



**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

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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 by default procedure: *Local Courts Act 1904*, s.46(2). If the plaintiff's claim is for a debt, liquidated demand or for damages of \$50 or less, then provided the defendant does not file a notice of intention to defend within the time prescribed (normally 10 days from the date of service) judgment may be entered and execution levied without a hearing. The Commission's recommendations in this report are designed to preserve this valuable procedure: see paragraph 4.4 below.

³ 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; 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".

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

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.

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- "(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".

⁵ The *Small Claims Tribunals Act 1974*, 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 (*Government Gazette*, 12 August 1977) to the *Small Claims Tribunals Act Regulations 1975: Government Gazette*, 7 March 1975.

It also includes a claim for repayment of a tenancy bond of less than \$1,000.

The *Small Claims Tribunal Act* contemplates the setting up of more than one Tribunal. For convenience, however, this paper refers to them separately or collectively as "the Tribunal". A similar convention has been adopted in regard to Local Courts.

⁶ The claimant pays only a \$3 fee to file a claim and the action is normally heard within five weeks. There are no pleadings or interlocutory matters. The hearing is conducted in private in an informal way without solicitors. The referee at first attempts to negotiate a settlement between the parties but if this does not succeed he proceeds to determine the matter. His decision is final and there is no right of appeal. The above matters are described in greater detail in paragraphs 2.1 to 2.13 of the Working Paper.

CHAPTER 2

WORKING PAPER AND PUBLIC COMMENT

2.1 The Commission issued a working paper in June 1978. It attracted comments from a wide range of persons and organisations with both interest and expertise in this field. A list of those who commented is set out in Appendix I and the paper itself is reproduced as Appendix III. The commentators included the Department for Consumer Affairs, the Perth Chamber of Commerce (Incorporated), the Consumer Affairs Council, magistrates, private organisations and persons directly involved in small business. The Commission is grateful to all concerned. The various views expressed have been considered and taken into account in preparing this report.

2.2 On 14 November 1978, one of the Commissioners, Mr. D.K. Malcolm, presented a paper¹ entitled “The Proposed ‘Small Debts Court’” to a seminar on “Credit - A Changing World” organised by the Australian Institute of Credit Management (Western Australian Division). The paper outlined the Commission's tentative views as expressed in the Working Paper and was well received. There was a general consensus of opinion at the seminar that the proposal to establish a small debts division in the Local Court with a simplified procedure would constitute a worthwhile reform. Almost three hundred representatives drawn from all sections of the Credit Industry of Western Australia attended the seminar. The Commission is grateful to the Institute for the opportunity to present its views to a gathering so closely involved with the problem of small debts and debt collection generally.

¹ The paper is unpublished but a copy is on file with the Commission.

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 There are provisions for payment into Court: see *Local Courts Act 1904*, s.49. If the plaintiff elects to pursue his claim and does not recover more than the amount paid in by the defendant then he must pay the defendant's costs from the date of payment in. This may encourage settlement in some instances but in practice would appear to be less successful than the conciliation measures of the Small Claims Tribunal.

³ W.A. Parl. Deb. (1974) at 2863.

⁴ This was realised at the time the Small Claims Tribunals legislation was introduced into Parliament. The then Minister mentioned the possibility of a parallel small debts court: *ibid* at 2864.

⁵ See paragraph 1.3, n.3 above.

⁶ See paragraph 1.3, n.4 above.

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 particularly important in the field of commerce. In many cases bad debts are indirectly passed on to consumers in the form of higher prices. Hence any step which facilitates the speedy and effective recovery of debts benefits the whole community. Further, the economic resolution of disputes contributes to the solvency of business and is of particular importance to the small trader.

(ii) Commentators' view

3.5 The overwhelming majority of commentators thought that certain persons in addition to consumers should have access to a special forum in which to litigate small matters. One commentator considered it was a fundamental principle that all litigants should have equal access to Courts and Tribunals. This commentator considered that at present consumers had an unfair advantage in the selection of a forum, particularly as the Small Claims Tribunal offered such an inexpensive option.

⁷ See Working paper, paragraph 3.7.

