



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 63

Small Debts Court

WORKING PAPER

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

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PREFACE

The Commission has been 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.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms (with reasons where appropriate) on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 29 September 1978.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

TERMS OF REFERENCE

1.1 The Commission has been 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 The terms of reference need explanation. Under the existing laws a debt or other claim up to a value of \$3,000 may be heard by a magistrate in the Local Court in accordance with the ordinary procedure of that Court.¹ However, the law gives "consumers" (which includes tenants in the case of tenancy bond claims)² a special privilege in that claims by them against "traders" (which includes landlords in the case of tenancy bond claims)³ of amounts less than \$1,000 may be heard by a referee in the Small Claims Tribunal.⁴ The name of the Tribunal is therefore misleading since it deals only with small claims by consumers, not small claims generally. The substantial question discussed in this paper is whether a similar procedure

¹ *Local Courts Act 1904*, as amended by the *Acts Amendment (Jurisdiction of Courts) Act 1976*. Subject to the prescribed money limit, the jurisdiction of the Local Court is wide and generally covers personal actions of whatever kind. However, 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 are 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*, 066, R17.

² The *Small Claims Tribunals Act 1974* (s.4(1)) defines a consumer as -

- "(a) a person, other than an incorporated person, who buys or hires goods otherwise than for re-sale or letting on hire or than in the course of or for the purposes of a trade or business carried on by him, or than as a member of a business partnership, or for whom services are supplied for fee or reward otherwise than in the course of or for the purpose of a trade or business carried on by him, or than as a member of a business partnership; or
- (b) a person who is or was the tenant of any premises let to him for the purposes of a dwelling and otherwise than for the purposes of assigning or sub-letting or for the purposes of a trade or business carried on by him".

³ The *Small Claims Tribunals Act 1974* (s.4(1)) defines a "trader" as -

- "(a) a person who in the field of trade or commerce carries on a business of supplying goods or providing services or who regularly holds himself out as ready to supply goods or to provide services of a similar nature; or
- (b) a person who is or was the landlord of any premises let to the tenant for the purpose of a dwelling and otherwise than for the purposes of assigning or sub-letting by the tenant or for the purposes of a trade or business carried on by the tenant".

⁴ The *Small Claims Tribunals Act* (s.4(1)) defines a small claim as -

- (a) a claim for payment of money in an amount less than \$1,000;
- (b) a claim for performance of work of a value less than \$1,000; or
- (c) a claim for relief from payment of money in an amount less than \$1,000

"that in any case arises out of a contract for the supply of goods or the provision of services made between persons who, in relation to those goods or services, are a consumer on the one hand and a trader on the other. ...". The figure of \$1,000 was substituted for \$500 by an amendment in 1977 (*Gazette*, 12 August 1977) to the *Small Claims Tribunals Act Regulations 1975: Gazette*, 7 March 1975. It also includes a claim for repayment of a tenancy bond of less than \$1,000. The *Small Claims Tribunals Act* contemplates the setting up of more than one Tribunal. For convenience, however, this paper refers to them separately or collectively as "the Small Claims Tribunal", or "the Tribunal". A similar convention has been adopted in regard to Local Courts.

THE ADVANTAGES OF THE SMALL CLAIMS TRIBUNAL

General

2.1 Under the existing law, a consumer¹ is in a privileged position in that, if he has a dispute with a trader² he may in certain cases elect to have the dispute dealt with by the Small Claims Tribunal instead of undertaking proceedings in the Local Court. Proceedings before the Small Claims Tribunal offer a number of advantages to a consumer contemplating proceedings against a trader. However, if for some reason a consumer considers that proceedings before the Tribunal would be undesirable from his point of view, he is free to commence an action in the Local Court in the ordinary way. The Small Claims Tribunal offers an alternative jurisdiction to a consumer which he may take advantage of or not, as he chooses.

Initiation of claim

2.2 One possible advantage of the Small Claims Tribunal lies in its procedure. It is simplicity itself. All a consumer has to do to commence proceedings is to, complete and file³ a simple form setting out the circumstances of his claim and pay a \$2 fee. If he finds it difficult to complete the form, an official will help him do so.⁴ It is the responsibility of the registrar to arrange for service of the claim on the respondent by certified mail.⁵ The claimant then simply appears before the referee at the time and place set down for the hearing, bringing whatever documents are necessary, such as receipts, letters or a written contract. He will also bring witnesses if he considers they will help his case. The respondent does likewise if he desires to defend the claim.

Hearing

2.3 The hearing is conducted in quite a different manner from a hearing in the Local Court. The aim is to conduct the proceedings in as relaxed, personal and informal manner as

¹ See note 2 above.

² See note 3 above.

³ The form is filed in the Small Claims Tribunal Registry if the claimant is in the Perth metropolitan region, otherwise in any Local Court office.

⁴ The registrar is bound to give such assistance if required: *Small Claims Tribunals Act*, s.24(2). If the claim is to be filed in a Local Court office, the clerk is required to give such assistance: *ibid.*

⁵ s.40.

is practicable. All constraints which may work against these ends are avoided. The hearing is in private. A party cannot be legally represented except in special cases.⁶ In the words of s.32(1) of the *Small Claims Tribunals Act*, "Each party to a proceeding before a tribunal shall have the carriage of his own case". However, a claimant need not fear that he would therefore be obliged to display any forensic skill, since the referee himself will attempt to get at the true position by questioning the parties and their witnesses and by inspecting any documents the parties bring with them. A referee is not bound by the rules of evidence and may inform himself as he thinks fit.⁷ This role has been described as "inquisitorial", which is probably a technically correct description, though it may give a misleading impression because of the term's unfortunate historical associations.

