HOW TO RUN YOUR OWN COURT CASE

A practical guide
to representing yourself in
Australian courts and tribunals

{NON-CRIMINAL CASES}

Nadine Behan

A Redfern Legal Centre Publishing book
<www.rlcp.org.au>

Published by
University of New South Wales Press Ltd
University of New South Wales
Sydney NSW 2052
AUSTRALIA
<www.unswpress.com.au>

First published 2009

National Library of Australia
Cataloguing-in-Publication entry
Author: Behan, Nadine.
Title: How to run your own court case: a practical guide to representing yourself in Australian courts and tribunals/Nadine Behan.
ISBN: 978 1 921410 83 3 (pbk.)
Notes: Includes index.
Subjects: Civil procedure – Australia.
Pro se representation Australia – Popular works.
Self help (Law) – Australia.
Civil procedure – Popular works.
Pro se representation – Popular works.
Self help (Law) – Popular works.
Dewey Number: 347.94

Design Josephine Pajor-Markus
Cover iStock
Printer Ligare

This book is printed on paper using fibre supplied from plantation or sustainably managed forests.

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.

12 Preparing your case part 3

The presentation at the hearing is the final building block in the preparation of your case, and luckily, much of the groundwork is already completed. By now you have compiled your lists, collected your evidence and researched the law. You are familiar with your own and your opponent's case as well as with the litigation process itself. How successfully you present your case in court will depend on your ability to know and use this groundwork thoroughly.

The steps to prepare the presentation for the hearing are similar for both the plaintiff and the respondent, although the orientation will be different because the goals are different. If you are the plaintiff, remember the burden is on you to adequately prove the claim you're making and you must prove it on the balance of probabilities. If you are the respondent, you must show how and why the plaintiff's claim must fail.

There are three stages to the formation of your presentation for the hearing. The first is to revisit all the details of your case and to organise them into a preliminary outline. This will provide a rough sketch of the elements necessary to establish your case. It will bring together the law and evidence and will order your evidence into its natural sequence. The next stage is to reshape this preliminary outline into a main outline that fits the framework of the hearing. The third step is to summarise your main outline in point form to use as a prompt to guide you through your presentation at the hearing.

Allow yourself enough time before the hearing date to prepare your case properly. You'll need time to structure your presenta-

tion, organise your paperwork, check details and make final preparations. But just as important, also give yourself time to think through the facts and issues carefully and convert your thoughts to clear argument.

Doing this will yield a number of benefits. It will finalise your approach to the case and consolidate all you have learnt so far. It will improve the quality of your preparation and help you construct a more coherent, persuasive presentation. And it will restore calm if you have any fuzzy confusion or mounting panic. This thorough preparation will be your best antidote to nerves at the hearing.

And by all means, while you are making your final preparations, keep alive any negotiations to settle the case. Most settlements occur just before the hearing.

Stage 1. The preliminary outline

Much of the work for your preliminary outline has already been done in the lists you compiled for the preparation of your claim or defence. Using your chronology and your lists, prepare your outline following the guidelines on the next page.

When you have completed your preliminary outline, examine it closely and take the time to consider your case as whole. Review again, what is its essence? What are the issues? Are they factual? Legal? Are they a combination? Consider the other party's case. Are their claims wrong? How? Have they missed something crucial? Have you? Now make any necessary changes to your outline.

What follows on pages 99–116 are four simple examples of the way you might approach preparing a preliminary outline. One involves a plaintiff in a tenancy matter, the second is a plaintiff's case in a consumer matter, the third is a respondent's in a family law dispute, and the fourth concerns an applicant's appeal of a government decision.

The purpose of the examples is to show you how to structure

a preliminary outline. For their maximum application and because laws vary so much from state to state and change so often, all the laws and cases mentioned are completely fictional and will not accurately reflect the law. Do not rely on them in the preparation of your own case.

PRELIMINARY OUTLINE

1 WHAT I WANT Begin by reviewing and itemising exactly what remedies you want from the case. If you are the plaintiff, consult your claim. If you're the respondent, consult the claim and your defence.

2 FACTS AND EVIDENCE Next, using your chronology and other lists, compile a concise account of the necessary facts in point form. Alongside a fact, itemise in brackets what evidence you will use to confirm the fact.

3 LAW Next, set out the relevant provisions of the law that apply to your dispute. If your dispute involves an agreement, include the relevant clauses of that agreement. Also specify any relevant cases. In brackets, note down that you will need to provide a copy of the case at the hearing.

4 THE OTHER PARTY'S CASE Where you are aware of the substance of the other party's case, outline it.

5 ARGUMENT Next, formulate the argument section of your outline by applying the law to your facts, showing how the law applies in your favour. Include in this section, the reasons why the other party's case should fail. For example, point out how the evidence or law doesn't support their case or how their evidence isn't adequate to prove their case or how yours is better than theirs. This argument section of your outline explains why you should get what you want.

6 SUMMARY Give a brief summary of the case in three or four sentences.

7 CASE IN A NUTSHELL Finally, express exactly what your case is, in a nutshell. Explain it in one or two sentences.

PRELIMINARY OUTLINE
Example 1
Plaintiff's case in a tenancy dispute

ALL LAWS AND CASES USED IN THIS EXAMPLE ARE FICTITIOUS.
DO NOT USE THEM IN THE PREPARATION OF YOUR CASE.

You are the plaintiff and landlord of a property. Your last tenants left the premises in less than ideal condition and refuse to rectify the situation. You have lodged a bond dispute claim because you would like the cost of repairs to come out of the tenants' bond. You might prepare an outline like this.

1 What I want

An order that $1180 be paid to me by the tenants from the rental bond as compensation for the damage to my rental premises.