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.

present system tends to induce litigants to forego litigation rather than to promote settlements. It is undesirable that persons with valid disputes cannot have those disputes adjudicated economically. The matter at issue may be important to the litigant even though considered "small" by other members of the community.

(iii) Commission's view

3.10 The Commission agrees with the majority of commentators that there is a need for a special forum in which traders and non-consumers can litigate small claims. The Commission's view is reinforced by the wide range of matters which can be dealt with in a simplified way in some other jurisdictions.¹⁰

3.11 While such a forum may be of greatest benefit to traders, it should be available to any non-consumer who has a claim within jurisdiction.¹¹ "Consumers" are already adequately catered for by the Small Claims Tribunal and should be excluded as far as practicable.¹²

SELECTION OF THE SPECIAL FORUM

3.12 There are three principal ways in which a suitable forum could be established. These are -

- (a) to extend the jurisdiction of the Small Claims Tribunal;
- (b) to establish a separate small debts tribunal; or
- (c) to establish a special division of the Local Court.

3.13 The Commission recommends the third of these options, namely to establish, a special division of the Local Court (to be known as the "Small Debts Division") with procedures analogous to those of the Small Claims Tribunal.¹³ There are sound practical as well as legal reasons for this choice. Perhaps the most substantial one is that it could be introduced at minimal cost on a statewide basis in a relatively short space of time. The facilities required are

¹⁰ See Working Paper, paragraphs 4.2 to 4.13.

¹¹ For the scope of the jurisdiction recommended by the Commission see paragraphs 4.2 and 4.8 to 4.12 below.

¹² While most consumer claims would fall outside the jurisdiction proposed by the Commission some would not: see paragraph 4.13 below.

¹³ This is the method chosen in New Zealand where the Small Claims Tribunals are divisions of the Magistrates' Court: *Small Claims Tribunals Act 1976* (NZ), s. 4(3).

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 implementation of a similar proposal in Queensland did not require any additional facilities over and above those available at the time.¹⁴

3.14 Most of the matters which would ultimately be heard in the Small Debts Division are at present heard by the Local Court. While it would be reasonable to expect some increase in the overall volume of cases, this should be offset by the simpler and speedier methods which would be available in the Small Debts Division for determining them. Some of the resources of the Local Court might have to be re-deployed but this could be carried out administratively.

ALTERNATIVES

3.15 While some of the other alternatives may appear attractive, the Commission in the following paragraphs outlines the reasons why it considers these are unsuitable.

(a) Extension of the Small Claims Tribunal

3.16 The Commission considers that there are possible dangers to the effectiveness of the Small Claims Tribunal if this approach were adopted.¹⁵ The Small Claims Tribunal was set up to assist consumers who were seen as being in need of special assistance¹⁶ and the Tribunal was oriented towards their needs. It has been the experience in the United States that where Tribunals have been given jurisdiction over both consumer and non-consumer claims, consumers have tended to be disadvantaged.¹⁷ This is largely because business claimants (with a large volume of litigation) who have constant recourse to such tribunals become increasingly familiar with the procedures and may obtain for themselves a privileged position so that their claims tend to dominate the system.¹⁸ The individual consumer who needs

¹⁴ The Queensland position prior to 1975 was similar to the present Western Australian position in that it had both a Magistrates Court (equivalent to our Local Court) plus a Small Claims Tribunal. A Small Debts Court was subsequently established as a division of the Magistrates Court: see *Magistrates Courts Act Amendment Act 1975* (Qld).

¹⁵ A number of commentators favoured this approach including Mr. R.H. Burton, S.M. (who has had experience as a part-time referee of the Small Claims Tribunal in addition to his magisterial duties), a solicitor in private practice, and the Perth Chamber of Commerce (Incorporated).

¹⁶ W.A. Parl. Deb. (1974) at 2863.

¹⁷ See, for example, the article entitled *Special Project: Judicial Reform at the Lowest Level - A Model Statute for Small Claims Courts* (1975) 28 Vand L. Rev. 711.

