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

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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

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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; 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”.

⁴ The Small Claims Tribunals Act 1974, s.4(1) defines a "trader" as -
Tribunal \(^5\) 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.

\(^5\) 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 paper\(^1\) 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.

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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.
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. 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.

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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 individual\(^9\) 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

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\(^8\) 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.\(^\text{10}\)

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.\(^\text{11}\) "Consumers" are already adequately catered for by the Small Claims Tribunal and should be excluded as far as practicable.\(^\text{12}\)

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.\(^\text{13}\) 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

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\(^\text{10}\) See Working Paper, paragraphs 4.2 to 4.13.
\(^\text{11}\) For the scope of the jurisdiction recommended by the Commission see paragraphs 4.2 and 4.8 to 4.12 below.
\(^\text{12}\) While most consumer claims would fall outside the jurisdiction proposed by the Commission some would not: see paragraph 4.13 below.
\(^\text{13}\) 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.\textsuperscript{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.\textsuperscript{15} The Small Claims Tribunal was set up to assist consumers who were seen as being in need of special assistance\textsuperscript{16} 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.\textsuperscript{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.\textsuperscript{18} The individual consumer who needs

\textsuperscript{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).

\textsuperscript{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).


\textsuperscript{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.

\textsuperscript{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' Court) must satisfy the Registrar that the claim is in dispute. 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 circumstances 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.

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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 $50$\textsuperscript{23} the plaintiff may obtain judgment without a hearing if the defendant has not given notice of intention to defend.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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:\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{24}Local Courts Act 1904, s.46(2).

\textsuperscript{25}See paragraph 4.4 below.

\textsuperscript{26}See Working Paper, paragraph 4.23.

\textsuperscript{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' Court\(^3\)) has jurisdiction over

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\(^1\) 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 $50 6) 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 place.

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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. 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. 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.

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.

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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 demands\(^{12}\) 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 limit\(^{14}\) 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 order\(^\text{15}\) 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.\(^\text{16}\) 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,\(^\text{17}\) 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. 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. 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, 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. 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. 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, the problem could be resolved by allowing the magistrate, once a counter-claim had arisen, to transfer the matter to

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18 Project No. 16 (Amendments to the *Local Courts Act and Rules*).
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. 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”. 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. The limit in the Tribunal was recently increased 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. 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

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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.


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 debt must be commenced within six years 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, 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
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.\textsuperscript{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.

\textsuperscript{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 representation\(^1\) 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

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\(^1\) 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 Tribunal\(^6\) 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.

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\(^2\) 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. 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”. To prevent judgment being entered by default all a defendant need do is to file a notice of intention to defend the claim. He does not have to file a specifically pleaded defence except in certain instances. 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 magistrate will have to oversee this function. 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. 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*.

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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

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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.  

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. 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

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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 inquisitorial\(^\text{21}\) 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.\(^\text{22}\) 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 recommended\(^\text{23}\) 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.\(^\text{24}\) 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 provides\(^{25}\) 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. In practice, however, most claims for debts or liquidated demands will continue to be filed by solicitors. As mentioned above, 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. 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. A party should, however, be permitted representation by an agent who is not a solicitor where the magistrate considered that was necessary. 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 Tribunal 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.

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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 Bureau\(^\text{36}\) 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.\(^\text{37}\) 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.\(^\text{38}\) These powers have recently been widened\(^\text{39}\) 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

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\(^{36}\) 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 them 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. 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. 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

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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. If the Small Debts Division felt that an important issue had arisen which should be capable of being taken on appeal, 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.

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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)
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)

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

NOTICE OF DEFENCE

(Rule 76)

In the Magistrates Court of Queensland )
Held at )
Between )
of )
and )
of )

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.
APPENDIX III

THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 63

Small Debts Court

WORKING PAPER

JUNE 1978
The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

Mr. N.H. Crago, Chairman  
Mr. E.G. Freeman  
Mr. D.K. Malcolm.

