. He didn't know where to start to defend this claim, he had no lawyer and his previous encounters with the Family court had been a disaster.

Through a local support group for divorced fathers, Thanh got some telephone numbers and rang around for the help he needed. He was able to get some one-off legal advice about his problem and took the time to consider his situation very carefully. He could see a way to prove the allegations to be untrue, but he also looked at what he wanted for his children and what he could reasonably provide for them.

Thanh got the evidence he needed and went ahead with his defence, but in it he included an application of his own for the contact arrangements to be varied in a way that suited him better.

Although a cross- or counter claim can effectively change the nature of a dispute, it must have a valid basis. You must be able to substantiate your cross- or counter claim, just as the plaintiff must be able to substantiate their claim.

You might be able to include the cross- or counter claim as part of your written defence or you might be required to lodge a separate document or form, attracting a filing fee. Check with the website or registry of the court or tribunal. If there is a fee for the cross- or counter claim and you're on a low income, check

whether you can get **waiver**; that is, exemption from paying the fee.

Once you have identified exactly what result you want, return to your lists and using all the information you have compiled so far – that is, the elements of the claim, the legal requirements, the points that challenge the claim and your facts and evidence – set out in detail your argument as to why the plaintiff's case should fail.

Next, prepare a brief summary of your case in three or four sentences. Then condense this further into one or two sentences. What is your case, in a nutshell?

Here is one example of these lists for a defence:

CASE STUDY **KIM'S CURTAINS**

Kim and her mum had a successful curtain business with many years' experience between them. They obtained most of their customers through word of mouth and rarely had complaints. Any problem was always fixed promptly and courteously and they prided themselves on their attention to detail and their customer service.

To their great frustration and against their advice, one customer insisted on using fabric she had that was well known to fade. Kim and her mum still made the curtains, but they used a style that when open, would minimise their exposure to the afternoon sun. They gave specific instructions about the care of these curtains and the customer assured them that in the daytime they would always be open. When the curtains were hung, the customer was very pleased with the job.

Eighteen months later, without warning and with a rude note attached, the curtains were returned in poor

condition with substantial fading. Shortly after, Kim received a consumer tribunal claim by the customer for the cost of replacing the curtains.

To defend the claim, Kim's chronology would include the dates she and her mum attended the customer's home to advise and quote on the curtains, the date the quote was accepted, the date they delivered and hung the curtains and the date they were paid. It would include the specific dates they advised of the risk of fading, advised of the choice of style and the date they gave instructions about their care.

The claim alleged that Kim and her mum hadn't made the curtains properly, and due to the fading they were no longer fit for their purpose. The elements of the claim were that Kim and her mum had breached implied conditions in the agreement that they made with the customer to make and install the curtains. The alleged breaches were:

- they had not exercised due care and skill;
- the curtains were not of merchantable quality;
- they were now not fit for their purpose.

Kim got legal advice and researched the law in her state. In her list of legal requirements she put the specific provisions of her state's *Fair Trading Act and Consumer Claims Act* concerning the implied conditions and also the factors the tribunal must take into account when making orders regarding a consumer claim. Kim even found a case of the tribunal's that was similar and was decided in the curtain maker's favour. The case showed that the test for any breach of the implied conditions is an objective assessment of the respondent's (that is, the curtain maker's) conduct: did the curtain maker act in a reasonable manner that accords with the skills ordinarily expected of a person in this field; and were the curtains of a reasonable quality, taking into account their purpose, price and any other

relevant matter. Kim included this case in her list.

Her points of challenge to the claim involved all of the alleged breaches. She felt sure that she and her mum had acted in a reasonable manner and exercised due skill and care in making and installing the curtains; that the curtains were of merchantable quality; and that, with the style used and the advice and instructions about their care, they were fit for the purpose.

Beside the points of challenge, Kim listed the important facts and evidence she had to refute the elements of the claim. She had a copy of the quote given to the customer. Against the item marked 'material to be used' it stated 'Customer's fabric. May fade.' Her mum's hand-drawn design for the curtains accompanying the quote also showed arrows for opening and closing with the words 'to reduce fading' beside the arrows. Kim's copy of their invoice also included instructions for the care of the curtains.

The curtains themselves would be good evidence for Kim's case as the particular faded areas showed the style had been tampered with, producing prolonged exposure to strong sun. Kim's mum also set to making a small, portable version of the curtain with the same curtain tracks and rings and style of curtain to show how the style worked, if properly used, to protect the fabric.

For her facts and evidence Kim would include her own and her mum's testimony.

The remedy Kim wanted for the case was to have the customer's case dismissed.

In her argument section Kim used the quotation, the invoice, the curtains themselves, her mum's miniature replica and her and her mum's own testimony to argue that, by first advising against using that fabric, by using a suitable style to minimise the risk of fading and by making and installing the

curtains to the customer's own satisfaction with appropriate instructions about their care having regard to the risk, she and her mum had acted reasonably and had not breached the implied terms of the agreement. They were therefore not liable for the cost of replacing the curtains.

