



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 63

Small Debts Court

REPORT

APRIL 1979

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

Mr. D.K. Malcolm, Chairman

Mr. N.H. Crago

Mr. E.G. Freeman.

The Executive Officer of the Commission is Mr. C.W. Ogilvie and the Commission's offices are on the 16th floor, City Centre Tower, 44 St. George's Terrace, Perth, Western Australia, 6000. Telephone: 325 6022.

To: THE HON. I.G. MEDCALF, Q.C., M.L.C.
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on special provisions for hearing claims in respect of small debts.

David K. Malcolm
Chairman
6 April 1979

CONTENTS

	Paragraph
CHAPTER 1 - TERMS OF REFERENCE	1.1
CHAPTER 2 - WORKING PAPER AND PUBLIC COMMENT	2.1
CHAPTER 3 - SPECIAL FORUM FOR NON-CONSUMER CLAIMS	
CONSUMERS	3.1
C H C ONS 2410.246 T c 0 OR NONR	3.2

DE

3
CHAPTER 3
CHAPTER 3
CHAPTER 3

CHAPTER 1

TERMS OF REFERENCE

1.1 The Commission was asked to examine the desirability of expanding the jurisdiction of the Small Claims Tribunal into a comprehensive Small Debts Court or of making some other special provision for the hearing of claims in respect of small debts.

1.2 Since the inception of the Small Claims Tribunal traders have felt at a disadvantage, compared with consumers, when disputes have arisen out of consumer transactions. A trader's claim against a consumer is usually for the debt due to him and can only be brought in the ordinary courts. Under the present law, the Local Court has jurisdiction over various matters up to \$3,000 including debts.¹ These are determined by a magistrate in accordance with the ordinary procedures of the Local Court. This is often time consuming and expensive in relation to the amount at issue.²

1.3 By contrast the law allows "consumers" (which includes tenants in the case of tenancy bond claims³) a special advantage in that if their claim is against a "trader" (which includes landlords⁴) and is for less than \$1,000 it may be heard by a referee of the Small Claims

¹ *Local Courts Act 1904*, as amended by the *Acts Amendment (Jurisdiction of Courts) Act 1976*. Subject to the prescribed money limits, the jurisdiction of the Local Court is wide and generally covers personal actions of whatever kind. Jurisdiction in actions in ejectment, those in which the title to land or the validity of a bequest under a will or settlement is in question, seduction or defamation is limited or excluded.

A litigant may alternatively commence proceedings in the District Court or Supreme Court, but this would be unusual in the case of a small claim. It is a deterrent that the Court may award costs only on the Local Court scale: *Supreme Court Rules 1971*, Order 66, rule 17.

² This is brought about by the inter-reaction of a number of factors including the complexity of pleadings, the length of time taken by interlocutory matters, the lapse of time between setting a case down for trial and the hearing date, and the legal costs which may approach or even exceed the value of the matter in dispute.

However, the Local Court does provide a relatively cheap and efficient procedure known as the judgment

Tribunal⁵ under an inexpensive and speedy procedure.⁶ Thus the Tribunal is a "consumer claims" tribunal and not a general "small claims" tribunal as its name might suggest. Understandably, traders have claimed that when they have disputes with consumers, they should also have access to a tribunal with a simplified and speedy procedure. As well, other persons who are neither "traders" nor "consumers" have also urged that they should have access to a simplified forum for small disputes. Hence this report deals with the question of whether persons other than consumers should have access to a simplified procedure similar to the Small Claims Tribunal and, if so, whether this should be achieved by expanding the jurisdiction of the Small Claims Tribunal, by creating a separate Small Debts Tribunal, or by creating a special division of the Local Court.

"(a)

CHAPTER 3

SPECIAL FORUM FOR NON-CONSUMER CLAIMS

INTRODUCTION

3.1 At first, it might appear odd to find that traders and other non-consumers wish to have access to a special jurisdiction in which to litigate small claims when they already have access to the Local Court. As the Minister for Justice said some seventy-five years ago when introducing the Local Courts Bill: ¹

“...Local Courts are held chiefly for the purpose of deciding disputes in regard to small debts.”

Despite the original intention, the Local Court has proved increasingly unattractive to litigants with small disputed claims. Among the criticisms offered have been that -

- (a) Local Court actions are too expensive in relation to the value of the subject matter in issue;
- (b) the Local Court procedure is too cumbersome and the delays too lengthy to be an appropriate method for the adjudication of small claims; and
- (c) the procedure is defective in that it does not provide a means by which parties can be induced to settle their disputes by conciliation.²

3.2 The establishment of the Small Claims Tribunal as a cheap and speedy method of resolving the claims of consumers, was a recognition of the validity of the complaints about the Local Court.³ The Tribunal and its procedures therefore provide a valuable precedent for the direction which further reforms might take.⁴ At present, only "consumers"⁵ can bring a claim in the Small Claims Tribunal and then, only against "traders"⁶ as defined in the Act. This restricts access to the Tribunal to a narrow range of litigants.