2.4 In contrast to the function of a magistrate or judge in court proceedings, it is the referee's primary function to attempt to bring the parties to a dispute to a settlement that is acceptable to all of them.⁸ It is only if this appears to be impossible will he proceed to make an order determining the dispute. The referee accordingly normally attempts to get each party to see the other's point of view.⁹ During this stage legal issues are usually kept in the background and the parties are encouraged to concentrate on what would be a fair and reasonable solution in the circumstances.¹⁰ The referee may leave the parties alone in the room together if he thinks this would help bring about a settlement. If he thinks it desirable he will adjourn the hearing to inspect the subject matter of the dispute (e.g. an allegedly faulty concrete driveway or the condition of the premises in a tenancy bond claim). Often an expert employed by the Consumer Affairs Bureau is called by the referee to give his opinion on the subject of the claim (for example a claim that repairs to a car were defective or that the bill was unreasonable). The cost of doing so is borne by the Government in the sense that such experts are civil servants attached to the Consumer Affairs Bureau.¹¹

Costs

2.5 A hearing in the Small Claims Tribunal differs from that in a court in other ways as well. The Tribunal has no power to award costs to or against any party to a proceeding before it.¹² In certain cases a potential claimant may see this as a disadvantage, since he will receive nothing by way of costs if he wins. In other cases it may be a distinct advantage, since a claimant may otherwise be disinclined to commence proceedings by the fear that substantial costs would be awarded against him if he loses.

Finality of decision

2.6 Another significant point of difference from a court action is that a settlement or order made by the Small Claims Tribunal is final and not subject to appeal.¹³ In most cases the absence of appeal probably would be considered an advantage by a potential claimant and a factor in favour of commencing proceedings in the Small Claims Tribunal. If he wins, the decision in his favour cannot be overturned on appeal. Equally he cannot seek to overturn a decision against him, but a right of appeal would probably be illusory, since the expense of appealing would usually be disproportionate to the amount in issue.

2.7 Although there is no appeal as such, the Supreme Court is given a limited supervisory role in that it could quash a decision which had been made without jurisdiction or where there had been a denial of natural justice.¹⁴

Absence of delay

2.8 Delays in proceedings are not necessarily avoided simply by setting up a Small Claims Tribunal jurisdiction, but the simplicity of the procedure may yield speedier results. It appears that a hearing before the Tribunal usually takes place about five weeks after the claim form is filed, whereas it is about five months before a hearing takes place in the Local Court in Perth.¹⁵ Although a particular claimant may not see a delay as a serious disadvantage, it would

¹² s.35.

¹³ s

generally be in a claimant's interest to dispose of a claim quickly. In the absence of a power in the Local Court to award interest from the date of the original demand for payment, a delay of five months could mean a significant loss in inflationary conditions for a creditor.

Enforcement

2.9 The Small Claims Tribunal does not offer any advantage over the Local Court when it comes to enforcement of a decision in a party's favour. The Tribunal has no powers of enforcement. If the Tribunal makes an order against a trader for the payment of money and he does not comply with it, the consumer must register the order in the Local Court to compel enforcement.¹⁶ There is no power to enforce directly an order for the performance of work (which is the only other positive order the Tribunal can make).¹⁷ If such an order is not complied with, the claimant can apply to the Tribunal for an order for the payment of money instead.¹⁸ In practice, to avoid the necessity for the claimant to re-apply, the referee usually requests the trader to do the work required and then adjourns the hearing. If the trader does not comply, the case is brought on again and an order for the payment of money is made.

Generally

2.10 A general picture of the work of the Tribunal, and of the approach of referees to their task, may be gathered from the 1977 Annual Report of the Senior Referee.¹⁹

2.11 In its present role as a forum for consumers to bring their claims against traders, the Small Claims Tribunal seems to be a success if its continually increasing use by consumers is a guide. During the year ending 30 June 1976, 775 claims were lodged with the Tribunal, resulting in 824 sittings and 678 determinations. During the corresponding period in the year following, 910 claims were lodged, resulting in 1,195 sittings and 931 determinations. This is

however, judgment can generally be entered ten days from the date of service of the summons: *Local Courts Act 1904*, s.46(2) (a). See also *Local Court Rules 1961*, 05, R9.

¹⁶ *Small Claims Tribunals Act*, s.22.

¹⁷ The Small Claims Tribunals Act Amendment Bill, presently before Parliament, would enable the Tribunal to order the return of specific goods.

¹⁸ *Small Claims Tribunals Act*, s.23.

¹⁹ The report is reproduced as an Appendix to this paper. A most useful account of the procedures of small claims jurisdictions in Australia is given by G.D.S. Taylor, now the Director of Research of the Administrative Review Council, in an article to be published in Vol.II of *Access to Justice* (Florence Institute of Comparative Civil Procedure).

SHOULD THESE ADVANTGES BE CONFINED TO CONSUMERS?

ARGUMENTS FOR EXTENSION

Genesis of the Small Claims Tribunal

3.1 The present restricted jurisdiction of the Small Claims Tribunal is explained by its genesis as a means of assisting consumers who approach the Consumer Affairs Bureau with complaints against traders. The Minister in charge of the Small Claims Tribunals Bill in the Legislative Assembly said:¹

"A function of the Consumer Protection Bureau [now the Consumer Affairs Bureau] ...is to receive complaints from consumers as to fraudulent or other illegal or unfair practices. The Bureau normally refers a complaint to a trader seeking an explanation and the matter often results in a satisfactory settlement. ... There are, of course, other cases where the supplier either ignores the approach from the Consumer Protection Bureau or refuses to correct the cause of complaint where it is a justifiable claim.

In such cases, the consumer may be required to take civil proceedings but the thought of doing so and the likely cost involved deters a person from continuing with the complaint and, by not doing so, his case may not receive the justice it merits. Many people, particularly those more elderly, have a fear of courts or a dislike of court atmosphere and are unwilling to prosecute claims by appearing in court to give sworn evidence from a witness box. As an alternative method, the Bill will provide a cheap and speedy method of settling small claims by the use of informal proceedings".