Being for:

Carpet cleaning & replacement	$640
Bathroom basin replacement	$240
Replacement of destroyed curtains	$260
Plus	
Claim filing fee	$40
TOTAL	$1180

2 Facts and evidence

Tenancy Agreement entered 3 August 2007.
(COPY OF TENANCY AGREEMENT 3/8/07)

(BOND LODGEMENT RECEIPT 7/8/07)
(COPY OF CONDITION REPORT 3/8/07)
Tenancy Agreement shows:
Tenants: John and Sue Smith.
Property: 3 Gould Lane, Bensfield. Term: 12 months.
Rent: $340 per week. Bond: $1200.
Condition Report shows: condition of carpet 'excellent', condition of all curtains 'fair', condition of bathroom 'clean and tidy'. There is no mention in the condition report of any chip or crack or problem with the bathroom basin.
Tenancy ended 3 August 2008.
Final Inspection of premises carried out 3/8/08.
(COPY OF FINAL INSPECTION REPORT 3/8/08)
Final Inspection Report shows: carpet in three of the rooms is 'stained', bathroom basin 'chipped and cracked', curtains 'torn'.
Photos taken 3/8/08 show details of damage.
(6 PHOTOS OF DAMAGE 3/8/08)
Age of carpet at end of tenancy: 3 years.
(RECEIPT FOR LAYING OF NEW CARPET DATED 12/12/05)
Age of premises and all fittings at end of the tenancy: 10 years.
3/8/08 Repairs requested verbally, request refused, damage disputed as 'fair wear and tear'.
4/8/08 Bond dispute form and claim lodged.
5/8/08 Carpet cleaned, cleaning unsatisfactory, replacement recommended. (QUOTE, RECEIPT AND LETTER OF RECOMMENDED ACTION FROM NIFTY CARPET CLEANING CO.)
5/8/08 Quotes obtained for new basin and curtains, similar in standard to those damaged.
(QUOTES FROM BATHROOMS GALORE, SUPERIOR BASINS, READYMADE CURTAINS)
The premises are not covered by insurance for this damage.

3 Law

Section 65 of the *Tenancy Act 1989* gives the Tribunal power to make the order I want. It states: 'The Tribunal may, in any proceedings before it, make any one or more of the following orders:

(a) an order for which an application may be made by any person under this Act;

(b) an order arising out of the Tribunal's jurisdiction with respect to rental bonds.'

Clause 20 of the Tenancy Agreement makes the tenant liable for damage that is not fair wear and tear. It states: 'The tenant agrees: when the agreement ends, to leave the premises as nearly as possible in the same condition (fair wear and tear excepted) as set out in the condition report for these residential premises.'

Section 15 of the *Tenancy Act 1989* states: 'The parties are required to minimise their loss from breach of the Tenancy Agreement.'

Relevant cases on fair wear and tear:

Mills v Boon (2004): Fair wear and tear is the damage reasonably expected to happen in the 'normal helter skelter of daily life'. (COPY OF *MILLS V BOON* CASE)

Smith v Jones (2003): The length of the tenancy and the age of the carpet are factors to be considered in relation to damage, fair wear and tear and compensation. (COPY OF *SMITH V JONES* CASE)

4 The respondents' case

The respondents deny the extent of the damage and assert that the damage is fair wear and tear. Their evidence will be oral. Any other evidence is unknown.

5 Argument

The tenants have breached clause 20 of the Tenancy

Agreement and are liable for the damage to the premises. The photos and final inspection report clearly show that when the tenancy ended, the tenants did not leave the premises, as nearly as possible, in the same condition as set out in the condition report.

The extent of the damage, as shown by the photos, is not fair wear and tear as it is in excess of 'the normal helter skelter of daily life'. Damage due to normal helter skelter of daily life would not warrant the replacement of carpet within its first three years and replacement of the bathroom basin and curtains within ten years.

I have complied with the requirement of section 15 of the *Tenancy Act 1989* to minimise my loss by obtaining a number of quotes before having the repairs carried out and choosing the cheapest of them. As the items were relatively new and were not due for replacement, I claim the full cost of replacement.

6 Summary

Bond dispute: Claim for $1180.

Damage to property during tenancy: carpet
basin
curtains

Not fair wear and tear:

Evidence: condition report
final inspection report
photos
quotes
letter recommending replacement of carpet
receipts

Law: Under tenancy agreement, tenants are liable for damage except for fair wear and tear. Evidence and cases support that the damage here was not fair wear and tear.
I have minimised my loss.

7 Case in a nutshell

The damage done to the premises during the tenancy is not fair wear and tear. The tenants are liable.

PRELIMINARY OUTLINE
Example 2
Plaintiff's case in a consumer matter

ALL LAWS AND CASES USED IN THIS EXAMPLE ARE FICTITIOUS.
DO NOT USE THEM IN THE PREPARATION OF YOUR CASE.

You are the owner of a home that was built three years ago. The roof leaks and despite numerous requests, the builder has not returned to fix it.

1 What I want

An order that the respondent pay me $7725 for the repair of the roof of my home plus $40 for the cost of the filing fee plus interest pursuant to the *Small Claims Act 1993* calculated at 9 per cent per annum from the date of the damage occurring.

2 Facts and evidence

June–December 2005 home built by Easy Build Ltd, Builders Licence No 344402.
(BUILDING CERTIFICATE DATED DECEMBER 2005)
December 2006 Home purchased by me. (COPY OF CERTIFICATE OF TITLE)
January 2008 Roof began leaking.
January 2008 Letters sent to builder requesting repairs under Builder's Warranty. (COPY OF TWO LETTERS SENT DATED 4/1/08 AND 28/1/08)
February 2008 Inspection by Office of Fair Trading,

Rectification Order issued to builder. (COPY OF BUILDING REPORT AND RECTIFICATION ORDER DATED 20/2/08)
February–May 2008 Problem not rectified. No action taken by builder.
(PHOTOS OF CURRENT STATE OF ROOF AND RAIN DAMAGE TO CEILING, DATED 2/7/08)
15 June 2008 Two quotes obtained for repair of roof. (TWO QUOTES)
1 July 2008 Claim issued.

3 Law

Section 20(c) *House Building Act 2001* provides the following warranty for the building of new dwellings: 'a warranty that, if the work consists of the construction of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling.'
Section 45 *House Building Act 2001* states: 'The warranty shall be for a period of seven years from the date of completion of construction.'