¹ W.A. Parl. Deb. (1904) at 313.

²

THE NEED FOR A SPECIAL FORUM FOR NON-CONSUMER CLAIMS

(i) Nature of the need

3.3 Traders, and non-consumers generally, have similar difficulties in the Local Court to those experienced by consumers before the Small Claims Tribunal was established. That is, it is very difficult to economically litigate small causes of action in the Local Court. The costs usually bear a disproportionate relationship to the value of the subject matter in issue and may in fact exceed it.⁷ Thus any proposed small debts jurisdiction is principally aimed at solving this problem. It is not intended to be a "poor man's court" but simply a process by which small disputes can be economically resolved. Nevertheless, persons of modest means may derive substantial benefit from it.

3.4 At the outset, the Commission points out that it does not see the issue as one of traders versus consumers or consumers versus traders. It is in the general public interest that private individuals and businesses alike should have access to a simple inexpensive procedure for the determination of their disputes, appropriate to the amount at issue. This is

3.6 While there was general agreement on the need for a special forum, there was a divergence of opinion as to how this could best be brought about. The Council of the Law Society advised that while it was unable to agree on whether or not non-consumer claims should be the subject of a special forum, it was unanimously of the view that no separate tribunal should be created. There was also a divergence of opinion amongst the commentators on who should be given access to the forum. Some thought it should be restricted to traders while others thought it should be available to all.

3.7 There were only two commentators totally opposed to the idea of a special forum for non-consumers. One of them, the Deputy Chief Stipendiary Magistrate, was of the view that there were adequate steps a trader could take to protect himself from bad debts.⁸ He could, for example, insist on a high credit rating or an adequate deposit before dealing with a customer. If all else failed he could write the debt off against his profits for income tax purposes.

3.8 The Commission appreciates that prudent traders may take these steps to protect themselves if they can. However, in practice it is often not feasible for them to do so. In many small businesses it is expected that credit will be given and traders may not have sufficient economic bargaining power with their customers to reverse the established pattern of trade. Also, it might not be in the best interests of the community to rely on measures which tighten the availability of credit. It is useful to have credit readily available in small amounts over a wide range of commercial transactions. Finally, although it is possible to write bad debts off against income tax, it may still represent a substantial loss to a small trader whose economic position might be no better than the consumers with whom he deals. A private individual⁹ is in a worse position than a trader in that he cannot write off debts against his income tax and thus must bear the full burden of the loss.

3.9 The only other commentator to oppose the concept of a special forum thought that if access to a low cost tribunal were made too attractive it might encourage avoidable litigation (i.e. of a speculative or frivolous nature). He thought the present costs of a Local Court action provided a worthwhile deterrent to this occurring. This argument would have more weight if it could be shown that the present situation forced litigants into reasonable settlements. After all, no one wants to encourage avoidable litigation. In practice, however, it appears that the

⁸ This commentator was also opposed to "any form of hearing, be it Tribunal or Court, which is not required to abide by the rules of evidence - and from which there is no right of appeal".

⁹ i.e. a person who was not engaged in an income producing activity by which the debt was created.

already available in Local Courts throughout the State. Further, it is unlikely that any additional magistrates or court staff would be required. The Commission understands that the

assistance to file his claim can, in such circumstances, be seen as a problem to overworked court staff rather than as the focal point of the system.

3.17 As a result, there may be a trend to adapt court procedures and practices to serve volume litigants to the detriment of individual litigants. In the process the informal atmosphere and practices which are so important to a tribunal of this nature can soon disappear. The present Small Claims Tribunal appears to be working well and neither the Senior Referee, Mr. A.G. Smith, nor the Department for Consumer Affairs consider that the jurisdiction should be extended.

3.18 If, contrary to the Commission's recommendations, the approach of extending the jurisdiction of the existing Small Claims Tribunal were adopted, there are some procedural safeguards which could be used to restrict claims to disputed matters and perhaps help prevent the Tribunal from being used as a mere debt collection mechanism. These might not, however, prove very satisfactory in practice. In New Zealand a claimant who wishes to sue for a debt or liquidated demand in the Small Claims Tribunal (which is a division of the Magistrates' Court¹⁹) must satisfy the Registrar that the claim is in dispute.²⁰ The Commission considers that even if an affidavit to that effect were required, such a provision might become a mere formality and be difficult to supervise. Frequently claims are disputed up to the issue of a summons and are then not defended.