Kim's summary was that she and her mum were not liable for replacing the curtains because they had not breached the implied conditions of their agreement with the customer. They had exercised due skill and care in the making and installation of the curtains and the curtains, when made and installed, were of merchantable quality and fit for their purpose.

In a nutshell, Kim and her mum are not liable to replace the curtains because they have not breached the agreement.

Finally, return to your list of points that challenge the claim and assess whether your defence is a valid one. Do your challenges have substance? Do they actually attack the heart of the matter, the crucial elements of the claim, or do they just pick away at the edges? It will be no use pointing to errors in the other party's case if these errors are largely irrelevant to the substance of the claim. While you're busy picking at the lies and inconsistencies of who said what and when, if they don't relate to defeating the elements, the other party will still establish their claim and you will be found liable.

At this or any other stage of the proceedings you can contact the other party or their lawyer and offer to settle, or end, the matter. To negotiate a settlement, do it in writing and clearly title the letter '**Without Prejudice**'. This means the offer to settle is given without it prejudicing your case in any way. It prevents the other party from using the letter against you in court later on if the matter doesn't settle.

One school of thought says the letter should be marked 'With-

out Prejudice Save as to Costs'. This means that if the matter doesn't settle, you the letter writer can still tender it in court on an argument about costs. For example, you offer to settle for X amount and the offer is rejected and the matter goes to court. If the court result is similar to what you offered your opponent in the first place, then when your opponent asks the court for an order that you pay the legal costs, you can use this letter to argue against such an order. After all, if the offer had been accepted, it would have saved the court's time and the legal costs.

Don't forget to sign and date the letter and keep a copy. Negotiations to settle a case do not stop the court process, so keep an eye on the time limit for lodging your defence. If the matter does settle, notify the court or tribunal. You may need to sign consent orders or other forms to finalise the litigation.

Whether or not you want to settle the case, the clock for your defence is still ticking, so get started now on drafting your defence. Use your lists.

There may be a particular format for the defence or a particular form that must be used. It might have a special name like 'Response' or 'Statement Contesting the Application' or it might also have a number like 'Form 9'. You may be able to fill out and lodge a defence form online or else download it and print it, fill it in and lodge it yourself.

For information about the form or format of the defence, check on the claim itself or at the website or registry of the court or tribunal. Make the most of any brochures, fact sheets or information kits available from the registry about defending a claim.

The requirements of the defence and its degree of formality vary depending on the nature of the claim and the court or tribunal involved. You might need to address each paragraph of the claim stating whether you agree or disagree with it. This helps clarify the issues and narrow the dispute. If you neither agree nor disagree with a particular paragraph you can say so. Use your lists to help you.

Or you might be required to just state briefly why you oppose the claim. Again, use your lists. You might also be asked whether you are seeking other orders yourself.

There may be a filing fee for lodging your defence. Check with the website or registry and check if waiver is available. Check also whether you need to provide extra copies of your defence when you lodge it. For example you may need the original plus two copies. One copy (when stamped by the registry) will be returned to you, one is for the plaintiff and the original is kept for use by the court or tribunal.

Check too whether, after the defence is lodged, the court or tribunal will **serve** it on the plaintiff, that is, provide it to the plaintiff, or whether you must attend to this. If it's you, ask if posting or faxing is allowed.

If at a later stage you wish to change your defence or add to it, you will need to prepare an **amended defence** and lodge it with the registry. In some instances you may need to get permission first. Check with the registry. Check also if you need to provide extra copies and whether they or you will serve it on the plaintiff.

If you are the applicant in an appeal against the decision of a government department, the department's response is not called a defence. Instead, the department must give to the court or tribunal, within a specified time, a copy of all the relevant documents used in making the original decision. These documents show exactly what the department's case entails and often include a statement setting out the reasons for the decision. They may be called **T docs** or Tribunal Documents. The court or tribunal will send you a copy of these as soon as they receive them.

STEPS FOR PREPARING THE DEFENCE

- Examine the claim carefully;
- Prepare a chronology;
- List the elements of the claim;
- List the legal requirements of the claim;
- List your points of challenge to the claim. Mark on it any facts you have to support your challenge. Beside those facts, itemise what evidence you have or can get to support those facts;
- Determine the outcome you want from the case;
- If you wish to cross- or counter claim, obtain advice and research the requirements. Follow the steps for preparing a claim;
- Using your lists, set out your argument for the case, explaining how and why the other party's case should fail;
- Briefly summarise your case in three or four sentences;
- Reduce it to one or two sentences. What is your case, in a nutshell?