4 The other party's case

The respondent denies that the damage has resulted from poor construction of the roof. Respondent's evidence is a letter to me from him dated 20 July 2007 referring to his extensive experience in the building industry.

5 Argument

The warranty created by the *House Building Act 2001* applies to this home because it is less than seven years since completion of its construction. Under the warranty, the builder is liable to construct a building that's reasonably fit for occupation as a dwelling. The Building Report and the Rectification Order carried out by the Office of Fair Trading expressly state that the poor construction of the roof has

resulted in the home not being reasonably fit for occupation as a dwelling. The builder is therefore liable for repairing the roof.

6 Summary

Builder's Warranty case. The home is less than seven years old. Poor construction of the roof has resulted in damage, making the home not fit to occupy. The builder is liable. I have notified the builder of the problem and requested that he fix it. He has not fixed it.

7 Case in a nutshell

Under the House Building Warranty the builder is liable for the cost of repairing the roof of my home to make it fit for occupation.

PRELIMINARY OUTLINE

Example 3

Respondent's case in a family law matter

ALL LAWS AND CASES USED IN THIS EXAMPLE ARE FICTITIOUS.
DO NOT USE THEM IN THE PREPARATON OF YOUR CASE.

You are divorced and have primary care of your three-year-old son. Your ex-husband has contact with your son according to the arrangements set out in the Final Orders granted by the Family Court. But there have been compliance problems with these arrangements. And now your ex-husband wishes to take your son to Italy for two weeks to visit extended family. He has applied to the Family Court to change the Final Orders to allow this trip. You are afraid that if he goes overseas with the child he will not return.

1 What I want

(A) The applicant's Application to Vary the Final Orders be dismissed;

(B) An order made placing the child's name on the Federal Police Airport Watch List.

2 Facts and evidence

The Final Orders, granted 4/5/07, set out the current contact arrangements for Jason aged three years. They provide for contact with the applicant father each alternate weekend from 4 pm Friday to 4 pm Sunday plus one week four times a year plus Christmas day. (COPY OF FINAL ORDERS)

There have been a number of compliance problems with these orders. Since 4/5/07 there have only been two blocks of one-week contact with the applicant father instead of the five blocks possible under the Final Orders. Lack of contact has been due to the applicant cancelling the arranged blocks at short notice. As well there have been the following other problems:

14/6/07 Applicant late in returning Jason to my care after contact.

17/8/07 Applicant late in returning Jason to my care after weekend contact.

19/1/08 Applicant late in returning Jason to my care after weekend contact.

10/7/08 Applicant late in returning Jason to my care after weekend contact. On that day there was an argument between the applicant and myself, in front of my mother, about returning Jason late to my care. During the argument the applicant threatened to take the child and never return. (COPY OF MY AFFIDAVIT ACCOMPANYING MY RESPONSE TO THE APPLICANT'S APPLICATION DATED 9/10/08) (COPY OF AFFIDAVIT OF MY MOTHER, SUE ANN BEST, DATED 9/10/08)

(COPY OF MY EMAIL TO APPLICANT, DATED 19/7/07, COMPLAINING OF HIS CONDUCT)
(COPY OF HIS REPLY, DATED 20/7/08)
6/8/08 Applicant sold his home in Australia and his car. Applicant owns a home in Italy and has family there. He holds an Australian and Italian passport.
(COPY OF AFFIDAVIT OF MUTUAL FRIEND DOROTHY ANN KELLERS DATED 2/10/08)
10/9/08 Applicant lodged Application for the Final Orders to be varied to allow the applicant to take Jason to Italy for 14 days between 2 December 2008 and 16 December 2008 to visit the child's paternal grandmother.
10/10/08 I lodged my response to the application, including affidavits.

3 Law

Under section 65Y of the *Family Law Act 1975*: 'A party cannot take the child out of Australia unless either
(a) both parties agree in writing; or
(b) the court makes an order allowing it.'
Section 68F *Family Law Act 1975* sets out the matters that the court must consider when deciding what parenting and contact arrangements will promote the best interests of the child.
Subsections (c), (h), (j) and (k) are relevant here:
(c) the likely effect of any change in the child's circumstances, including the likely effect on the child of any separation from either parent;
(h) the attitude to the child and the responsibilities of parenthood as displayed by the relevant parties;
(j) those orders least likely to lead to the institution of further proceedings;
(k) any other fact or circumstance.

Cases:
X v Y (2002). In that case, the Family Court found that the father's threats to abduct the child constituted a real risk that he would remove the child from the country unlawfully and the Court granted orders that the child's name be placed on the AFP Airport Watch List.

4 The applicant's case

The applicant claims that his wish to take Jason to meet and bond with his family in Italy is in the best interests of the child and that the trip shared together is an important element of parenting.
The applicant claims the breaches of previous orders were minor aberrations and were due to misunderstandings between the parties.
The applicant claims the duration of the separation (two weeks) is not a substantial separation of the child from his mother and will not adversely affect the child.
The applicant agrees to telephone me daily from Italy so that I can speak to Jason. The applicant denies that he intends not to return to Australia with Jason.
The applicant agrees, if required by the Court, to deposit a $30 000 bond as security against Jason not returning.
The applicant also argues that Italy is a signatory to the Hague Convention and this would help secure the return of Jason if he and Jason did not return.

5 Argument

(A) That the applicant's Application to Vary the Final Orders be dismissed:

Applying the factors set out in section 68F *Family Law Act 1975*, it is not in the best interests of the child to change the contact arrangements to allow the applicant to take Jason, aged three, on a two-week overseas trip:

Subsection 68F (c): the likely effect of the two-week

separation from his mother:

Jason is not accustomed to such an extended separation. He has never been away for two weeks from his mother.

Apart from alternate weekends with the applicant, the child has only had two blocks of one-week contact. At age three, Jason still requires substantial care and is accustomed to full-time care provided by the mother. Given the history of broken arrangements, it is also unlikely the applicant would honour his promise of making the telephone calls from Italy.

Subsection 68F (h): the applicant's attitude to the child and the responsibilities of parenthood:

Since the Final Orders were granted, the applicant has breached them on many occasions by returning Jason late and by cancelling three of the five one-week block visits. In addition he has made threats to abduct Jason.