The Executive Officer of the Commission is Mr. C.W. Ogilvie, and the Commission's offices are on the 11th floor, R. & I. Bank Building, 593 Hay Street, Perth, Western Australia, 6000 (Telephone: 3256022).
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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. However, the law gives "consumers" (which includes tenants in the case of tenancy bond claims) a special privilege in that claims by them against "traders" (which includes landlords in the case of tenancy bond claims) of amounts less than $1,000 may be heard by a referee in the Small Claims Tribunal. 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.
should also be made available for claims of persons other than consumers 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 procedure in the Local Court.

1.3 In its consideration of the problem, the Commission has been helped by discussions with Mr. A.G. Smith, the Senior Referee of the Small Claims Tribunal in this State. It expresses its gratitude to him for this assistance.
THE ADVANTAGES OF THE SMALL CLAIMS TRIBUNAL

General

2.1 Under the existing law, a consumer is in a privileged position in that, if he has a dispute with a trader 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 or 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 file 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. It is the responsibility of the registrar to arrange for service of the claim on the respondent by certified mail. 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

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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. 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

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⁶ Legal representation is permitted only where all parties agree and the Tribunal is satisfied that the other parties will not be unfairly disadvantaged: s.32(3).
⁷ s.33(3).
⁸ s.10(1).
⁹ This account of the usual procedure of a referee was given by Mr. A.G. Smith: see paragraph 1.3 above.
¹⁰ Where conciliation attempts have failed and the referee decides to make an order determining the dispute, he must apply the law: see R. v The Small Claims Tribunal and Syme [1975] VR 831.
¹¹ A division of the State Department of Labour and Industry.
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. 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.

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. 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.

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. Although a particular claimant may not see a delay as a serious disadvantage, it would

\[^{12}\text{s.35.}\]
\[^{13}\text{s.18.}\]
\[^{14}\text{s.19. See the Victorian case of } R. v \text{ Small Claims Tribunal and Homewood [1976]} \text{ VR 427, for an illustration of the exercise of this power.}\]
\[^{15}\text{That is, after the action is listed for trial. Before this point is reached, many months could elapse, depending on the complexity of the interlocutory proceedings. In the default judgment procedure,}\]
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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{16} However, judgment can generally be entered ten days from the date of service of the summons: \textit{Local
Courts Act 1904}, s.46(2) (a). See also \textit{Local Court Rules 1961}, 05, R9.
\item \textsuperscript{17} \textit{Small Claims Tribunals Act}, s.22.
\item \textsuperscript{18} The Small Claims Tribunals Act Amendment Bill, presently before Parliament, would enable the Tribunal
to order the return of specific goods.
\item \textsuperscript{19} \textit{Small Claims Tribunals Act}, s.23.
\item 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 \textit{Access to Justice} (Florence
Institute of Comparative Civil Procedure).
\end{itemize}
an increase of 17½% in the number of claims, bringing with it a corresponding increase in sittings and determinations.\(^{20}\)

2.12 The power to settle claims by conciliation\(^{21}\) has been used in about 30% of cases, showing a significant use of this aspect of the jurisdiction. The figure that referees are "carrying out the intentions of the legislature to endeavour to settle cases where possible".\(^{22}\)

2.13 A wide range of claims is dealt with by the Tribunal, including claims against builders, building trades contractors, retailers (particularly those selling furniture, floor coverings and household appliances) motor vehicle repairers and landlords (tenancy bond claims).\(^{23}\) Many of these claims were brought before the Tribunal by a consumer at the request of a trader. The Tribunal was seen as a convenient forum for determining the dispute.\(^{24}\) This gives the trader indirect access to the Tribunal.

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\(^{20}\) The increase in claims has required the appointment of two referees.

\(^{21}\) See paragraph 2.4 above.

\(^{22}\) Senior Referee's report, 30 June 1977. See Appendix below.

\(^{23}\) Ibid.

\(^{24}\) The Senior Referee, Mr. A.G. Smith, informed the Commission of this. See also paragraph 3.2 below.
SHOULD THESE ADVANTAGES 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".