CHECKLIST FOR THE DEFENCE

- Is your defence clear and accurate?
- Does it address the elements of the claim?
- If you need more details of the claim, have you written requesting further and better particulars?
- Are you lodging the defence in time?
- Do you need to include other documents with the defence?
- Is there a filing fee for the defence? Is waiver available?
- Do you need to lodge extra copies of the defence?
- Do you need to serve it on the other party?

The conference

The case conference, or mediation as it is sometimes called, is a fairly new addition to the litigation process. Not all courts and tribunals use it. Its aim is to save the court's or tribunal's time and expense by filtering out the cases that should settle without going to a hearing and by progressing those that will go to the hearing stage.

The conference is a meeting attended by both parties and/or their lawyers, with an official of the court or tribunal presiding over it. The official's job is not to take sides or adjudicate on the case but to facilitate a productive meeting between the parties.

It might take place at the court or tribunal or by telephone link-up. It is informal and any discussions of the issues take place on a without prejudice basis. This means that these discussions can't be used as evidence against you later on at the hearing.

The conference gives the parties the chance to explore the issues, identify the strengths and weaknesses of each other's case and explore any options for compromise. It's an opportunity for each side to learn more about the other's case, to clarify points of agreement and disagreement, discuss the facts and the law and pursue any queries about evidence. If the evidence of witnesses will be used in the case, you can use the conference to notify the other party which of their witnesses will need to attend the hearing so that you can cross-examine them.

At the conference you can also ask the official any questions about process or the next steps to the hearing. Although they won't give legal advice, they can help you with valuable, practical tips.

Some conferences resemble barnyard squabbles, with the parties becoming very emotional. This wastes everybody's time as it usually accomplishes very little. Even worse, it distracts you from the issues of your case that you must confront if you wish to succeed. It's important to set aside your sense of grievance and focus on the legal matters you are trying to resolve.

Try to use this meeting strategically. Take your paperwork with you as well as any documents that could help clarify or resolve the matter. Beforehand, try to understand which points you and your opponent agree on and which ones you don't, so you can work on these at the conference. Also try to pinpoint any areas of compromise that you're willing to negotiate. And beforehand, know your fall-back position and your ultimate bottom line in this case.

During the conference be prepared to be constructive and co-operative, but have your wits about you. Your opponent may appeal to your hip pocket, your values or your ego without necessarily offering anything of substance or genuine compromise. So don't allow yourself to be sweet-talked or bulldozed into a position that doesn't serve your interests. Take time to consider the pros and cons of any proposal carefully before agreeing to it.

{ ***Golden Rule of Litigation:***
DON'T GET RATTLED, DON'T BE BULLDOZED }

A successful conference may or may not result in settling the case, but it should certainly help progress it. Use it to learn as much as you can about the other party's case so that you can better assess the merits of their case as well as your own.

If the conference results in the parties agreeing to settle the case, they can draw up an agreement with the court or tribunal official and sign it then and there. If the agreement is complied with, the settlement is then formalised and the legal proceedings are ended.

If the case doesn't get resolved, usually at the end of the conference, a hearing date is set. In some jurisdictions further conferences can be held.

If the conference process doesn't result in settling the case, you must now begin preparing for the hearing.

CASE STUDY **CONFERENCES**

In Conference Room 1 of the Tribunal, Tribunal Member Smith is pleased with the progress the parties are making in sorting out the issues of their case. They have worked out what they agree on and have moved on to discussing what they cannot agree on.

Next door in Conference Room 2, Tribunal Member Cooper and the parties at least agree on one thing: that this case won't settle and must go to a hearing. They have systematically gone through the elements of the claim and defence, and are now busy discussing evidence.

Across the hall in Conference Room 3, Tribunal Member Tsakis is having a much harder time. The parties are bickering terribly and it is starting to get personal. Ms Tsakis repeatedly tries to return them to the issues, but now with only 15 minutes to go in the 45-minute conference, she isn't hopeful.

Back in Conference Room 1, the parties don't settle their case, but they do come up with a mutually agreeable plan. If the plaintiff provides the requested evidence within the next week, the respondent will pay two-thirds of the amount claimed. The plaintiff will then contact the Tribunal and withdraw the claim. Tribunal Member Smith agrees to review the file in fortnight's time and, if the case has not settled, he will set a hearing date. The parties leave the conference, satisfied that their time has been well spent.

In Conference Room 2, the parties have narrowed the issues that are in contention and indicated which of the other party's witnesses will be needed for cross-examination at the hearing. With no other preparations to be finalised, Tribunal Member Cooper sets a hearing date and they pack up their paperwork and leave.

In Conference Room 3, the conference has gone over time and no progress has been made at all. The issues are no clearer, there has been no discussion of the evidence and the parties have gained nothing that helps their case. They are disgruntled and exhausted. Tribunal Member Tsakis is unable to offer them another conference. She sets a hearing date for the case and the parties leave the conference angrier than ever.