¹⁸ One American Commentator said small claims courts have become "government financed collection agencies": L. Downie Jr., *Justice Revised: The Case for Reform of the Courts* (1971) at 82. See also

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 real dispute over whether the debt were due or not. He might lose income by attending the hearing and this would not be recoverable.²²

Eovaldi and Meyers, *The Pro Se Small Claims Court in Chicago: Justice for the "Little Guy"?* (1978) 72 Northwestern University L. Rev. 947.

¹⁹ *Small Claims Tribunals Act 1976* (NZ), s. 4(3).

²⁰ *Ibid.*, s.10.

²¹ Mr. A. G. Smith, Senior Referee of the Small Claims Tribunal informed the Commission that no solicitors had yet been permitted to appear in the Small Claims Tribunal.

²² Costs are not allowed to or against any party to a proceeding before a tribunal: *Small Claims Tribunals Act 1974*, s. 35.

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.²⁵

(b) A separate small debts court

3.21 Another option would be to establish a separate small debts court independent of both the Local Court and the Small Claims Tribunal. This would be an expensive alternative as it would involve the establishment of new courts and the recruitment of the necessary staff. It might also create legal difficulties. In the working paper the Commission pointed out some of the jurisdictional problems which could arise.²⁶ As a result there might be substantial confusion in the minds of the public over the appropriate court in which to sue. There has been recent criticism of the tendency in Australia to create additional courts and tribunals outside the existing system. The Chief Justice of New South Wales said:²⁷

“...this fragmentation weakens ... the whole fabric of what ought to be an integrated and all-embracing system of regular courts.”

The Commission is opposed to the notion of a separate small debts court. If after a sufficient period the Small Debts Division of the Local Court is found to be operating satisfactorily consideration could be given to the question of whether or not the present Small Claims Tribunal should also be brought into the Local Court structure.

²³ The Commission suggests that this amount be increased to a more substantial amount, say \$250. Insurance companies often require particular categories of driver to pay 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.

²⁴ *Local Courts Act 1904*, s.46(2).

²⁵ See paragraph 4.4 below.

²⁶ See Working Paper, paragraph 4.23.

²⁷ See address delivered by Sir Laurence Street to the Twenty-second Annual Industrial Relations Conference Dinner: 52 ALJ (1978) 594 at 595. This tendency has been noticeable in Western Australia. For example, certain disputes in relation to motor vehicles may be adjudicated upon by the Commissioner for Consumer Protection: *Motor Vehicle Dealers Act* (1973), ss.36 and 37.

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 damages of less than \$50⁶) would proceed to judgment by default as at present.⁷ Other claims which were undefended would proceed in the ordinary division of the Local Court in the usual way.

4.5 The transfer of a defended matter to the Small Debts Division should be carried out administratively by the Clerk of Court, unless on the application of either party, a magistrate orders that the claim be dealt with in the Local Court in the usual way. This might be appropriate if the matter in issue were unusually complex or involved a substantial question of law or if it were a "test case" which one or other of the parties might wish to take on appeal.⁸

4.6 If the above procedure is implemented it will ensure that most claims which reach the Small Debts Division are genuinely disputed. It would still be possible for a defendant to file a notice of intention to defend even though he had no real defence. This is sometimes done at present to prevent the plaintiff from entering judgment by default. Under the present system this can result in a long delay before judgment is finally obtained. Such delays should not be allowed to occur in the Small Debts Division. Hence, although the action would be set down for hearing automatically, the Commission does not believe a hearing should actually take

⁴ Ibid., s.9.

⁵ Ibid., s.10.

⁶ The Commission has suggested that this amount be increased to \$250: see paragraph 3.20, n.23 above.

⁷ *Local Courts Act 1904*, s.46(2).

⁸ The Commission recommends that there be no right of appeal from a decision of the Small Debts Division: see paragraph 5.29 below.

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 Court of Queensland that a dentist was not a "trader" and hence could not be sued in the Small Claims Tribunal.