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 foreshadowed\(^3\) 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 contractors are in this position. For example, an

\(^3\) Ibid.
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. Unless the customer agrees to commence proceedings in the Small Claims Tribunal seeking
relief from paying the $400, 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. 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. Thus, in order to recover the sum of $400, the electrician would be required to outlay
$300, of which $100 would be irrecoverable. If the electrician felt confident of winning the
case he might nevertheless be prepared to commence proceedings in the Local Court. But if
his solicitor regarded his case as less than watertight he might well decide not to sue at all.
Instead, he might attempt to compromise with the householder who might, or might not, be
prepared to negotiate.

3.8 If, in the above example, the electrician had access to the Small Claims Tribunal or its
equivalent, all that he would have had to outlay would have been a $2 filing fee. Of course, he

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4 For example, the householder may consider the bill too much, or the work defective.
5 See paragraph 2.13 above.
6 The solicitor's work could be considerable and would not be confined simply to appearing in court. He
would be required to draft a statement of claim and pleadings (although these are not required under the
Local Court Rules, as a matter of practice it is usual to supply them in a defended case). Discovery and
interrogatories may also be necessary.
7 This is an estimate of what the Court would award under the recently revised Local Court scale: see
Gazette (1978) at 849.
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. However, the hearing would be unlikely to last more than about an hour or two 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. 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. Such traders are often in business in a relatively small way and could be seen to be in as much need of protection as some consumers, who may in fact be better off financially than they are.

3.10 In the above discussion, the Commission has described the difficulties that might be faced by certain classes of tradesmen in enforcing claims against their customers under the present law. However, it could be argued that there is no real justification for differentiating between small traders and other sorts, no matter how large their business. The difficulty in pursuing any one small claim would not cause the same hardship to a larger trader as to a small one, but the former is likely to have many more small claims, so that the total effect could be as significant.

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8 Since he would be required to attend as a witness in a Local Court action, this "hidden cost" would be common to both types of proceeding.
9 This is the estimate given the Commission by Mr. A.G. Smith.
10 Although motor vehicle repairers often contract with consumers they are not in a vulnerable position. Under the law a repairer has a possessory lien over a vehicle on which he has worked and can lawfully retain possession of it until he is paid: see Crossley Vaines' Personal Property (5th ed. 1973) at 139.
11 Architects are also in a vulnerable position since they usually do work before being paid. However, an architect is not a "trader" for the purposes of the Small Claims Tribunals Act (see s.4(2) (a)), so that a client of an architect cannot take proceedings against him in the Tribunal if, for example, he seeks relief against paying what the architect demands. The situation would also apply to doctors, dentists and legal practitioners: see R v Small Claims Tribunal [1973] Qd R at 490, where it was held that a dentist was not a "trader". The argument based on reciprocity cannot be used in the case of such professions.
12 The discussion here is intended to relate only to cases where there is a genuine dispute and not where the person against whom the claim is made is merely attempting to avoid payment: see paragraph 4.16 below.
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. 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). The cost of running the Small Claims Tribunal is not publicly available, but it must be many times more 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. 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 system\(^{21}\) 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
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 nominal filing fee, but because legal representation is generally excluded. But a person against whom a claim is made may not wish to "have the carriage of his own case", particularly if it is complicated. It is true that the referee is presumed to have the expertise to ascertain the facts and correctly apply the law, but a defendant may feel that he should be legally represented if he is to be sure that nothing in his favour is overlooked. Furthermore, it may not always be the case that appearing on one's own behalf is significantly cheaper than being represented by a solicitor. It may depend on whether a person must take time off from income producing activity to attend the Tribunal.

3.23 The absence of any right of appeal could also appear as a significant disadvantage to a respondent. He might regard the proceedings as a test case which he would have been prepared to take on appeal to the District Court if he had been sued in the Local Court and had lost. Although it is in the public interest that claimants have ready access to a cheap and speedy system of justice, such attributes may be bought too dearly if a party is not permitted adequate legal assistance or a right of review.