To date, the applicant has not discharged his parenting responsibilities well. He has been neither conscientious nor co-operative and hasn't shown an appropriate attitude to these responsibilities nor appropriate respect for the Court's orders.

Subsection 68F (j): the risk of further proceedings if the Final Orders are changed to allow the overseas visit:

The applicant's threats to abduct Jason show that a real risk exists that, if allowed to take Jason to Italy, he may not return. The applicant has recently disposed of his property in Australia but owns property in Italy. He has no other family or strong ties in Australia apart from Jason. His family ties are in Italy. If Jason is not returned to Australia at the end of the two-week period, further applications to the Family Court will be necessary to secure his return. The services of the Italian government may also be needed. Although Australia is a signatory to the Hague Convention, this may improve the chances of the return of the child but does not guarantee it.

The deposit of a $30 000 bond may not cover the expenses of court proceedings and further action to recover

the child and, given the substantial recent income earned from selling assets in Australia, may not be a sufficient deterrent to the applicant.

Subsection 68F (k): any other fact or circumstance:
The threat made by the applicant to myself in the presence of my mother that the applicant would take the child one day and never return is a significant factor in considering whether to grant the variation of the Final Orders.

(B) That an order be made placing the child's name on the Federal Police Airport Watch List:
The threat to abduct Jason also shows that, should the application to Vary the Final Orders be denied, there is a real risk that the applicant may try to take Jason out of the country unlawfully. As in the case of *X v Y* (2002), where the facts were similar and the extent of the risk was similar, such an order was made. On the balance of probabilities, an order placing Jason's name on the Federal Police Airport Watch List is justified.

6 Summary
Applying the factors outlined in section 68F *Family Law Act 1975*, the applicant's application to Vary the Final Orders to allow Jason aged three years to travel to Italy with his father for 14 days should be dismissed.

Applying the case *X v Y* (2002), my application for an order placing the child's name on the AFP Airport Watch List should be granted.

7 Case in a nutshell
It is not in the best interests of the child to vary the Final Orders.

It is in the best interests of the child to have his name put on the AFP Airport Watch List and such an order is justified in the present circumstances.

PRELIMINARY OUTLINE
Example 4
Applicant's case in an appeal of a government decision

ALL LAWS AND CASES USED IN THIS EXAMPLE ARE FICTITIOUS. DO NOT USE THEM IN THE PREPARATION OF YOUR CASE.

Due to a Centrelink computer error, you have been overpaid $3200 in Family Tax Benefit. You were mistakenly paid your entitlement twice. Now Centrelink says you should have known you weren't entitled to the double payment and you should have notified them. Centrelink wants the money back and is withholding $40 per fortnight from your Family Tax Benefit to repay the debt. You have decided to appeal the government decision that says you must repay the debt.

1 What I want

The decision of the Secretary, Department of Family and Community Services, that I owe a Family Tax Benefit debt of $3200 set aside.

2 Facts and evidence

14 February 2007 I received advice from Centrelink to overestimate my income for purposes of receiving Family Tax Benefit to avoid risk of an overpayment. Any income shortfall would be reconciled by the Australian Tax Office (ATO) at the end of the financial year with my tax return and, if entitled, I would receive a top-up payment of Family Tax Benefit.

23 February 2007 I lodged Family Tax Benefit Application. (T DOC page 23)

March–December 2007 I received Family Tax Benefit of $110 per fortnight for my two children, Amy and Tan. (T DOC page 24)

1 September 2007 I lodged my tax return. (COPY OF TAX RETURN)

1–10 December 2007 I phoned Centrelink three times asking about top-up payment. I was advised each time that the ATO was doing the reconciliation. I requested that any top-up amount be deposited into my bank account that received the regular FTB payments. During each of these telephone calls with Centrelink I was advised to contact ATO. (SCREEN DUMPS OF NOTES BY CENTRELINK OFFICER OF THE PHONECALLS. T DOCS pages 26, 27, 31)
1–10 December 2007 I phoned ATO twice, asking about the reconciliation. Each time I was advised to call Centrelink.
13 December 2007 I received cheque for $3200 in the mail, with no accompanying letter from either Centrelink or ATO itemising my entitlement. It was unclear whether cheque was from ATO or Centrelink.
15 December 2007 $3200 was deposited by Centrelink in my bank account. (SCREEN DUMP OF TRANSACTION. T DOC page 34)
18 December 2007 Letter received from Centrelink advising of bank deposit. (CENTRELINK LETTER DATED 15 DECEMBER. T DOC page 35)
23 January 2008 Letter from Centrelink advising of overpayment of $3200, caused by a double payment of the entitled amount. (T DOC page 37)
No actual details of the reconciliation were ever received, either from Centrelink or ATO.
My financial position is as follows:
Household income: The household consists of myself (widowed two years ago), mother-in-law, two school-aged children and two adult children. My wage of $50 000 per year is the sole income for the household plus the FTB of $110 per fortnight received for the school-aged children.
I have various medical problems requiring regular, costly medication. (COPY OF LETTER FROM GP) At present Centrelink is withholding $40 of the $110 per fortnight to

repay the debt.
I have received infrequent financial assistance from the Salvation Army and from my brother-in-law during 2007. (COPY OF LETTER FROM SALVATION ARMY FINANCIAL COUNSELLOR; COPY OF LETTER FROM BROTHER-IN-LAW DETAILING HIS LOANS TO ME)
Assets: Home valued at $450 000 mortgaged for $300 000. Mortgage repayments are $24 000 per year. (COPY OF HOME LOAN BANK STATEMENT); car worth $4000 (COPY OF REGISTRATION PAPERS); furniture worth approx $3000.
Expenses: As outlined in Income and Expenditure Statement, prepared with the help of the financial counsellor at the Salvation Army. (COPY OF I & E STATEMENT AND LETTER FROM FINANCIAL COUNSELLOR; COPY OF PHONE, ELECTRICITY, RATES, SCHOOL FEES AND PHARMACY BILLS; COPY OF LETTER FROM PRINCIPAL, MARIST SCHOOL, OUTLINING FEE RELIEF PROVIDED FOR THE TWO CHILDREN)

3 Law
Section 1234 *Social Insecurity Act 1998* states: 'Subject to subsection (2), the right to recover a debt, that is caused solely by administrative error made by the Commonwealth, is waived if the debtor received the payment in good faith.'
Subsection 2 of section 1234 *Social Insecurity Act 1998* states: 'The financial circumstances of the debtor must be such that repayment of the debt would cause severe financial hardship to the debtor.'