3.19 Another argument against the expansion of the Small Claims Tribunal is that traders (who would provide the majority of debt actions) might not be satisfied with its procedures in relation to hearings and consequently might not avail themselves of it. When a claim is filed in the Small Claims Tribunal it automatically leads to a hearing whether the claim is defended or not. As representation by a solicitor is permitted only in exceptional circumstances²¹ a trader would have to attend personally. A trader might resent this if, in his view, there were no

3.20 By contrast, in the Local Court if the claim is for “a debt or liquidated demand in money or for delivery of goods or for a damages claim of not more than \$50”²³ the plaintiff may obtain judgment without a hearing if the defendant has not given notice of intention to defend.²⁴ This process is known as “judgment by default” and is a much more suitable procedure where a debt claim is undisputed. The Commission in its subsequent recommendations has carefully preserved the “judgment by default” concept.

CHAPTER 4

THE JURISDICTION OF THE SMALL DEBTS DIVISION

4.1 The proposed jurisdiction recommended by the Commission in this chapter, has been framed to achieve the following objectives -

- (a) to provide a simple, inexpensive and speedy means of determining certain small disputed claims brought by non-consumers, together with any counter-claims defendants may have;
- (b) to restrict access to the Small Debts Division in such a way that it does not become a mere debt collection tribunal;
- (c) to prevent consumers from bringing claims in the Division which should more properly be brought in the Small Claims Tribunal;
- (d) to preserve the simplicity of the judgment by default procedure in respect of undefended debt and liquidated demand claims in the Local Court.

JURISDICTION LIMITED TO DISPUTED CLAIMS

4.2 The proposed Small Debts Division is intended as a mechanism to resolve small disputed claims.¹ There is a danger that if undisputed matters were allowed access to the Division it would be overwhelmed by mere debt collection claims. This danger has already been discussed in relation to the possible expansion of the Small Claims Tribunal.² Accordingly, the Commission considers it essential that the jurisdiction of the Small Debts Division be limited to disputed matters.

4.3 The practical difficulty is to devise a simple means by which disputed and undisputed claims can be separated. It would be difficult to effect a separation at the time the action was commenced because neither a plaintiff nor the Court would know whether a defence to the action would or would not be filed. Many claims are disputed until a summons is issued but are subsequently undefended. This problem has been of concern in New Zealand where the Small Claims Tribunal (which is a division of the Magistrates' Court³) has jurisdiction over

¹ For the causes of actions which come within the jurisdiction see paragraphs 4.8 to 4.12 below.

² See paragraphs 3.16 to 3.18 above.

³ *Small Claims Tribunals Act* (NZ), s. 4(3).

debt claims as well as other matters.⁴ The solution has been to provide that in order for a plaintiff to file a claim for a debt in the Tribunal he must satisfy the Registrar that it is in dispute.⁵ This could mean, for example, that a plaintiff might have to swear an affidavit stating that he believed the claim would be disputed. The Commission considers that a proposal along these lines would be difficult to regulate in practice.

4.4 In its view separation could best take place once it was known whether the action was actually going to be defended or not. The Commission therefore proposes the following procedure. All non-consumer actions should be commenced, as at present, by a summons being filed in the Local Court. If a notice of intention to defend is filed then those matters within the jurisdiction of the Small Debts Division should automatically be listed for hearing in that Division, while those matters outside the jurisdiction should remain in the ordinary division of the Local Court. Undefended claims for debts or liquidated demands (or for

place if there were no appearance by the defendant at the time listed for the hearing. In such a case the plaintiff should be allowed to enter judgment by default without being put to the proof of his case. This is already so in the Local Court where the plaintiff's claim is for a debt or liquidated demand.⁹ In all other cases, however, the plaintiff is put to the proof of his case and must call his witnesses to give evidence and so on. This appears to be undesirable in the Small Debts Division.¹⁰ In this respect the procedure of the Small Debts Division will differ from that of the Small Claims Tribunal. In the Tribunal the claimant is always put to the proof of his case.

CAUSES OF ACTION

4.7 In paragraphs 4.8 to 4.19 below the Commission discusses which causes of action it considers should fall within the jurisdiction and which should be excluded.

(a) Within the jurisdiction

4.8 In deciding how to frame the jurisdiction there are two principal issues involved. One is whether access to the jurisdiction should be restricted to a particular class of claimant, for example, "traders". The Commission sees no reason to restrict the benefits of the proposed jurisdiction in this way. If this were done it might raise difficult jurisdictional problems arising out of the definitions, including that of "trader", as has been the case with the Small Claims Tribunal.¹¹

4.9 The other issue is the range of causes of action which should be allowed. While the focus of this project has been on debts or liquidated demands, the Commission in the Working Paper canvassed whether the jurisdiction should also cover tort claims (whether generally or confined to, say, motor vehicle accident property claims) as well as possession or title to goods and all contract and quasi-contract claims.