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 There would, however, still be some actions involving traders or non-consumers which would fall outside the jurisdiction of the Small Debts Division. For example, a claim by a trader against a carrier for loss or damage to an article which was carried, would fall outside the jurisdiction, unless the contract of carriage stipulated a specific sum payable upon loss.¹⁶ There are other matters such as small damages claims arising out of motor vehicle accidents, title to goods and possession of premises which also would fall outside the jurisdiction. Some commentators considered the jurisdiction should extend to such matters. However, as mentioned above,¹⁷ the difficulty is that if the jurisdiction were wider than simply debts and liquidated demands it might divert matters from the Small Claims Tribunal, which would be undesirable. It might also result in a substantial portion of ordinary Local Court work being heard in the Small Debts Division. Such a significant change would be too far reaching at this stage. If the experience with the Small Debts Division proves satisfactory then consideration could be given to expanding the jurisdiction at a later stage.

4.15 By comparison, the procedures in the Small Debts Division will appear more attractive than those of the ordinary division of the Local Court. This may cause concern to those unable to bring their claims in the Small Debts Division and thus provide further criticism for the procedures of the Local Court.

¹⁵ A "work order" is an order that requires a party (other than the claimant) to perform work to rectify a defect in goods or services to which the claim in the proceeding relates: *Small Claims Tribunals Act 1974*, s.20(2)(b).

¹⁶ It may be appropriate to amend the *Small Claims Tribunals Act* to embrace certain "consumer transactions" by small traders, companies and businessmen. For example, the owner of a delicatessen may buy a refrigerator for his business. If the refrigerator is not satisfactory, perhaps he should have access to the Small Claims Tribunal.

¹⁷ See paragraph 4.10 above.

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

¹⁸ Project No. 16 (Amendments to the *Local Courts Act and Rules*).

¹⁹ *Acts Amendment (Jurisdiction of Courts) Act 1976*, ss.11-13.

²⁰ See paragraph 4.10 above.

²¹ This principle is reflected in the *Local Courts Act* which allows for the joinder of more than one cause of action: see *Local Courts Act 1904*, s.58.

²² This is already the situation in the Local Court: see *Local Courts Act 1904*, s.48.

²³ In Queensland a counterclaim is not permitted in reply to a claim for a small debt: *Magistrates Courts Rules 1960*, Rule 89A.

the ordinary division of the Local Court.²⁴ The Commission does not favour this approach. It would cause needless complexity. The magistrate should, however, be empowered to transfer matters of unusual complexity to the ordinary division or if the parties wished the decision to be subject to appeal.

CONFLICT OF JURISDICTION

4.20 At present it is possible for a trader to commence action against a consumer in the Local Court at the same time the consumer commences action against the trader in the Small Claims Tribunal. Though this is a comparatively rare occurrence, provision was made in the *Small Claims Tribunals Act* for this problem. The Act provides that the Small Claims Tribunal does not have jurisdiction if an action has been commenced in another court in respect of the same “issue in dispute”.²⁵ This provision would continue to regulate matters if a Small Debts Division were created in the Local Court.

MONETARY LIMIT

4.21 The Commission recommends that the monetary limit of the Small Debts Division be \$1,000 which is similar to that of the Small Claims Tribunal.²⁶ The limit in the Tribunal was recently increased²⁷ to this amount on the basis that this would cover a substantial portion of the disputes likely to arise out of consumer transactions. It is envisaged that many of the cases which arise in the Small Debts Division will also arise out of ordinary consumer transactions. It therefore seems appropriate that both bodies should have a similar monetary jurisdiction and that in future the limits be adjusted concurrently.²⁸ The majority of commentators who discussed this issue agreed that \$1,000 was the appropriate upper limit.

4.22 A party whose claim or counterclaim exceeded \$1,000 should be permitted to abandon the excess in order to bring the matter within the jurisdiction of the Small Debts Division. This process is permitted in both the Small Claims Tribunal and the Local Court. The only difficulty is to determine at what stage of the proceedings a plaintiff, as distinct from a

²⁴ The Chief Stipendiary Magistrate of Brisbane suggested this step to overcome the problem of multiplicity of claims: see letter dated 26 July 1978 on file with the Commission.

²⁵ *Small Claims Tribunals Act*, s.17.

²⁶ In the *Small Claims Tribunals Act* the monetary limit is in the form “less than \$1000”. Thus the maximum claim is \$999.99.

²⁷ Small Claims Tribunal Regulations, *Government Gazette* 12 August 1977.