3.2 Consumers, particularly the elderly, were seen as being in urgent need of a special judicial forum because of the high cost of proceedings in the ordinary courts and their allegedly intimidatory atmosphere. The Minister was, however, aware that traders also may have a case for a special forum apart from the ordinary courts. To begin with, he envisaged that the Small Claims Tribunal system would indirectly confer some benefit upon them also. He said:²

"A trader involved in a complaint lodged by a consumer with the Tribunal is not burdened with the costs of legal representation to defend his actions. ... Thus he may find it more advantageous to have a consumer with a grievance refer the case to the tribunal, than committing himself initially to an action before the Local Court for payment of an outstanding debt".

¹ W.A. Parl. Deb. (1974) at 2863.

² Ibid., at 2864.

This refers to the possibility of a trader who claims money from a consumer, agreeing that the latter will commence proceedings in the Small Claims Tribunal for an order granting relief from paying the trader the amount the trader claims. By this means a trader can get indirect access to the Tribunal for a determination of a dispute with a consumer. It is, however, important to note that the trader himself cannot commence proceedings before the Small Claims Tribunal: the initiative must come from the consumer. If the consumer refuses to cooperate, and continues to refuse to pay what the trader claims is owing, the latter must take proceedings in the Local Court if he wishes to pursue his claim.

3.3 The Minister also foreshadowed³ the possibility of setting up a "small debts court" to which traders could resort to

"...take more expedient and inexpensive action to obtain orders for enforcement of small debts owing to them. ... A court of this nature, similar to a small claims tribunal, would help overcome the deterrent of persons failing to seek redress in court because often legal costs are out of proportion to the amount of money in dispute".

3.4 Should the advantages provided by the Small Claims Tribunal be confined to consumers who have claims against traders? Why should not the advantages of an informal, cheap and speedy procedure equally be available to traders who have claims against consumers and indeed to other sorts of claimants?

Different types of trader

3.5 Whether or not one considers that traders should also have access to a special forum possibly depends on the sort of trader one has in mind. If one thinks of a large company operating a department store or car sales yard, one may feel that they are not in need of any special procedure for the determination of their disputes with their customers. One may feel that the Local Court is not an inappropriate forum for them to sue those to whom they have extended credit.

3.6 However, even if that be a just approach, not all traders are in this category. Some cannot, by the very nature of their business, obtain payment before they perform work or transfer property. Many building trade TD - tnu758 0 TDT3889ra5TD /F1gs foxamprate,nst

electrician contracts with a householder to install additional wiring in his home. It is usually not practicable to decide upon a fixed price for such a contract beforehand, so that an implied term of the contract would usually be that the householder pay a reasonable sum for the work upon completion. The electrician, having done the work to what he regards as a reasonable standard, sends the householder a bill for, say, \$400 which the householder refuses to pay.⁴ Unless the customer agrees to commence proceedings in the Small Claims Tribunal seeking relief from paying the \$400,⁵ the electrician must sue him in the Local Court. It would be an unusually confident person who would be prepared to conduct his own case in the Local Court in such an action. The argument would probably involve questions of law (what were the precise terms of the contract), questions of fact (what precisely the electrician did in his purported performance of the contract), and questions of mixed law and fact (did the work conform to the standard laid down in the contract).

3.7 The electrician would therefore probably engage a solicitor to conduct the proceedings on his behalf. The cost of engaging a solicitor could well approach the amount in dispute, depending on the complexity of the case.⁶ Of course, if the electrician won his case he would obtain an order for costs (that is, an order that the customer, in addition to paying the amount in dispute, pay an amount towards the electrician's legal costs). However, it would not be unusual for the legal costs (covering pre-trial preparation and, say, one day in court) to be about \$300 in a case of this sort, of which the defendant would probably be ordered to pay \$200.⁷ Thus, in orde

would be required to attend in person at the hearing before the referee, and this may represent a hidden cost in that he might be foregoing the earning of income during the time he was attending.⁸ However, the hearing would be unlikely to last more than about an hour or two⁹ and, if a settlement could be reached through the referee's efforts at conciliation, possibly much less than that. The electrician need not consult his solicitor at all (although he could do so if he wished). Legal questions could be left to the referee and, since the referee plays an active part in bringing out the relevant facts, there would be little need for the services of an advocate to present them to the Tribunal.

3.9 Electricians are just one example of "traders" who seem to be at a disadvantage under the present system. Other examples are plumbers and fencing contractors. None of these can readily protect themselves by demanding payment before completing the work.¹⁰ It may be regarded as unfair that although a customer of such a trader is able to commence proceedings in the Small Claims Tribunal if he considers that the trader has not performed his side of the contract, the trader is unable to do so if he considers that the consumer has not performed his.¹¹

3.11 There is the further argument that to confine access to a special forum to "small traders" would be bound to produce arbitrary results, whether the criterion was amount of capital, or turnover or profit. It would almost certainly generate resentment among those excluded.

Other classes of claim

3.12 There are other classes of claims which possibly merit consideration, such as -

- (a) Claims by persons to whom goods or services are supplied for the purposes of a trade or business. For example, a small trader may purchase a refrigerator for his delicatessen shop. If the appliance proves faulty he may wish to obtain repayment of the cost of repairing it and compensation for spoilt goods. A person acting in such a capacity is not a "consumer" under the present legislation.¹³
- (b) Claims by landlords against tenants for non-payment of rent or for compensation for damage to premises.¹⁴ Usually a landlord protects himself by obtaining a tenancy bond as a condition of letting the premises. If he does, he may have no need to sue the tenant. He simply deducts the appropriate amount from the bond. However, if he did not obtain a tenancy bond - perhaps because he trusted the tenant - or if the bond is insufficient, it could be argued that he should have access to a special forum to recover the amount.
- (c) Claims by one private person against another. For example, a person may have bought a motor vehicle from another private person who promised to pay for certain repairs as an inducement for the other to buy. If the vehicle proves defective and the seller disputes that he made such a promise, the buyer cannot bring proceedings in the Small Claims Tribunal. However, this might be the very sort of case which could be settled by a referee under his powers of conciliation.