⁹ See *Local Courts Act 1904*, s.73. The magistrate may, however, set aside a judgment so entered and grant a new trial on such terms as he thinks fit: *ibid*.

¹⁰ For example, a landlord may sue a tenant for arrears of rent and for damages done to the premises. At present judgment in default of appearance by the defendant can only be entered in respect of the arrears of rent and not for the damage to the premises which might be for, say, painting a wall or cleaning a carpet.

¹¹ See *R. v Small Claims Tribunal, ex parte Gibson* [1973] Qd R 490 where it was held by the Supreme

4.10 A number of commentators were in favour of a jurisdiction in which a broader range of small claims could be litigated. However, if this were permitted it could result in consumers bringing their claims in the Small Debts Division rather than in the Small Claims Tribunal and this would be undesirable. It would also detract from the simplicity of the jurisdiction proposed for the Small Debts Division. Therefore, in the Commission's view the jurisdiction should principally cover debts and liquidated demands¹² though it would not be practicable to confine it to these matters exclusively. A plaintiff may wish to sue for other matters as well. A typical example would be a landlord who wanted to sue a tenant for arrears of rent (debt) as well as for damage done to the property. Another instance would be where a defendant wished to bring a counter-claim which was not a debt or liquidated demand.

4.11 Consequently, the Commission recommends that in order to litigate a claim in the Small Debts Division a plaintiff's claim must include a claim for a debt or liquidated demand. If it does so, then the plaintiff should be permitted to join any other cause of action in dispute between him and the defendant.¹³ A defendant should be under no restriction and should be entitled to set-off or counterclaim in respect of any matter. The only proviso would be that the claims and counterclaims were within the monetary limit¹⁴ of the Small Debts Division or the parties consented to the magistrate adjudicating on a larger amount.

4.12 While this proposal may seem to give a narrow jurisdiction to the Small Debts Division, it would provide substantial assistance to traders and others who might need to sue in respect of debts or liquidated demands. Traders and retailers would inevitably provide the bulk of litigation and their claims are likely to be mainly small debt actions which arise from the sale of goods or the provision of services. The jurisdiction would thus be broad enough to cope with most claims likely to be brought by them, while at the same time excluding most claims which should properly be brought by consumers in the Small Claims Tribunal. Moreover, a private individual who wished to sue in respect of a debt or liquidated demand would be able to do so.

¹² Within the monetary limit of \$1,000: see paragraph 4.21 below.

¹³ This is essential in order to avoid a multiplicity of actions between the parties. The amount recoverable in respect of any one cause of action should not exceed the monetary limit of \$1,000.

¹⁴ See paragraph 4.21 below.

(b) Outside the jurisdiction

4.13 Most of the matters actionable by consumers in the Small Claims Tribunal could not be brought in the proposed Small Debts Division as few of them are for a debt or liquidated demand. Most consumer claims are for damages, a work order¹⁵ or for cancellation of a contract. The few instances in which a consumer simply claims a debt from a trader, say, for recovery of a deposit on work which was not carried out, or for the return of a tenancy bond, would not over-burden the Small Debts Division. As a result it is unlikely that the role of the Small Claims Tribunal would be substantially reduced.

4.14

4.16 The *Local Courts Act and Rules* are currently under review by the Commission.¹⁸ Eventually it may be possible to simplify the Local Court procedure so that it compares favourably with both the Small Debts Division and the Small Claims Tribunal. However, a note of caution must be sounded. The monetary limit on the jurisdiction of the Local Court has recently been increased to \$3,000.¹⁹ It may be that, for many of the larger claims which will now be litigated in that Court, the present procedure is necessary in order to clarify the issues before trial. Although pleadings are not required under the present rules of the Local Court, they are exchanged in most defended cases as a matter of practice. Consequently, there may be practical difficulties to be overcome before substantial simplification of general Local Court procedures could be achieved

COUNTERCLAIMS AND SET-OFFS

4.17 As mentioned above,²⁰ a defendant may have a counterclaim or set-off which is not a debt or liquidated demand. For example, a trader may sue a defendant for a debt being the balance due on a refrigerator. In reply the defendant may wish to counterclaim for the cost of repairs to the refrigerator and the loss of food incurred when the refrigerator broke down.

4.18 It has long been an established principle that where more than one cause of action exists between parties, these should be resolved at the same time so that a multiplicity of legal proceedings can be avoided.²¹ In the Commission's view this principle should apply in the Small Debts Division. Accordingly, the Commission recommends that a defendant to a claim for a small debt or liquidated demand should be able to counterclaim or set-off any other matter in dispute between the parties.²² The only proviso should be that the cause of action, whether by way of set-off or counterclaim, should not exceed the monetary limit of the Small Debts Division, unless both parties consent.