Cases:
Secretary, Department of Social Security v Ted Fred (1996) 1 FLR 123: The payment can't be said to have been received in good faith if the recipient knew or had good reason to know that he or she isn't entitled to the payments received. (COPY OF TED FRED CASE)

Secretary, Department of Family and Community Services v Fooey (2003) ALD 64: payment can't be said to have been received in good faith if the recipient turned a blind eye to the circumstances that raise doubt as to the entitlement and the person refused to make reasonable inquiries where such doubt exists. (COPY OF FOOEY CASE)
Secretary, Department of Family and Community Services v Tiddles (2003) ALD 32: Severe financial hardship goes beyond mere straitened financial circumstances and includes suffering of a severe or extreme nature. (COPY OF TIDDLES CASE)
Secretary, Department of Family and Community Services v Bambam (2005) ALD 44: The family's financial circumstances are such that the family 'is going out backwards. Relief from this debt will not solve their financial problems but will release them from a further additional burden'. (COPY OF BAMBAM CASE)

4 Centrelink's case

That there is an overpayment of $3200, that it was not received in good faith, as I should have known that I was not entitled to two payments of the same amount, and that I am not suffering severe financial hardship.

5 Argument

I concede that there is a debt, caused by double payment of my entitled top-up Family Tax Benefit.

Administrative error issue: The overpayment was caused solely by administrative error by the Commonwealth. The overpayment didn't occur through any fault of mine. At all stages I fulfilled what was required of me for the FTB to be assessed and paid correctly. In fact, upon advice from Centrelink, I overestimated my income to begin with, to avoid an overpayment.

Good faith issue: I did not know that I was not entitled to a cheque from ATO and a payment from Centrelink. When I did inquire about the top-up payment, I was shuttle-cocked back and forth between Centrelink and the ATO and it was unclear who had responsibility for what. The records of my telephone calls with Centrelink do not show that Centrelink clarified where the payment would be coming from or how much it would be for. The only letter regarding any payment was not received until after both payments had been given to me and the letter was ambiguous, when read in light of the circumstances of my payment. I did not make further inquiries when I received both payments because I had no reason to doubt my entitlement.

In reference to the Ted Fred and Fooey cases, I did receive the payments in good faith, as in the circumstances I had no good reason to know that I was entitled or to doubt my entitlement to both payments.

Severe financial hardship issue: Since the death of my husband two years ago I have been going backwards at a rate of knots. I am struggling to keep the family home. I have received help from the Salvation Army and my brother-in-law, but cannot expect to continue relying on this charity indefinitely. My medical condition has stabilised so that I can continue working, but I need to continue with the medication. My two adult children have not had an income to contribute to the household for 18 months.

Since the Tiddles case of 2003, severe financial hardship has been further defined, by the Bambam case, to include circumstances similar to mine.

6 Summary

There is an overpayment of Family Tax Benefit of $3200. It is attributable solely to an administrative error made by the Commonwealth. The duplicate payments weren't made

through any fault of mine. I received the payments in good faith. I reasonably thought that Centrelink and the ATO shared equal responsibility for the top-up FTB payment so I had no reason to know or doubt that I wasn't entitled to both payments. None of the evidence supports Centrelink's case that I should've known I wasn't entitled or made further inquiries to ascertain my entitlement.

My financial situation is becoming dire since my husband's death as I struggle to keep the family home, rear a family and support dependent extended family and adult children. For these reasons, under the provisions of the *Social Insecurity Act 1998*, I should not have to repay the overpayment.

7 Case in a nutshell

According to Section 1234 of the *Social Insecurity Act 1998*, the Commonwealth should not recover this debt because the overpayment is due solely to the Commonwealth's administrative error, I received it in good faith and recovery of the debt would cause me severe or extreme financial hardship.

Your preliminary outline sets out the logical steps needed to establish your case. It also shows, with the bracketed sections, how to order your evidence and other paperwork and where it fits as you steadily build your case.

As it is though, your preliminary outline doesn't quite fit into the format of a hearing. It still needs some fine-tuning. To transform it into a fully functional presentation for the hearing, you first need to know more about the hearing itself.

How a hearing works

The conduct of hearings varies greatly, but most follow the pattern below. Check this with your court or tribunal.

HOW A HEARING WORKS

Housekeeping matters
then
Plaintiff's introduction and evidence
then
Respondent's introduction and evidence
then
Plaintiff's argument and summary
then
Respondent's argument and summary
then
Plaintiff's reply (if necessary)
And respondent's reply (if necessary)
then
Result

The hearing usually begins with any housekeeping matters that affect the progress of the hearing. These are often procedural things like last-minute changes to the availability of witnesses or amendments to documents already before the court or tribunal. When these are dealt with, the plaintiff's case begins.

The plaintiff or applicant always presents their case first. Generally, they start with a brief introduction of what the whole case is about and what their case involves, in a nutshell. Then they proceed with presenting their evidence. They tender documents, drawing attention to salient features, and present their witnesses.

The evidence of the plaintiff's witnesses is taken one at a time. The witness is called into the room, goes to the witness box, is sworn in and then questioned, first by the plaintiff.

The party providing the witness always questions their witness first and the questions must cover all of the witness's evidence. This is called **examination-in-chief**. Then the other party, here the respondent, questions the witness, called **cross-examination**.

Then the plaintiff can ask any follow-up questions arising from the cross-examination. This is called **re-examination**. After re-examination, the witness is dismissed from the witness box and the next of the plaintiff's witnesses is called.