¹³ See paragraph 1.2, note 2 above. Corporate bodies also cannot be consumers: *ibid.*

¹⁴ Claims by tenants for return of tenancy bond money are already included: see paragraph 1.2 above.

3.13 In all these cases it could be argued that claimants should be given the advantages of a small claims jurisdiction with its attendant low cost, simplicity of procedure, opportunity for settlement and finality. However, in deciding whether such a facility should be extended to them, it is necessary to have regard to arguments against any such extension.

ARGUMENTS AGAINST EXTENSION

3.14 There are two broad arguments against extending the concept of a special forum (whether by extending the jurisdiction of the Small Claims Tribunal or by some other means) much beyond its present limits. These are (a) cost and (b) the position of the defendant and the effect on the administration of justice generally.

(a) Cost

3.15 The Commission has been informed by the Crown Law Department that Local Court fees are set at a figure which would broadly recoup the cost of running the Perth Local Court.¹⁵ The cost of running the judicial system in Western Australia is considerable, consisting of salaries for judicial officers and court staff, equipment, stores and the upkeep of buildings. All this must be paid for, whether by those who resort to the judicial system or by the taxpayer through the Consolidated Revenue Fund. Determinations of this kind are a matter of policy.

3.16 One of the main advantages seen in the Small Claims Tribunal system is the nominal amount of the fee payable by a claimant (at present \$2). For this amount he has available the services not only of a referee, but the registrar (to help him fill out his claim form and serve the claim on the other party) and, if necessary, experts of the Consumer Affairs Bureau (to attend at the hearing and give evidence).¹⁶ The cost of running the Small Claims Tribunal is not publicly available, but it must be many times more is than the sum of \$1,820, which was the total amount of the fees collected by the Tribunal in the year ended 30 June 1977.¹⁷ There are at present two referees, a registrar and administrative staff. Any extension of the Small

¹⁵ Local Courts outside the metropolitan area generally run at a loss. The Perth Local Court accounts for about 2/3rds of the total Local Court business in this State.

¹⁶ See paragraph 2.4 above.

¹⁷ See Appendix below.

Claims Tribunal system must generate more expense which would have to be borne by the general community.

3.17 Because of the generally inferior bargaining position in which consumers were considered to be in relation to traders, the Western Australian Parliament, in common with many other jurisdictions, has passed a number of enactments aimed at restoring the balance, including the Small Claims Tribunal legislation.¹⁸ Other legislation is in prospect.¹⁹ It could possibly be seen as inconsistent that, having created a special forum with its attendant expense to improve the position of consumers as against traders, legislation should then be enacted to grant a similar concession to traders as against consumers.²⁰

3.18 It might be argued that traders who do not regard it as economically feasible to pursue small debts through the Local Court system²¹ are able to treat the loss as a business expense for income tax purposes, so that the actual loss to them would be less than to a consumer, who cannot deduct such losses for tax purposes.

3.19 Further, it might be argued that a trader can, to some extent, protect himself by insisting on a high credit rating before he deals with a customer or by demanding payment beforehand.²² However, these steps may be neither practicable nor effective. As was pointed out above,²³ some traders cannot readily insist on payment beforehand or on doing business only with persons with a high credit rating. In any case, it is not in the interests of consumers generally for traders to insist on prepayment or high credit ratings as a way of avoiding bad debts.

3.20 It could accordingly be suggested that some extension of the small claims system would benefit both traders and consumers, and that the resulting expense to the taxpayer would be justified. It could also be argued in favour of an extension that it is in the general public interest that all members of the community should have access to an inexpensive

¹⁸ Another example is the *Hire Purchase Act 1959*.

¹⁹ Legislation regulating credit sales.

²⁰ This probably takes too narrow a view of the purpose of providing a convenient forum for the determination of disputes: see paragraph 3.20 below.

²¹ In some cases - where the trader can obtain judgment by default - the Local Court procedure is comparatively inexpensive: see paragraph 4.16 below.

²² A Small Business Advisory Service has recently been established by the Government in the Department of Industrial Development. This is available to give advice on the avoidance of bad debts.

²³ See paragraph 3.6 above.

procedure for determination of their claims, and that it is undesirable that some should forgo taking legal proceedings merely because of the expense of doing so.

(b) Disadvantages to the respondent

3.21 The possible advantages of the Small Claims Tribunal system have been described in terms of the advantages to the claimant, that is the person who wishes to commence legal proceedings. A claimant is not obliged to take his case to the Small Claims Tribunal. If he considers that the disadvantages of doing so outweigh the advantages, he can commence an action in the Local Court instead. A respondent has no such choice. If proceedings are taken against him in the Small Claims Tribunal he is obliged to defend them there.

3.22 The low cost of proceedings in the Small Claims Tribunal is brought about not only by the fact that the respondent is obliged to defend them there.

IF A SPECIAL FORUM FOR NON CONSUMER CLAIMS IS DESIRABLE, HOW SHOULD IT BE ACHIEVED?

ALTERNATIVES

4.1 Put broadly, there are three ways in which the small claims procedure can be made available to a wider class of claimants than at present, as follows -

- (a) By extending the jurisdiction of the present Small Claims Tribunal.
- (b) By creating a tribunal along the lines of the present Small Claims Tribunal, but separate from it.
- (c) By creating a special division of the Local Court.¹

HOW HAVE OTHER JURISDICTIONS DEALT WITH THE QUESTION?

4.2 It may be useful at this point to discuss briefly the flows c)
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4.4 In *England*, the small claims jurisdiction is exercised by way of arbitration, with the registrar usually being appointed the arbitrator. The jurisdiction is not confined to any particular class of case. The proceedings are in private, and the precise terms on which the arbitration is to take place are settled in the particular case by the Court. There is no express power given to the arbitrator to attempt conciliation. There is no appeal, although the judge may set aside the award in special circumstances.

4.5 The development in *New Zealand* is interesting. The forum is called the Small Claims Tribunal, but it is really a division of the Magistrates' Court. However, the cases are heard by specially appointed referees, who need not be legally qualified. The jurisdiction of the Tribunal is up to \$500 and covers claims in contract, quasi-contract and tort claims arising out of damage to property resulting from a motor vehicle accident. The procedure is substantially the same as in the Small Claims Tribunal of this State.