²⁸ As the limit in the *Small Claims Tribunals Act* is adjusted by regulation it would seem appropriate that the limit of the Small Debts Division be adjusted in the same manner.

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 further restriction has been introduced. Under s.16 of the *Small Claims Tribunals Act*, the Tribunal has no jurisdiction over a claim more than two years old. A consumer would still be able to sue in respect of such a claim, but would have to do so in the Local Court. The Commission does not believe there is any advantage in making a similar provision in the Small Debts Division. This would mean that the ordinary limitation periods would apply.

DESIGNATED MAGISTRATES

4.24 One of the more difficult issues is whether all magistrates should exercise the small debts jurisdiction or only those who are specially designated to do so by the Chief Stipendiary Magistrate. In the Working Paper,³¹ the Commission expressed the tentative view that the proposed jurisdiction should not be confined to designated magistrates. It took this view because it wanted to ensure that Small Debt Divisions were available in rural areas as well as

²⁹ A longer period may be allowed for claims for other debts. For example, claims for rent on a covenant in an indenture of demise are allowed twelve years in which to be brought: *Limitation Act 1935*, s.38.

³⁰ Ibid.

³¹ See Working Paper, paragraph 4.45.

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 The Commission has divided its consideration of the remaining matters into four sections -

PART A - PRE-TRIAL PROCEDURES

PART B - MATTERS RELATING TO THE TRIAL

PART C - POST-JUDGMENT MATTERS

PART D - IMPLEMENTATION.

PART A - PRE-TRIAL PROCEDURES

Introduction

5.3 The Commission's proposals to separate disputed and undisputed claims at the time a notice of defence has to be given, would prevent any distinction being drawn between defended and undefended claims prior to that point in time.

Filing fees

5.4 Since it will not be possible to draw any distinction between disputed and undisputed small debt claims for the purpose of assessing fees, the Commission recommends that all claims should continue to bear the usual filing fees. However, once a claim is transferred into the Small Debts Division, no further fees should be payable by either the plaintiff or the

¹ See paragraph 5.22 below.

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 The Commission is aware that Local Court fees play a substantial role in recouping the costs involved in running the courts.⁵ Under the Commission's proposals some of the costs of operating the Small Debts Division will be borne by the Government and through it the taxpayers of the community. Therefore, in the establishment of the Small Debts Division an endeavour should be made to reduce the real costs involved and not merely to transfer them to Consolidated Revenue.

Service

5.6 Under the Commission's proposals there can be no differentiation in the mode of service of the summons which initiates the action. This is unfortunate as service by post which is the method usually used in the Small Claims Tribunal⁶ is less expensive than personal service by the bailiff.⁷ The Commission recommends, however, that any subsequent documents which need to be served in the course of the action should be able to be served by post. In due course consideration could be given to the introduction of service by post in the Local Courts.

Pleadings and interlocutory matters

5.7 The Commission is anxious to avoid the complexities of pleadings and interlocutory matters in the Small Debts Division. However, some difficulties may arise if the present Local Court Rules applied in the formulation of the claim and defence.

² See the Commission's discussion on enforcement in paragraphs 5.27 to 5.28 below.

³ This fee has only recently been increased from \$2.00 to \$3.00: see *Government Gazette* 17 November 1978.

⁴ These include court fees and bailiff's fees for the execution of the enforcement proceedings: See *Local Court Rules 1961*, Appendix Part II, "Table of Court Fees" and "Bailiff's Fees".

⁵ See the Working Paper, paragraph 3.15 and n.15.

⁶ *Small Claims Tribunals Act 1974*, s.40. Under this section documents are to be served in the manner prescribed by s.31 of the *Interpretation Act 1918*.

⁷ In the Local Court summonses must be served personally except in those cases where a different method of service is prescribed or the magistrate or clerk orders otherwise: *Local Courts Act 1904*, s.42(1). Service may be effected by post if the clerk or magistrate is satisfied that personal service would involve undue expense: *Ibid.*, s.42(2).

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 He will probably also have to advise the parties to bring documents, witnesses and so on to the hearing.

¹⁴ In Queensland the form of defence gives clear guidance on how it should be completed: see Appendix II.

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 execution if that is necessary.