Any documents that specifically relate to the witness's evidence may be tendered to the court during the questioning. For example, if the witness has made an affidavit, the examination-in-chief will probably begin with the tendering of this affidavit. Other relevant documents may be tendered during the questioning, with the witness being specifically asked for their response to the contents of the document.

When the plaintiff has finished presenting their evidence, it's the respondent's turn to present this first part of their case in a similar fashion. The respondent begins with a brief introduction about their case and how it differs from the plaintiff's version, what it is about, in a nutshell.

Then the respondent presents their evidence. Documents are tendered and attention is drawn to the relevant parts and the respondent's witnesses are called. One by one the witnesses are examined-in-chief by the respondent, cross-examined by the plaintiff, then if necessary, re-examined by the respondent.

Much of the hearing time can be spent dealing with the parties' evidence. It is often the most important part of each party's case. After all, the evidence establishes the story of the case.

Once the plaintiff and respondent have finished with the evidence, the plaintiff presents their arguments. This part of the presentation, called **submissions**, includes a discussion of the

relevant law, a review of the evidence and an explanation of how the law applies to the facts and applies favourably to their case. It also includes any arguments against the other party's case. Written submissions may also be tendered in addition to the verbal submissions. Often the plaintiff completes their presentation with a brief summary.

After this, the respondent presents their submissions and concludes by summarising their case. If needed, the plaintiff can reply to the respondent's arguments or summary with further submissions and, if needed, the respondent can then respond also.

This usually ends the parties' involvement in the hearing. The decision-maker may then give the result immediately or might **reserve the decision**, that is, announce it at a later date.

Many informal tribunals use a simpler format for the hearing. Their pattern can be as straightforward as having the plaintiff's (or applicant's) whole case heard first, followed by the respondent's, with the plaintiff having the right of reply at the end. The presentation generally contains the same elements in the same order (that is, housekeeping matters, introduction, evidence, submissions and summary) but it is heard in one block.

Some tribunals are simpler still. Using an inquisitorial approach, the decision-maker may entirely control the direction of the hearing. Having read the paperwork beforehand, they may begin with their own questions about the issues of the case and proceed from there. With this format, the parties still need to prepare their presentation along the same lines (that is, housekeeping, introduction, evidence, arguments, summary) but as always, at the hearing they may need to improvise.

The best way to learn how your hearing will work is to watch one in action. Most hearings are open to the public, so contact the registry about cases similar to yours or check the website for the daily listings of hearings. See for yourself how the decision-maker and staff handle the matters and how the lawyers and parties conduct themselves. Observe the format, the procedures and the

degree of formality. Take notes. It will be well worth your while.

Technological advances are now allowing the legal system to dispense with expensive courtroom time by conducting some hearings via the internet. Still in the infant stages, developments at present allow lawyers on both sides, in appropriate cases, to lodge documents, submissions and evidence online and the decision-maker decides the case from this and notifies the lawyers of the result. In time, this method will be extended to a greater variety of cases and may well be available to you. If it is available, you will need to follow the process carefully and attend promptly to its requirements.

A small number of legal bodies deal with and decide a case solely on the basis of the documents provided and no actual hearing between the parties takes place. If your case is to be dealt with in this way, check your paperwork very carefully before submitting it. Be sure that it covers all the aspects of your case. In this and any other non-traditional format for a case, still prepare your outlines in the usual way. They will be of great benefit to the drafting of your submissions, the ordering of your evidence and the formation of your case.

Stage 2. The main outline

From the patterns of a routine hearing described above, a party's presentation needs to consist of these elements, in this order:

Housekeeping matters – Introduction – Evidence – Submissions – Summary

Now using your preliminary outline, craft your main outline on this model. Whether you are the plaintiff or the respondent, your task is to lead the decision-maker in a series of simple, logical steps to the result you're asking for. Frame your outline to achieve this.

You can leave out the housekeeping matters for the moment, as these will probably arise closer to the hearing. For the introduction you can combine the 'What I want' section of your preliminary outline with its 'Case in a nutshell'. Then shape the 'Facts

and evidence' section to guide the decision-maker through the evidence. For the submissions, use the 'Law' and 'Argument' sections, fitting the facts to the legal requirements, and the 'Other party's case'. Then use your 'Summary' to finish the presentation.

How brief or elaborate you make your main outline depends on the complexity of your case and the formality of the court or tribunal involved. For example, an informal court or tribunal that hears the same types of applications day after day might expect a short, to the point presentation. A more formal court may require great attention to detail. Where the decision-maker, the parties and the lawyers are all familiar with the case and its issues, the hearing may move straight into the evidence stage. In any case, still draft your main outline on the same model as that above. And remember to keep it as simple and as clear as possible. The decision-maker will quickly identify any irrelevant or unclear evidence, and you risk testing their patience.

Transforming the preliminary outline into your main outline shouldn't take much time. Play around with the sections and improve the wording and expression wherever possible.

Once you have completed your main outline, check that it is accurate and contains all the necessary elements of your case but no more. Delete any irrelevancies. Check that the points you make follow coherently. Be thorough, but don't make it more complicated than it needs to be.

Here is one example of a main outline of a presentation, using the information from the preliminary outline of Example 2 the plaintiff's case in a consumer matter. Its contents, including the laws and cases, are purely fictional so don't use any of the information in the outline for your own presentation.

MAIN OUTLINE
Example
Plaintiff's case in a consumer matter

THE LAWS AND CASES USED IN THIS EXAMPLE ARE FICTITIOUS.
DO NOT USE THEM IN THE PREPARATION OF YOUR CASE.

1 Introduction

Builder's Warranty case. This is a claim against the builder under the provisions of the *House Building Act 2001* for the cost of repairs to the roof of my home to make it habitable. The claim is for $7725 plus $40 filing fee plus interest pursuant to the *Small Claims Act 1993*.