4.6 There is a provision which may be of significance to Western Australia if it is decided to extend the small claims jurisdiction to traders and others. The New Zealand Tribunal does not have power to hear small claims for a debt or a liquidated demand, unless the claimant either satisfies the registrar that "the claim, or a part thereof, is in dispute" or that "the claim is in the nature of a counter claim by a respondent against a claimant".⁷ The exclusion of actions

for undisputed debts has the object of preventing the Tribunal from being used as a dispute resolution mechanism for undisputed debts. The exclusion of actions for undisputed debts has the object of preventing the Tribunal from being used as a dispute resolution mechanism for undisputed debts.

4.11 The jurisdiction of the Small Debts Court is confined to a claim in the nature of a debt or liquidated demand of not more than \$450. This would include a claim for a specific sum of money due and payable under a contract or statute, but would exclude a damages claim (whether in contract or tort) and a claim for the return of property. A trader could thus take proceedings in the Small Debts Court for payment of the purchase price of an article he had sold to a consumer or another trader. However, he could not apply in the Small Debts Court for an order requiring the other party to return goods.¹¹ He also could not take proceedings in the Court for payment of the cost of repairing damage to his vehicle. This claim would not be a "liquidated demand".

4.12 There is provision for the magistrate to attempt conciliation, the hearing is in private and there is no appeal.

TABLE

4.13 The following table sets out in tabulated form information about the legislation described above and the existing Western Australian legislation.

[SEE OVER FOR TABLE]

	W.A. Small Claims Tribunal	QLD. Small Debts Court	N.Z. Small Claims Tribunal	A.C.T. Petty Sessions (Small Claims)	N.T. Local Court (Small Claims)	S.A. Local Court (Small Claims)	England County Court (Small Claims)
Who may sue	Consumers	Anyone	Anyone	Anyone	Anyone	Anyone	Anyone
Who may be sued	Traders	Anyone	Anyone	Anyone	Anyone	Anyone	Anyone
Maximum amount of claim	Less than \$1,000	\$450	\$500	\$1,000	\$1,000	\$500	£100
Is there requirement to conciliate?	Yes	Optional	Yes	No	No	Optional	No
Is there any appeal?	No	No	No No				

It can be seen that, apart from differences as to details, the basic difference in regard to small claims lies between those jurisdictions which have created a single jurisdiction on the one hand, and Queensland which has a dual jurisdiction on the other. In the discussion which follows, the Commission draws attention to considerations for the adoption of one or other of these approaches, should it be decided to make special provision for non-consumer claims.

DISCUSSION OF DIFFERENT WAYS OF MAKING PROVISION FOR NON-CONSUMER CLAIMS

(a) Extension of the Small Claims Tribunal

4.14 It would be possible to extend the jurisdiction of the Small Claims Tribunal to cover non-consumer claims. At first sight this possibility seems to have much to commend it. The organisational machinery already exists, and the referees and registrar have no doubt developed expertise in the special procedures involved. Such an extension would also mean that jurisdiction with respect to all small claims was vested in the one judicial body.

4.15 There are, however, dangers in extending the jurisdiction of the Small Claims Tribunal in this way. The volume of business of the Tribunal is steadily increasing,¹² though not yet to an extent which is throwing a strain on the system.¹³ A significant increase in the jurisdiction could impose severe pressures upon it. In the United States of America there are a number of small claims tribunals whose jurisdiction covers claims against consumers as well as claims

¹³culd

the Local Court. Under the *Local Courts Act* at present, where the claim is for "a debt or liquidated demand in money or for delivery of goods",¹⁵ or for a damages claim of not more than \$50¹⁶ the plaintiff may obtain judgment if the defendant has not given a notice of defence. This process is called "judgment by default" and does not involve a hearing. All that is necessary is the filing with the clerk of a form requesting him to enter judgment.¹⁷ In such cases plaintiffs might continue to use the Local Court. Only \$8.20 in court fees are payable by the plaintiff.¹⁸ This is \$6.20 more than the fee payable in the Small Claims Tribunal, but on the other hand if a party commences proceedings in the Small Claims Tribunal he must attend a hearing before the referee. A trade creditor might find this inconvenient, since he would be required to attend himself if he was an individual¹⁹ or, if an incorporated body, through an agent who cannot be a legal practitioner.²⁰

4.17 However, if the defendant in the Local Court files a notice of defence, the case cannot proceed to judgment without a hearing. It is true that s.47A of the *Local Courts Act* permits a plaintiff to apply for leave to sign judgment in such cases where he swears that he believes that the defendant has no defence. Nevertheless, it would still be necessary to appear personally, or by a legal practitioner, before a magistrate to obtain leave. Whether or not a trade claimant would use the Local Court or the Small Claims Tribunal in a particular case might therefore depend on his assessment of whether the defendant would be likely to file a notice of defence if the action were commenced in the Local Court.

4.18 No statistical information is available as to the number of actions in the Local Court which are of the sort for which judgment by default is possible and in what proportion of these is judgment by default actually entered. The Commission has been informed that in Perth alone there are about 38,000 of such actions commenced annually, and that judgment is

¹⁵ s.46(2)(a).

¹⁶ There would seem to be a good argument for increasing this amount to, say, \$200. Insurance companies commonly require young persons to meet the first \$100-\$200 of the cost of a motor vehicle accident. An increase in the limit in respect of judgment by default would allow such persons a simplified procedure for recovering the excess from the party at fault.

¹⁷ *Local Court Rules 1961*, 0.10, R.4.

¹⁸ \$2 for the issue of the summons, \$4.20 for service of the summons by the bailiff, and \$2 for entry of judgment: *Local Court Rules 1961*, Appendix, Part II.

¹⁹ A claimant can be represented by an agent only "as a matter of necessity": *Small Claims Tribunals Act*, s.32(2). The Commission assumes that the existing procedural rules would apply to any extended jurisdiction.