5.14 The above duties might involve the clerk in giving legal advice, and accordingly, some protective provision similar to s. 42 of the *Small Claims Tribunal Act* should be inserted.¹⁹

PART B - MATTERS RELATING TO THE TRIAL

The hearing

5.15 In developing the procedures for the hearing of cases in the Small Debts Division, the experience of the Small Claims Tribunal should be drawn upon with regard to such matters as privacy, informality, conciliation and other related matters.

5.16 The hearings should take place in the private and informal atmosphere of a magistrate's chambers rather than in the intimidating atmosphere of a public courtroom. This is essential in order that parties feel relaxed and able to put their case with confidence. The privacy and informality will also assist the magistrate in his attempt to negotiate a settlement between the parties.

5.17 One of the most important features of the Small Claims Tribunal has been its emphasis on conciliation as a means of settling disputes.²⁰ In fact the *Small Claims Tribunals Act* in s.10 states "The primary function of a referee is to attempt to bring the parties to a dispute... to

¹⁹ Section 42 provides:

"No action shall lie against the registrar, any referee, any claimant or any other person on account of any proceeding taken, any publication made, or anything done under the authority of this Act or taken, made or done *bona fide* purportedly under the authority of this Act, or on account of any omission made *bona fide* in the administration of this Act".

²⁰ Mr. A.G. Smith estimated that approximately 30% of claims were settled: see Annual Report of the Senior Referee, Small Claims Tribunal, for the year ended 3 June 1977 published as an Appendix to the Working Paper. The most recent report showed a slight decline in the number of cases settled and suggested that this was probably because many parties settled before the hearing. This appeared to be borne out by the number of claims withdrawn: see 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 1978 at 87.

a settlement acceptable to all parties". It is only when it is apparent that the parties cannot reach a settlement that the referee will intervene and make a formal determination. The procedure works well and should be followed in the Small Debts Division of the Local Court. It will enable the magistrate to focus rapidly on the real issues in dispute with consequential savings in time and expense. For example, in the Small Claims Tribunal the average hearing lasts about an hour. A similar result could be expected in the Small Debts Division of the Local Court. The development of conciliatory techniques may ultimately benefit the ordinary division of the Local Court.

5.18 If the parties cannot reach a settlement the magistrate should proceed to a formal determination. He should use an inquisitorial²¹ approach rather than the traditional adversarial practice normally used in the courts. He should cross-examine the parties and their witnesses and endeavour to assess the facts of the case in the best way he can.²² It might also be important to inspect the subject matter of the dispute in the presence of the parties and their expert witnesses. This is of substantial benefit in the Small Claims Tribunal.

5.19 The informal nature of the hearing may also enable the referee, having made a decision as to liability, to discuss with the parties the best means of meeting that liability. The Commission has recommended²³ that the magistrate in the Small Debts Division be given similar power to that of a referee of a Small Claims Tribunal in respect of the orders which he could make. This would allow the magistrate to order that work be remedied rather than simply to award damages. If he considered that damages were appropriate he could award them also.²⁴ This would be primarily of value when a counterclaim succeeds.

Rules of evidence and application of the law

5.20 There is no doubt that adherence to the strict rules of evidence would cause difficulties in the Small Debts Division as parties would be expected to present their own cases without

²¹ The term "inquisitorial" is an accurate description of what should occur but has unfortunate historical connotations.

²² He will not be burdened by the rules of evidence in this task: see paragraph 5.20 below.

²³ See paragraph 5.26 below.

²⁴ Note also the *Local Courts Act 1904*, s.91 which allows a magistrate when giving judgment for less than \$100 to order payment by instalments.