4.19 If it were thought undesirable to permit counterclaims,²³ the problem could be resolved by allowing the magistrate, once a counter-claim had arisen, to transfer the matter to

defendant, should be allowed to elect whether or not to abandon the excess. In the Small Claims Tribunal and the Local Court abandonment takes place when a claim is filed. However under the Commission's proposals only matters in respect of which a defence had been filed would be eligible for the Small Debts Division. Thus a plaintiff would not know when he filed his claim whether it would ultimately be eligible for the Small Debts Division or not. It would thus not be feasible to require him to make his election at that stage. Consequently, the Commission recommends that a plaintiff should have the option of abandoning the excess once a notice of intention to defend has been filed. If he elects to do so, the matter will proceed in the Small Debts Division. If he does not, it will proceed in the ordinary division of the Local Court in the usual way. As far as a counterclaim by a defendant is concerned, abandonment of the excess should take place upon filing in the usual way.

TIME LIMITS

4.23 The time within which a plaintiff may bring an action in the ordinary courts is regulated by the *Limitation Act 1935* and varies in accordance with the cause of action. For example, an action for a simple debt²⁹ must be commenced within six years³⁰ of the date upon which the debt fell due. In respect of claims brought in the Small Claims Tribunal a fwrtshr

the metropolitan area. Since then both the Chief Stipendiary Magistrate and Mr. Burton, S.M have emphasised in their comments the special qualities required for such a position.

4.25 The exercise of the new jurisdiction will require the development of expertise in techniques such as conciliation and the conduct of cases by an inquisitorial rather than adversarial procedure. The Commission now considers that at least initially, it would be best if designated magistrates were to be allowed to develop these skills. This would lead to a rapid accumulation of experience and would also allow for any minor problems to be readily discerned.

4.26 Nevertheless, the Commission is still concerned that adequate arrangements should be made for rural areas which are served by only one magistrate.³² One of the compelling reasons for the selection of a special division of the Local Court as the appropriate forum was that it would be statewide in its application. This feature should be kept very much in mind when designated magistrates are appointed. Provision could be made for designation of magistrates to sit in the Small Debts Division in particular places to ensure that the facility is available in those areas where there is only one magistrate.

³² One solution might be to allow all country magistrates to exercise the jurisdiction but only designated magistrates in Perth.

CHAPTER 5

OTHER FEATURES OF THE SMALL DEBTS DIVISION

GENERAL

5.1 The Small Claims Tribunal has demonstrated the benefits which can be derived from a simplified procedure. In making the recommendations which follow, the Commission has drawn heavily on that experience. It is intended that plaintiffs will conduct much, if not all, of their case without legal representation¹ and accordingly the procedures must be kept as simple as possible.

5.2

defendant in respect of the hearing. When judgment has been obtained it should be enforced in the usual way upon payment of the usual fees.² This will mean some contrast with the Small Claims Tribunal in that the only fee payable is \$3.00 upon filing the claim.³ However, to enforce a judgment of the Small Claims Tribunal it has to be registered in the Local Court and it then takes effect as a judgment of that Court and is liable to the usual fees.⁴

5.5

5.8 Under the *Local Court Rules* it is not necessary for a plaintiff to give full details of his claim if he gave particulars of it before he commenced his action.⁸ All that he need endorse on the summons are sufficient particulars to inform the defendant of the demand made against him plus the statement “particulars whereof have been rendered”.⁹ To prevent judgment being entered by default all a defendant need do is to file a notice of intention to defend the claim.¹⁰ He does not have to file a specifically pleaded defence except in certain instances.¹¹ Under the Commission’s proposals, the filing of a notice of intention to defend will result in the claim being transferred into the Small Debts Division. If the only documents on the court file are those outlined above then this may not be an adequate basis on which to commence adjudication.

5.9 In the Local Court this problem is overcome by various interlocutory proceedings which require the parties to give further particulars of their claim or defence as the case may be. While the Commission does not consider that interlocutory proceedings should be allowed in the Small Debts Division, suitable steps may have to be taken to overcome any lack of information. The Commission, therefore, recommends that the clerk or designated magistrate should be empowered to seek further particulars on his own motion if he considers that further information is required. This will require some assessment of the state of the court file when the matter is listed for hearing. Presumably, the clerk or designated magistrate¹² will have to oversee this function.¹³ Lack of information should not create many difficulties in practice as the parties at the hearing will have the opportunity of presenting their case in full.

5.10 Another way the problem could be ameliorated is to provide improved forms for both claims and defences which compel litigants to complete them in a more comprehensive way. Steps along these lines have been taken in Queensland as far as defences are concerned.¹⁴ The question of the overall adequacy of Local Court documentation will be reviewed in the Commission's project on the *Local Courts Act and Rules*.