²⁰ *Ibid.*, s32(3). An incorporated body must, of course, act through an agent.

entered in about 13,000 of them.²¹ About 2,000 of these cases go to trial. The Perth Local Court does about two thirds of all Local Court business.

4.19 If these assumptions as to numbers are broadly correct, and if it is assumed that all actions for which judgment by default was likely to occur would continue in the Local Court, there would still be up to 3,000 cases throughout the State where the plaintiff might opt instead for the Small Claims Tribunal. A hearing would be required under both systems, the Small Claims Tribunal involves less fees and the claimant does not need to be legally represented.

4.20 It might be possible to avoid "swamping" the Small Claims Tribunal system by a provision aimed at restricting the number of traders' claims which could be dealt with there. This could possibly be achieved -

- (a) by limiting the number of claims which a trader could take to the Small Claims Tribunal each year;²²
- (b) by excluding corporate bodies,²³ or
- (c) by requiring a trader, as a condition of commencing proceedings in the Tribunal, to declare that the claim is genuinely in dispute.²⁴

4.21 The Commission does not consider that it would be desirable to implement either (a) or (b). To limit the number of claims numerically would be arbitrary, and act to the detriment of traders who operate the sort of business where the granting of credit is usual (e.g. traders in country areas where credit is extended on a seasonal basis and tradesmen, such as electricians, who specialise in household repairs). To exclude corporate bodies would tend to thwart the very purpose of the extension. Possibility (c) has, however, more to commend it. If the decision was made to extend the jurisdiction of the Small Claims Tribunal, such a condition could be imposed with the object of ensuring that the Tribunal remained a forum for deciding genuine disputes and did not become a mere debt collecting agency. The Commission doubts

4.25 It is the Commission's provisional view that this should also be the approach to be adopted in this State, should it be decided to institute a special procedure covering non-consumer claims.

4.26 Possibly it would have been more desirable at the outset to have adopted the approach of England, New Zealand, South Australia and the Northern and Capital Territories by creating a unified small claims jurisdiction in the first place, provided that an effective way could have been found to prevent any imbalance of traders' claims as against consumers' claims. However, consumer claims were seen as the more pressing and there was much to be said for focussing attention on them in the first instance.

4.27 The creation of a special division of the Local Court to deal with certain sorts of small claims raises the possibility of consumers choosing that forum instead of the Small Claims Tribunal. However, the probability of this occurring would be minimised if the proposed special division were restricted to deciding claims for "debts or liquidated demands", since a claim by a consumer against a trader would usually be for damages or for a "work order"²⁹ arising out of a breach of contract.³⁰ Such a claim is neither for a "debt" nor a "liquidated demand". The creation of a special division would also raise the possibility of a conflict of jurisdiction if a trader sued in the special division of the Local Court for payment of the purchase price of an article, and a consumer applied to the Tribunal for relief against paying him that amount. However, this possibility also exists under the present system, since the trader can sue in the Local Court under its ordinary procedure.³¹

4.28 Restriction of the jurisdiction of the proposed special division of the Local Court to debts and liquidated demands would mean that its jurisdiction was more limited than the Small Claims Tribunal. The Tribunal can deal with a claim for the payment of money which "arises out of a contract for the supply of goods or the provision of services" (s.4(1)), thus clearly giving it jurisdiction to deal with a claim for unliquidated damages for breach of such a contract (for example, the loss of perishable items due to a faulty refrigerator). The consequence would be that a special procedure would be available to deal with a claim by a consumer, but not for a similar claim by a non-consumer.

²⁹ "An order that requires a party....to perform work to rectify a defect in goods or services": *Small Claims Tribunals Act*, s. 20(2)(b).

³⁰ The claim would normally be for the cost of repairing the article.

³¹ It appears that, under the present law, the body in which the relevant proceedings are first commenced has got exclusive jurisdiction: *Small Claims Tribunals Act*, s.17.

ordinary way. This could happen if the questions at issue were unusually complex. Otherwise the claim would be determined in the special division.

4.33 This procedure could apply whether or not the jurisdiction of the special division were confined to debts or liquidated demands. If other sorts of actions were to be included the filing of a notice of defence in these cases would also determine that the special procedure would apply. Otherwise, the case would go before a magistrate for hearing in the ordinary way.

OTHER MATTERS TO BE DECIDED

4.34 A decision on the forum as to non-consumer claims and the type of claim that could be adjudicated in it, still leaves for decision certain other matters. These are discussed in the following paragraphs.

General

4.35 If a decision were made to extend the jurisdiction of the Small Claims Tribunal to cover non-consumer claims, it would seem to be inevitable that those claims should be dealt with in precisely the same way as claims by consumers.³⁶ Any attempt to provide for different rules, for example by prescribing a higher filing fee for non-consumer claims, would be bound to cause confusion in the minds of the public and resentment among those required to pay the higher fee. If different rules were thought to be desirable, this of itself would be a reason for creating a separate forum

4.33 If a decision set up (orne thatg a seTw (chatc 0.1te forum366o non) Tj 162.75 0 TD -0.24

Maxima

4.37 The first question to decide is what the maximum amount of a non-consumer claim should be. A consumer's claim can be up to \$1,000,³⁸ and the reasons for choosing this figure³⁹ would appear to apply equally to non-consumer claims.

Filing fee

4.38 The Commission has already suggested that a claimant should pay the same filing fee whether the claim is to be dealt with in the proposed special division of the Local Court or by that Court in the ordinary way.⁴⁰ In this respect, therefore, there would be a difference

experience of conciliation gained by magistrates in the special division of the Local Court could be of advantage in the exercise of their ordinary jurisdiction.

Privacy, general prohibition of legal representation, absence of appeal and costs

4.41 There seems no reason why the rules of the Small Claims Tribunal as to privacy of proceedings, the general prohibition of legal representation, the absence of any right of appeal and the prohibition against any award of costs⁴³ should not also apply to proceedings in the proposed special division of the Local Court. The Commission would, however, welcome comment.