2 Evidence

June–December 2005 Home built by Easy Build Ltd, Builders Licence No 344402. (BUILDING CERTIFICATE DATED DECEMBER 2005)
December 2006 Home purchased by me. (COPY OF CERTIFICATE OF TITLE)
January 2008 Roof began leaking.
January 2008 Letters sent to builder requesting repairs under Builder's Warranty. (COPY OF TWO LETTERS SENT DATED 4/1/08 AND 28/1/08)
February 2008 Inspection by Office of Fair Trading, rectification order issued to builder. (COPY OF BUILDING REPORT AND RECTIFICATION ORDER DATED 20/2/08)
February–May 2008 Problem not rectified. No action taken by builder.
(PHOTOS OF CURRENT STATE OF ROOF AND RAIN DAMAGE TO CEILING, DATED 2/7/08)
15 June 2008 Two quotes obtained for repair of roof. (TWO QUOTES)
1 July 2008 Claim issued.

3 Submissions

Section 20(c) *House Building Act 2001* provides the following warranty for the building of new dwellings: 'a warranty that, if the work consists of the construction of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling.' (COPY OF SECTION 20(c))

Section 45 *House Building Act 2001* states: 'The warranty shall be for a period of seven years from the date of completion of construction.' (COPY OF SECTION 45)

The warranty created by the *House Building Act 2001* applies to this home because it is less than seven years since completion of its construction. Under the warranty, the builder is liable to construct a building that's reasonably fit for occupation as a dwelling. The Inspection Report and Rectification Order carried out by the Office of Fair Trading show that the poor construction of the roof has resulted in the home not being reasonably fit for occupation as a dwelling. The builder is liable for repairing the roof.

I have notified the builder of the problem and requested that he fix it. He has not fixed it.

The respondent denies that the damage is due to poor construction. The Inspection Report and the Rectification Order prove that it is.

4 Summary

My evidence shows I own the home, that it is less than seven years old and it is not reasonably fit for habitation due to the poor construction by the builder. Under the *House Building Act 2001*, the builder is liable.

Witnesses

If you or the other party are using witnesses at the hearing, you'll need to prepare your questions beforehand as part of your presentation.

For your own witnesses, determine exactly what the decision-maker needs from each of them in order to build your case. Pinpoint the relevant facts they can confirm, any doubts or inconsistencies they can clear up and any important gaps or weaknesses they can expose in the other party's case. When examining your own witness, avoid asking leading questions. These are ones that clearly or obviously suggest the answers you want.

For your opponent's witnesses, determine what the decision-maker needs from your cross-examination of each witness in order to cast doubt on your opponent's case. Expose important inconsistencies or weaknesses in their evidence. Target the facts you need to challenge, bearing in mind your own evidence that can support your challenge.

With all witnesses, yours and theirs, make your questions simple and clear. Make them single-barrelled; that is, asking only one thing at a time. Focus on how best to ask a question to extract the information you need. Avoid ambiguity. Avoid questions that elicit information you aren't aware of. The rule 'don't ask a question you don't know the answer to' is a valuable one.

If your witness has made an affidavit or witness statement and you're satisfied that it contains all of their evidence, check with the other party whether they'll be required for cross-examination. If not, check with the court or tribunal whether the witness is needed at the hearing. Sometimes the witness may not need to attend.

If your witness is required to attend, the traditional procedure for them giving evidence is as follows. This method is appropriate for most courts and tribunals. Some informal tribunals, especially those not bound by rules of evidence, accept a more casual approach.

In all cases, instruct your witness to sit outside the court or hearing room until called in and to speak to no-one about their evidence until after they have finished giving it. Also, instruct them beforehand to direct their answers in the witness box to the decision-maker and not to the person asking the questions.

When it's time for your witness to give evidence, the court official will call them into court and swear them in. They can swear an oath or make an affirmation. When this is done, ask them to state their name, address and occupation. After this, begin your questions.

If they have made an affidavit or witness statement, begin your examination-in-chief by presenting it to them and asking them to confirm that they made this affidavit or statement and that it contains their evidence. Then state that you wish to tender this document. Hand it to the court official who will then pass it to the decision-maker. It will be received formally as evidence and given a number or letter, like Exhibit A.

If you're satisfied with its contents and there are no last-minute additions or clarifications, you may have no further questions for your witness. This will end the examination-in-chief and the witness will then be cross-examined by the other party.

If there is extra evidence to obtain from your witness or you want to clarify something in the affidavit, tailor your questions accordingly. Make sure your examination-in-chief covers all the matters you wish to raise with this witness.

If there is no affidavit or witness statement, your examination-in-chief must draw out all the relevant facts that you want this witness to provide. Later on in their evidence, for example during re-examination, you can't raise new matters with this witness unless your opponent has raised them in cross-examination. Also, in examination-in-chief, you can't ask your witness leading questions.

For your opponent's cross-examination of your witness, instruct the witness beforehand not to answer any question that

they don't fully understand. If the question is vague or ambiguous, confusing, complicated or the witness doesn't know the meaning of some of the words, tell the witness to ask that the question be explained or rephrased. A witness is also not required to answer a question if the answer might incriminate them. In cross-examination, though, leading questions are allowed.

While your witness is under cross-examination, do not speak to them about how to answer. For example, if there is an adjournment during the cross-examination, be careful not to advise your witness to answer any question in a particular way.

During cross-examination of your witness you can object to your opponent's questioning on much the same grounds as objecting to any other evidence. Check the basic rules of evidence, found in the section 'The facts' in chapter 11 'Preparing your case part 2'.

If you are giving evidence yourself or you're required for cross-examination, follow the same procedure as with any other witness. Go to the witness box and after being sworn in, state your name, address and occupation. State your evidence and then wait to be cross-examined.

With your opponent's witnesses, listen very carefully to the evidence they give during examination-in-chief. Add any new questions you have to your pre-prepared list of questions for your cross-examination.

Successful cross-examination tests the witness's evidence. Could they be wrong? Could they have remembered incorrectly? Could they have a vested interest in remembering incorrectly? Is their evidence as important to your opponent's case as it seems?

When preparing your questions for cross-examination, be careful not to get sidetracked into personal issues. Of course, a witness's credibility should be questioned where appropriate, but nothing useful is gained from mud-slinging and animosity. Your opponent can object to your questions in the same way as objecting to other evidence. Check the rules of evidence again.