⁸ *Local Court Rules 1961*, Order 5 rule 15.

⁹ *Ibid.*

¹⁰ The notice simply says “I intend to defend this action”: *ibid.*, Order 10 rule 1 and see Form 14.

¹¹ If he has a special defence he must plead that specifically: *ibid.*, Order 10 rule 15.

¹² An examination of the file may also alert the magistrate to any legal difficulties which the case may present.

¹³

The role of the Clerk of Court

5.11 The role of the Clerk of Court in the Small Debts Division is likely to prove crucial. As Mr. A.G. Smith, Senior Referee of the Small Claims Tribunal, commented in the latest annual report:¹⁵

"it is recognized throughout Australia that the success of a Small Claims Tribunal is to a large extent dependent on a capable and wise Registrar."

This is likely to be equally true of the Small Debts Division of the Local Court.

5.12 The Commission considers that it is essential that the clerk be under an obligation to provide some assistance to litigants in small debt actions. Of course, at the time a claim is filed it will not be possible to tell whether it will be defended or not. Thus it may or may not become a matter for the Small Debts Division. Nevertheless, the clerk should be obliged to assist plaintiffs in person who request his help to complete the summons form if they are suing in respect of a debt or liquidated demand. In the Working Paper,¹⁶ the Commission took the tentative view that such a blanket obligation might be undesirable because it feared that the clerk could end up drafting thousands of statements of claim, only a small proportion of which would ever be disputed. While the work load of the clerk will undoubtedly increase under this proposal it is unlikely that this will cause any substantial difficulty. At present, most debt claims are filed by solicitors acting on behalf of debt collectors and clients. As undefended claims for debts or liquidated demands will proceed to judgment by default in the usual way,¹⁷ most claims will still probably be filed by solicitors. Traders, and other plaintiffs with a large volume of claims, will not want to file them personally. It is, therefore, probably only the small trader and private individual who will be encouraged by the new forum to attend personally to file a claim. If this is so the burden on the clerk should not be great.

5.13 Plaintiffs could also be assisted by the production of suitable explanatory pamphlets.¹⁸ In addition, summonses could be printed with standard claims already endorsed on them so that all a plaintiff had to do was fill in the blank spaces. Further, as many defendants will be

¹⁵ Annual Report of the Senior Referee, Small Claims Tribunal, for the year ended 30 June 1978, published in the Department of Labour and Industry Annual Report for 1978 at 92.

¹⁶ See Working Paper, paragraph 4.39.

¹⁷ See paragraph 4.4 above.

¹⁸ In England, a small booklet published by HMSO, entitled *Small Claims in the County Court* is available which explains step-by-step the procedures for bringing an action in the County Court.

consumers, it would be appropriate if the obligation of the clerk extended to assisting them as well. As the parties will appear personally at the hearing the clerk may also have to provide some explanation of the form the proceedings will take and advise the parties to bring documents, witnesses and so on. This could be covered adequately by an explanatory pamphlet. After judgment the clerk may have to advise the successful party on how to levy

a settlement acceptable to all parties”

legal assistance. It was for this reason that the *Small Claims Tribunals Act* provides²⁵ that the Tribunal:

“shall not be bound by rules or practice as to evidence but may inform itself on any matter in such manner as it thinks fit”.

The Commission recommends that a similar provision be included in the legislation which establishes the Small Debts Division.

5.21 A more difficult issue is whether the Small Debts Division should be bound to follow the strict letter of the law or whether it should be allowed to disregard it in order to reach a result which it considers to be fair and reasonable in all the circumstances. In New Zealand, for example, it is provided that:²⁶

"The Tribunal shall determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities. "

There are deep philosophical issues involved in a step of this nature.²⁷ None of those who commented supported the New Zealand approach. As one commentator pointed out "everyone should be able to contract and organize their affairs on the basis of the law and not on the whim of the person sitting as the Tribunal". The Commission agrees and recommends that the Small Debts Division should be obliged to apply the law.²⁸ If any law proves defective it should be amended. Even so, the Commission realises that a strict adherence to the law may not always produce a just result. The appropriate balance may, nevertheless, be achieved in the process of conciliation. At that stage the magistrate is under no obligation to advise the parties on their strict legal rights and may prompt them into a settlement which he considers is fair and reasonable in all the circumstances. If, however, the attempts at conciliation fail the law should be followed.²⁹ This approach should provide sufficient flexibility as it does in the Small Claims Tribunal.

²⁵ *Small Claims Tribunals Act 1974*, s.33(3).

²⁶ *Small Claims Tribunals Act (NZ)*, s.15(4).

²⁷ It is, for example, arguable that a provision of this nature breaches the rule of law.