Technical assistance

4.42 Referees of the Small Claims Tribunal have access to expert assistance from officers of the Consumer Affairs Bureau. This is of considerable assistance to them in determining disputes dealing with claims involving repairs to motor vehicles and other technical matters.⁴⁴ The assistance is made available at no cost to the parties.⁴⁵

4.43 The question is whether a magistrate sitting in the proposed special division of the Local Court should similarly have access to expert assistance and, if so, at whose expense. The Commission considers that access to expert assistance is a significant aid to good adjudication in the Small Claims Tribunal, and should also be available in any special division of the Local Court. How often such assistance would be required would partly depend on the nature of the jurisdiction of the special division. If tort claims generally were to be permitted to be litigated there, questions as to the precise nature of the loss might often require expert evidence for satisfactory determination. Even a claim for a debt or liquidated demand could sometimes involve questions requiring expert assistance. For example, a person may refuse to pay the cost of the goods because of an alleged defect, and it would accordingly be important for the magistrate to have evidence available as to their quality. No doubt the parties themselves would often be able to supply this evidence, or the magistrate perhaps could assess the quality upon a simple inspection. However, the question might not always be resolvable in

⁴³ But see paragraph 4.44 below where the possibility is discussed of a party being ordered to pay for the cost of expert evidence.

⁴⁴ See the Report of the Senior Referee in the Appendix below.

⁴⁵ See paragraph 2.4 above.

this way. The Commission's provisional view therefore is that the magistrate should be empowered to call expert evidence to assist him.

4.44 More difficult, however, is the question of who should pay for the cost of such assistance. The possibilities are that -

(a)

QUESTIONS AT ISSUE

5.1 The Commission would welcome comment (with reasons where appropriate) on the following questions or on any other question arising out of the terms of reference.

5.2 (a) Should there be a special forum for non-consumer claims?

If so, should this be achieved by -

- (i) extending the jurisdiction of the Small Claims Tribunal;
 - (ii) creating a separate tribunal;
 - (iii) creating a special division of the Local Court;
 - (iv) some other means?
- (b) If there is to be special provision for non-consumer claims, should these claims be confined to traders or be unrestricted as to the person who could bring the claim?
- (c) What class of claims should be included -
- (i) Debts and liquidated demands?
 - (ii) All contract and quasi-contract claims?
 - (iii) Tort claims (whether generally or confined to, say, motor vehicle accident property claims)?
 - (iv) Possession or title to goods?
 - (v) Possession or title to land?
- (d) What should be the maximum value of such claims? Should it vary with the type of claim?
- (e) What should be the powers and procedure of the forum? As in the Small Claims Tribunal? If not, what should be the modifications? For example -
- (i) Should legal representation be permitted?

- (ii) Should costs be allowable?
 - (iii) Should there be a right of appeal?
 - (iv) Should the forum have special enforcement powers?
- (f) Should the forum have access to experts, and if so, at whose expense?
- (g) Should the forum be able to disregard the strict letter of the law?

involved. All this means cheap litigation for the public and shows beyond any doubt, that, the establishment of Small Claims Tribunals has been of great public benefit.

It is also very obvious that, due to the cost of litigation in the courts, many of the cases, particularly, in tenancy matters, except for the establishment of the Tribunal, would never have been litigated at all.

Annexed hereto as Annexure “A” is a graph prepared by the Registrar, Mr. Bastow, showing the trend of claims over the year and giving the comparison with 1976. It will be seen that the monthly pattern was very similar, although, in toto, 1977 figures were higher. The figures for the year reached a crescendo in March when a record number of one hundred and five (105) claims were lodged.

It is a matter of interest that whilst, 931 claims were determined, there were 1195 sittings. This means that in many cases, two or more sittings were necessary. This is chiefly due to the fact, that either all the evidence was not available at the initial hearing or cases were adjourned hereto of Small Claims Tribunal in March whilst the Tribunal was not able to sit.

It is a matter of obvious fact that

As will be see

Of the 192 claims determined, 19 were withdrawn. As with withdrawn claims generally, this does not mean they were abandoned.

Many were settled to the mutual satisfaction of the parties, but the terms were not disclosed to the Tribunal.

Thirty (30) cases were settled, fifty five (55) dismissed, thirteen (13) were totally in favour of the claimant and there were seventy four (74) partially in favour of each.

About thirty per cent of claims were dismissed, simply because there was no merit in them.

Only thirteen cases were determined totally in favour of the claimant but this should not create a false impression and there are good reasons for it. Generally speaking, there are certain deductions, mostly admitted, which are to be made from bonds and frequently the claim is not for the return of the whole bond but only portion thereof.

For example, in many instances, the tenant does not pay rent for the last week or two and requests it to be deducted from the bond. Frequently, excess water, gas and electricity charges cannot be calculated until the expiry of the tenancy and these are legitimate deductions.

Generally speaking, if the bond is \$100.00, this is the sum the claimant puts down in his claim and unless he gets all this, or all the portion thereof he is seeking, the result is put down as partially in favour of each.

The true position is that in the seventy per cent of cases not found totally in favour of the respondent, eighty seven (87) orders were made, returning some or all bond money to claimants and in many instances a goodly proportion of that sought. Added to this, must be practically all of the thirty (30) settlements, because some money agreed on, will have been returned and some in a good percentage of withdrawn claims. This is because, with few exceptions, the cases are also withdrawn because some money has been returned. Without being able to be really specific, I would say that of the seventy per cent above referred to, a large proportion would have been very favourable to the tenant.

Much of the alleged damage caused to demised premises is due entirely to reasonable wear and tear. Very often, the premises are old and dilapidated when the tenant takes over and no amount of care on his part can keep them from deteriorating.

With one particular landlord who is a "recidivist", the only safe way for the tenant to receive his bond money back is to lock up the premises, clean them every day and sleep in a tent in the back yard.