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 Ideally, solicitors should not take part in proceedings which are to be tried in the Small Debts Division.³⁰ In practice, however, most claims for debts or liquidated demands will continue to be filed by solicitors. As mentioned above,³¹ it will not be known whether a matter is to be tried in the Small Debts Division until the time for filing a defence has elapsed. Nevertheless, parties should be discouraged from continuing to use solicitors once it is known that the matter is to be tried in that Division.³² Accordingly, the Commission recommends that there should be a prohibition on solicitors appearing for any party in the Small Debts Division unless all parties consent and the court is satisfied that any unrepresented party would not be unfairly disadvantaged.³³ A party should, however, be permitted representation by an agent who is not a solicitor where the magistrate considered that was necessary.³⁴ If a party chose to consult a solicitor on any matter relating to his case he would be free to do so but it would hardly be worthwhile. The informal nature of the proceedings would allow parties to put their case without any difficulty. Once judgment was obtained a party could employ a solicitor to conduct the execution procedures if he wished to do so. However, it should be feasible for a litigant to carry out these procedures for himself with the advice and assistance of the clerk.

5.23 The costs of the proceedings should not be awarded for or against any party. Such a provision may appear unfair to the winning party who has incurred expense in the presentation of his case. However, if the Small Debts Division is to provide an inexpensive forum, it is essential that there be a provision of this nature. This is already the position in the Small Claims Tribunal³⁵ and the Commission is not aware of any complaints having been made about it. On the contrary, it relieves the parties of the fear of a substantial bill for costs if they should lose.

³⁰ Solicitors may not take part in the proceedings of the Small Claims Tribunal without the consent of both parties and the Tribunal being satisfied that the unrepresented party would not be unfairly disadvantaged: *Small Claims Tribunals Act 1974*, s.32.

³¹ See paragraph 4.4 above.

³² The plaintiff would have to personally pay his solicitor's costs to that stage. The scale charge for issuing a summons ranges from \$12 to \$35 depending on the amount at issue: see *Local Court Rules 1961*, Appendix, Part III "Local Court Scale of Costs".

³³ A similar provision is to be found in the *Small Claims Tribunals Act 1974*, s.32.

³⁴ A provision having this effect is to be found in the *Small Claims Tribunals Act*: *ibid.* An incorporated body must, of course, act through an agent and would therefore be permitted representation by an agent who was not a solicitor.

³⁵ *Small Claims Tribunals Act 1974*, s.35.

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 For example, if defective goods have been supplied the most appropriate thing to do may be to order the trader to repair them or alternatively to cancel the contract.

³⁸ *Small Claims Tribunals Act 1974*, s.20.

³⁹ *Small Claims Tribunals Act Amendment Act 1978*, s.2.

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 The Deputy Chief Stipendiary Magistrate was opposed to any forum from which there was no right of appeal. He was, however, opposed to the idea of a special forum altogether.

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

Tribunal. A party with a claim or counterclaim in excess of that amount should be permitted to abandon the excess in order to bring the claim within the jurisdiction of the Small Debts Division.

(paragraphs 4.21 to 4.22)

- (f) The jurisdiction should initially be exercised only by magistrates designated by the Chief Stipendiary Magistrate.

(paragraphs 4.24 to 4.25)

- (g) The fees for lodging a claim for a small debt or liquidated demand should be the same as for any ordinary claim. Once a claim is transferred to the Small Debts Division there should be no further fees levied until after judgment has been entered. The normal fees for execution of judgment should apply.

(paragraph 5.4)

- (h) Service of summonses for small debts or liquidated demands should be in accordance with the present *Local Court Rules*. However, any subsequent documents in the action should be able to be served by post.

(paragraph 5.6)

- (i) The Clerk of Court should be under an obligation to assist litigants in person with advice and help in the completion of court documents.

(paragraphs 5.12 to 5.14)

- (j) Interlocutory proceedings should not be allowed in the Small Debts Division. However, the clerk or designated magistrate should be empowered to seek further particulars on his own motion if he considers that further information is required.

(paragraph 5.9)

- (k) The hearing of the action should be informal and conducted in private in the magistrate's chambers. The magistrate should attempt to bring the parties to the dispute to a settlement in the first instance, as is the case in the Small Claims Tribunal. If this does not succeed then he should make a determination. In his

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 writs unless there has been a lack of jurisdiction or a denial of natural justice to any party.

(paragraph 5.29)

- (5) The above recommendations should be implemented by suitable amendments to the *Local Courts Act and Rules*.

(paragraph 5.30)

(Signed) David K. Malcolm
Chairman

Neville H. Crago
Member

Eric Freeman
Member

6 April 1979

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.