²⁸ In Western Australia the referee of the Small Claims Tribunal must apply the law in making a determination: *R. v Small Claims Tribunal and Syme; ex parte Barwiner Nominees Pty. Ltd.* [1975] VR 831.

²⁹ The Perth Chamber of Commerce (Incorporated) suggested that the unappealable nature of the decision may promote some flexibility.

Legal representation and costs

5.22

Technical assistance

5.24 In view of the restricted jurisdiction recommended by the Commission it is unlikely that there would be a substantial demand for technical assistance. Nevertheless, in some cases there might be defences or counterclaims based on the inadequacy of the goods supplied or the services performed. If the magistrate cannot resolve the matter by personal inspection or on the evidence before him, it should be possible for him to obtain the assistance of an expert witness.

5.25 Presumably in appropriate cases parties would usually call their own expert witnesses and meet the cost of doing so. If this does not occur, it is essential for good adjudication that the magistrate should be able to call for expert evidence, on his own motion, if he requires it. Accordingly, the Commission recommends that the magistrate should be able to obtain the advice and assistance of any available experts employed in the State Public Service. This should include those who are at present employed by the Consumer Affairs Bureau³⁶ and to whom the referees of the Small Claims Tribunal currently have access. As this assistance would be provided by salaried government officers for the benefit of the magistrate, and not the parties as such, the parties should not be liable to defray the cost. The sources of expertise available to the Small Debts Division would thus be wider than those generally available to the Small Claims Tribunal.

Judgments and Orders

5.26 Many of the claims to be heard in the Small Debts Division will be by traders against consumers. On some occasions the consumer will succeed and a judgment for a sum of money may not always be appropriate in such circumstances.³⁷ It would, therefore, be unfortunate if the magistrate did not have all the powers of a referee of a Small Claims Tribunal to make orders.³⁸ These powers have recently been widened³⁹ to include in effect the power to cancel contracts and order the return of goods and moneys. The Commission therefore recommends that a designated magistrate should have all the powers of a referee of

³⁶ This may require consequential amendments to the *Consumer Affairs Act 1971*.

³⁷

a Small Claims Tribunal to make orders. These powers should be in addition to those derived from the *Local Courts Act and Rules*.

PART C - POST-JUDGMENT MATTERS

Enforcement

5.27 There was some support among the commentators for the idea that the Small Debts Division should have special enforcement powers. One of them⁴⁰ pointed out that his main concern was not to have disputes determined but to have judgments enforced. A judgment is obviously worthless if it cannot be successfully enforced against the judgment debtor. However, the Commission considers that it would be inappropriate to recommend any special enforcement measures for the Small Debts Division alone. This could cause substantial confusion among litigants. The Commission is, nevertheless, aware of the difficulties some litigants have when they attempt to enforce Local Court judgments.⁴¹ The matter will be reviewed in the project on the *Local Courts Act and Rules*.

5.28 If the Commission's approach were adopted it would mean that judgments of the ordinary division of the Local Court, the Small Debts Division of the Local Court and the Small Claims Tribunal would all be enforced as judgments of the Local Court.

Appeals - natural justice

5.29 Nearly everyone who commented on this issue considered that there should be no right of appeal.⁴² To allow a right of appeal would introduce uncertainty and complexity. Moreover the cost of an appeal would be disproportionate to the value of the subject matter in dispute. The Commission accordingly recommends that the decision of the Small Debts Division should be final and no appeal should lie in respect of it. Nor should a decision of the Small Debts Division be reviewable in the superior courts by way of the prerogative writs unless

⁴⁰ A small businessman.

⁴¹ This matter is also under consideration by the Australian Law Reform Commission in its Discussion Paper No. 6 *Debt Recovery and Insolvency*. One of the proposals is to allow wages to be garnisheed. This is at present forbidden in Western Australia: see *Local Courts Act 1904*, s.145, *Supreme Court Act 1935*, s.126.

⁴²

there has been a lack of jurisdiction or a denial of natural justice to any party.⁴³ If the Small Debts Division felt that an important issue had arisen which should be capable of being taken on appeal,⁴⁴ then it could always transfer proceedings to the ordinary division of the Local Court to be heard in the usual way.

PART D - IMPLEMENTATION

5.30 The adoption of the recommendations in this report will require appropriate legislation. In the Commission's view it would be preferable if the *Local Courts Act* were amended to add a new part dealing with the Small Debts Division rather than to formulate a separate Act.

⁴³ This aspect of the Small Debts Division will therefore be similar to the *Small Claims Tribunals Act 1974*, ss.18 and 19. Most similar jurisdictions in other States prohibit appeals: see Working Paper, paragraph 4.13. See also the Victorian case of *R. v Small Claims Tribunal and Homewood; ex parte Cameron* [1976] VR 427, for an illustration of the exercise of this power.