It is felt by Mr. Burton, the staff and myself, but for the existence of the Tribunal, many tenants would have been done extreme injustice because, it is frequently more expensive to get the money back in a court than the claim is worth and hence the dishonest landlord scores.

Out of the total number of lettings in Western Australia, 192 claims are not high and whilst an increase on last year, do not disclose an alarming landlord and tenant situation in the State. Of course, it may be that the existence of a Tribunal may act as a deterrent on some other landlords or that some tenants just do not bother.

Many good landlords are, on occasions, brought before the Tribunal and often unjustifiably. This is borne out by the number of dismissals.

All my remarks above are directed to the recalcitrant. It is only to be expected that the Tribunal will see more of these than the good.

As I said, there are few landlords, however, who are crediting the tenants with interest on their bonds. The question I ask myself is "If the Real Estate Institute insists on interest being paid, why cannot others do the same?" All sorts of excuses are offered and many say they will not pay interest unless forced by law. It is respectfully suggested that the time has now arrived when consideration should be given to compelling landlords to credit tenants with interest on their bonds.

In many instances, claimants are in fairly poor circumstances and need their bond money to secure other premises. After wrangling for some weeks in unsuccessful attempts to get their money back, they have to make a claim before the Tribunal. This means that a successful

tenant will not get his money back for some considerable time. Interest should, therefore, be payable up to the time the money is repaid.

In Victoria, a government body, may be requested by a landlord or tenant to inspect premises when a tenant is about to leave. This is an ideal practice but I feel sure, it will be a very expensive exercise, needing many inspectors. Further, it is not much use unless a comparison can be made with the condition of the premises when the tenancy commenced.

Joint inspections are not generally being carried out at the conclusion of the tenancy and both landlord and tenant are often to blame.

The dishonest landlord, however, does not want a joint inspection, with often independent witnesses present, and he puts off the return of the bond on some pretext or other so that he can find some damages, often wear and tear with which he subsequently saddles the tenant.

The tenant is sometimes to blame because he does not want to face up to his neglect of the premises, with the landlord. Later, however, he will argue strenuously that he left the premises in perfect condition.

There are very many cases in which there are joint inspections and the landlords promise to return the bond money in due course but never do so.

I think the statistics show what I have previously said, that the truth in tenancy cases is often half way between the two stories.

Short Term Tenancies

Most of the trouble in these tenancy cases seems to be with short-term tenancies. Four out of five are for much less periods than twelve months and frequently there are very heated arguments over a tenancy that only lasts two months. There are many of these cases in which no bond moneys at all have been returned.

We have found that some of these tenants are "fly by nights", have wild parties and they neglect and damage the premises. They are often the most vociferous in seeking return of their bond money.

Some tenants take premises for a minimum term and then give a week's notice or no proper notice at all. In these circumstances, the landlord takes some time to re-let and the tenant is liable for rent up to the time of re-letting, providing reasonable efforts have been made to re-let. Many tenants are very unfair to landlords in this respect and my sympathy is with the latter in these circumstances.

Posters on Walls

Some tenants, particularly young people, have a mania for putting posters on walls and stick them on with sticky tape. When they are taken down, pieces of the plaster are pulled away. The tenants then try to patch the walls and paint over the patches unsuccessfully.

They cannot then object if money is deducted from the bond, to have the wall repainted.

Motor Vehicle Claims

Individually, these were the highest for the year and there were 206 of them compared with 131 in the previous year. The claims arise out of the purchase of vehicles, particularly second hand, and the alleged failure of dealers to service them and repair faults under warranty. There are also many, in which vehicles are taken to garages for repair and maintenance and allegations of overcharges and poor workmanship are made.

There have been many cases in which sums in dispute have exceeded \$500.00 and in order to braulums in dispaer thend

1. Warranties

It is frequently alleged by claimants that they are given certain warranties or special terms prior to signing an Offer to Purchase Form but they are not subsequently included in the Form. Interminable disputes arise out of this and purchasers should insist on all warranties and promises being inserted in the Form. This is particularly so because many of These Forms specifically negative any prior warranties.

There are cases in which, it is alleged that verbal promises have been made to return deposits, if the deal goes off. If such a promise has been made, it should be incorporated in the Form.

There have been several cases, however, in which a proposed purchaser signs an

6, *Roadworthiness*

There is often a big difference between work that is required to make a vehicle road worthy in accordance with the *Motor Vehicle Dealers Act* and all the work that is frequently found necessary to be done in an R.A.C. Report.

Under the above Act, regard has to be had to the age of the vehicle and its mileage etc., whereas the R.A.C. merely reports what is wrong, generally, with it.

The cost of conforming to the Act is often very much lower than attending to the majority of items in the R.A.C. Report. Many claims are also based on new parts, when serviceable second hand parts will suffice.

I shall give one example, being a case which came before the Tribunal.

A trader carried on business in his own and wife's name at a particular address. He also had a

ANNEXURE “B”

PARTICULARS AS TO THE VARIETY OF CASES DETERMINED

BUILDING

General

Patio & Pergola

Painting and Wallpaper

Plumbing

Concrete and Brick Work

Plaster Work

Electrical Work and Equipment

Earth Moving Work

Total

FURNITURE AND FLOOR

COVERINGS

Furniture

Carpets and Tiles 014.25 TD -0.0992 Tc 0.4742 Plaster Work

FURNITURE AND FLOOR COVERINGS

ANNEXURE “D”
TENANCY BOND CASES 1/7/76 to 30/6/77

	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	April	May	June	Total
Withdrawn	1	1	1	1	3	3	-	-	-	5	2	2	19
Settled	3	1	3	2	9	2	2	4	1	1	1	1	30
Dismissed	3	2	5	2	4	10	4	6	3	7	5	4	55
Total in Favour of Claimant	-	-	-	2	-	1	1	1	2	2	3	1	13
Partially in Favour of Each	5	4	5	4	8	5	4	8	8	2	7	14	74
No Jurisdiction	-	-	-	-	-	-	-	1	-	-	-	-	1