When challenging a witness's testimony, you must directly state to that witness your allegations about their evidence. This gives them the opportunity to respond to the allegations. For example you might say: 'I put it to you, that without your glasses on, your eyesight isn't good enough to tell whether it was any white car or my white car.'

Stage 3. The summarised outline

Once you've completed your main outline, you now have all the necessary information of your case arranged in suitable order for the hearing. The final step in preparing your outline is to produce a summarised version to guide you through the complete presentation.

On the day, instead of labouring through your main outline in rote fashion, like reading from a script, have a summarised version beside you to use as a prompt throughout the presentation.

Prepare the summary in point form. Make it easy to follow. Be sure to include the bracketed sections, to indicate which evidence and other paperwork you'll be using and where you'll be using it.

Some of the documents you'll be using as evidence may have already been lodged with the court or tribunal, for example, as part of the claim or defence. For these, mark on your summarised outline where during the course of your presentation you'll draw attention to the relevant parts of them, or if required, formally tender them. For documents that haven't been lodged with the court, mark on your outline where during the hearing you will be tendering them.

Here is an example of how your summarised outline might look. It uses the tenancy example, Example 1, of 'The preliminary outline'. Remember, its contents are fictional so don't use any of the laws or cases in your own case.

SUMMARISED OUTLINE
Example
Plaintiff's case in a tenancy dispute

THE LAWS AND CASES USED IN THIS EXAMPLE ARE FICTITIOUS.
DO NOT USE THEM IN THE PREPARATION OF YOUR CASE.

Your case is being heard by an informal tenancy tribunal that deals with similar such cases each day.

1 Introduction

Fair wear and tear case
Claim for $1180 from the $1200 bond
Damage to carpet, curtains and bathroom basin

2 Evidence

Details of tenancy (REFER TO TENANCY AGREEMENT)
Details of condition of premises at start of tenancy (REFER TO CONDITION REPORT)
Details of damage (REFER TO FINAL INSPECTION REPORT)
Extent of damage (TENDER PHOTOS)
Cost of repairs (TENDER ORIGINALS OF QUOTES, LETTERS AND RECEIPTS)

3 Submissions

Clause 20 Tenancy Agreement: Tenants liable except for fair wear and tear.

Smith v Jones case: Age of item is relevant. Here, carpet, curtains and basin are less than 10 years old. (TENDER COPY OF *SMITH V JONES* CASE)

Section 15 *Tenancy Act 1989*: Parties must minimise their loss. Here, the quotes and receipts show I have chosen the lowest quotes to repair the damage. Attempts to repair the carpet were unsuccessful. Replacement is needed.

The premises aren't covered by insurance for this damage.

4 Summary

Damage is not fair wear and tear. Tenants are liable.

Final preparations for the hearing

As the hearing date approaches, make your final preparations. Use a checklist.

Group your outlines together with the necessary documents you're using for the presentation. Order your documents in accordance with your main outline. Number them if necessary. Use post-it notes or post-it flags to be able to find the relevant bits quickly. Highlight the parts you'll be referring to.

Make extra photocopies of any documents that you will be tendering. One copy is for you, one is for the other party and the original is for the decision-maker. If there is more than one decision-maker hearing your case, make a copy for each of them. Also make copies of the cases you'll be using.

Make extra copies of your chronology, one for each decision-maker and one for the other party. This isn't essential, but if you tender a chronology at the beginning of your presentation, it can be a great help to the decision-maker.

Check that you have prepared, filed and served all necessary documents within the required time limits. Check with the court or tribunal how much time has been allotted for your hearing. Assess whether your outline corresponds roughly to half this.

Confirm with your witnesses that they're aware of the hearing date and will attend, where required. Check that they have the correct address of the court or tribunal and correct time of the hearing. Confirm the witness arrangements with the court or tribunal.

If appropriate, continue with attempts to settle the case before the hearing.

If you need to delay the hearing for some serious reason, notify the court or tribunal and the other party as soon as possible. Request an adjournment in writing, stating the reason and your next available time. If possible, get the other party's consent to the adjournment.

Lastly, prepare yourself psychologically for the result. Think through what will happen, win or lose, after the hearing. Investigate and strategically plan for both. For example, if you lose, how much money might you be liable for? How much time might you be given to pay? Will you need extra time to pay? Can you afford to pay in a lump sum or do you need to pay by instalments? Investigate the options and procedures to obtain a suitable arrangement. Make the calculations and be ready to ask at the hearing for these terms to be included in the orders.

Likewise if you win, you might want certain conditions of payment to be included in the orders. You might want other conditions included.

When you represent yourself and win, you can't ask to be awarded legal costs because these relate to the costs of a lawyer and you don't have one. If you lose, though, you may be ordered to pay the legal costs of your opponent's lawyer.

If there's a likelihood of costs being awarded against you, prepare a list beforehand of reasons why you shouldn't have to pay these costs. For instance, if there's an agreement in writing signed by both parties that each will bear their own legal costs, take this agreement with you to the hearing. Or perhaps the other party's lawyer has caused you significant extra effort by unnecessary delays, stalling tactics or general neglect in negotiating or settling the matter earlier. Record these details on your list and attach any relevant paperwork. At the hearing, be prepared to raise this matter at the conclusion of your presentation.

Also make a list of any housekeeping matters that need to be dealt with at the start of the hearing.

You should now have a neat, ordered bundle of documents to take to the hearing.

CHECKLIST OF DOCUMENTS FOR THE HEARING

1 Hearing notice stating the hearing date, time and hearing room or court number;

2 Claim and defence documents;

3 Any other documents filed with the court, for example, affidavits, witness statements;

4 List of any housekeeping matters to be raised at the beginning of the hearing;

5 Copies of chronology;

6 Main outline and summarised outline plus ordered copies of all evidence and cases;

7 List of questions for witnesses (yours and theirs);

8 Any submissions about terms of payment or other terms of the orders;

9 Any submissions about costs;

10 A folder containing all remaining sundry documents, correspondence, notes, drafts, preliminary outline and 'just in case' items;

11 Your diary or a calendar to check dates or confirm a future date if further hearing time is required.