⁴⁴ This might be because the case raised complex matters of law or because it was a "test case".

CHAPTER 6

SUMMARY OF RECOMMENDATIONS

6.1 The Commission recommends that -

- (a) A special division of the Local Court should be established (to be known as "the Small Debts Division") with a simplified procedure similar to that of the Small Claims Tribunal. It should be available to any litigant who has a claim within jurisdiction.

(paragraphs 3.10 to 3.11 and 3.13)

- (b) The jurisdiction of the Small Debts Division should principally be to adjudicate small disputed claims for debts or liquidated demands. In order to come within the jurisdiction a plaintiff must have a claim for a debt or liquidated demand which is defended by the defendant. If he does have such a claim then he should be permitted to join any other cause of action he might have against the defendant. The defendant should be able to raise any cause of action by way of set-off or counterclaim.

(paragraphs 4.8 to 4.12 and 4.18)

- (c) The procedure for lodging a claim for a small debt or liquidated demand should be the same as for any other claim in the Local Court. Once a notice of intention to defend has been lodged the claim should then be automatically transferred into the Small Debts Division for hearing. undefended matters or matters not within jurisdiction should continue to be dealt with under the present Local Court procedure.

(paragraph 4.4)

- (d) If a defendant fails to appear at the hearing the plaintiff should be permitted to enter judgment by default without being put to the proof of his case.

(paragraph 4.6)

- (e) The monetary limit on the jurisdiction of the Small Debts Division should be \$1,000 and should be adjusted concurrently with that of the Small Claims

conduct of the hearing the magistrate should adopt an inquisitorial rather than adversarial approach.

(paragraphs 5.15 to 5.19)

- (l) The magistrate in the Small Debts Division should not be bound by the rules of evidence but should be allowed to inform himself as he thinks fit. However, in arriving at a decision he should be bound to apply the general law.

(paragraphs 5.20 to 5.21)

- (m) Legal representation should not be allowed unless both parties consent and the magistrate is satisfied that any unrepresented party would not be unfairly disadvantaged. A party should, however, be permitted representation by an agent who is not a solicitor where the magistrate considered that was necessary.

(paragraph 5.22)

- (n) The costs of proceedings should not be awarded for or against any party.

(paragraph 5.23)

- (o) The magistrate should be able to obtain the advice and assistance of any available experts employed in the State Public Service (including those employed by the Bureau of Consumer Affairs).

(paragraphs 5.24 to 5.25)

- (p) A magistrate in the Small Debts Division should have all the powers of a referee of a Small Claims Tribunal to make orders in addition to the powers derived from the *Local Courts Act and Rules*.

(paragraph 5.26)

- (q) Judgments of the Small Debts Division should be enforced in the same way as any other judgment of the Local Court.

(paragraphs 5.27 to 5.28)

- (r) There should be no right of appeal from a judgment of the Small Debts Division. Nor should the decision be reviewable by way of the prerogative

APPENDIX I

List of those who commented on the Working Paper

Brown, D.W.J., S.M.

Burton, R.H., S.M.

Colin Reynolds Pty. Ltd.

Consumer Affairs Council

Cook, D.J., S.M.

Department for Consumer Affairs

Gorham, H.S.

Goudie, W.H.

Hogg, K. H., S.M.

Iddison, R., S.M.

Jackson, H.H.

Law Reform Committee of South Australia

Law Society of Western Australia

Master Painters, Decorators and Signwriters' Association

Master Plumbers' Association

Perth Chamber of Commerce (Incorporated)

Smith, P.V., S.M.

Taylor, G.D.S.

APPENDIX II

M.C. 18

MAGISTRATES COURTS ACT 1921-1976

Plaint No.

NOTICE OF DEFENCE

(Rule 76)

Filed.....
Fee.....
Receipt.....
Initials.....

In the Magistrates Court of Queensland)

Held at)

Between

of

and

of

Plaintiff

Defendant

Take notice that the defendant
intends to defend this proceeding on the following grounds: -

- *1.
- 2.
- 3.
- 4.

As regards the allegations of fact made in the plaintiff's particulars of claim -
The defendant admits the following facts: -

- 5.
- 6.
- 7.
- 8.

and does not admit or denies the following facts [OR denies generally the following allegations] : -

- 9.
- 10.
- 11.
- 12.

The defendant intends to rely on the following facts to show that the transaction sued on is void [OR voidable] in point of law [OR that the plaintiff's claim is not otherwise maintainable] -

- 13.
- 14.
- 15.

Dated at _____, this _____ day of _____, 19____
(Solicitor for) Defendant.

¶ The address for service of the defendant is at -

* Here state concisely and distinctly a statement of the grounds of defence including special grounds such as tender before action, infancy, statutory grounds, &c.

¶ See Rule 44.