24 See note 6, chapter 2 above.

25 The Small Claims Tribunals Act (s.17(3)) empowers the referee to rule that the claim involves such a complex point of law as to warrant it being heard in a court. If he does so rule, the Tribunal ceases to have jurisdiction. However, this is a matter for the discretion of the referee.
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 ways in which other jurisdictions have dealt with small "non consumer" claims. Attention is concentrated on the position in England, New Zealand and Australia. Where relevant, the situation in those States of the United States which have special procedures for small claims is also referred to.

4.3 In England,² New Zealand,³ South Australia,⁴ the Australian Capital Territory⁵ and the Northern Territory⁶ the problem was dealt with by providing at the outset for both consumer and non-consumer claims. These jurisdictions have done this by creating a special division of their equivalent of the Local Court. There are, however, certain differences between them.

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¹ It would also be possible to revise the procedure of the Local Court generally in the interests of simplicity, economy and expedition, and the Commission is considering this question in its study of Project No. 16 (Local Courts Act and Rules). However, the limit of jurisdiction of the Local Court has recently been raised to $3,000. This is quite a significant increase, probably requiring retention of the provision for legal representation, interlocutory proceedings and other matters to ensure that justice is done. It cannot be expected that the general procedure of the Local Court could be simplified to the extent desirable to deal with the problem of small claims.

² County Court (Amendment No.3) Rules 1973 (SI 1973/1412).

³ Small Claims Tribunals Act 1976.

⁴ Local and District Criminal Courts Act 1926-74.

⁵ Small Claims Ordinance 1974.

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". The exclusion of actions for undisputed debts has the object of preventing the Tribunal from being used as a forum for actions relating to arrears in payment or non-payment of debts. The restriction is aimed at preventing the Tribunal from being inundated with claims which can be pursued just as effectively before the Magistrates' Court.

4.7 A further significant feature of the New Zealand legislation is the provision that 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".

4.8 In South Australia, the small claims jurisdiction extends to claims of not more than $500 -

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7 Small Claims Tribunals Act 1976, s.10(1) and (2).
9 s.15.
(a) upon a contract or by way of damages for breach of contract;

(b) in respect of a quasi-contractual obligation;

(c) by way of damages for tort;

or

(d) upon a cause of action of a kind declared by the Attorney-General, by notice published in the Gazette, to be a cause of action upon which a small claim may be founded.

Certain magistrates have been appointed as the sole small claims magistrates in Adelaide. Power is given to the magistrate to attempt conciliation, though it is expressed simply as an option open to him, and not as his primary function. Proceedings are in public, the magistrate is not bound by the rules of evidence, and there is a restriction on legal representation. There is no appeal.

4.9 The provisions in the Australian Capital Territory and the Northern Territory are substantially the same. The jurisdiction extends to all claims of $1,000 or less, except where title to land is in question. It would seem that the principal differences in procedure from ordinary actions are that the Court is not bound by the rules of evidence, evidence is not given on oath, and there is no power to award costs. The proceedings are in public unless the Court decides otherwise. There is a limited right of appeal.

4.10 Queensland has adopted a dual jurisdiction approach, probably because it first established a Small Claims Tribunal for consumer claims and subsequently wished to make provision for other small claims. This was done by retaining the existing jurisdiction of the Small Claims Tribunal and by requiring the Magistrates Court to adopt a special procedure with regard to certain claims, whether consumer or non consumer.\(^\text{10}\) The Court when hearing such an action is called the Small Debts Court.

\(^\text{10}\) Qld. Parl. Deb (1975) at 889. The legislation creating the special division of the Magistrates Court is the *Magistrates Courts Act Amendment Act 1975*. 
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.\textsuperscript{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]

\textsuperscript{11} For example, which the other party had possession of under a hire purchase agreement which had been breached.
<table>
<thead>
<tr>
<th>Who may sue</th>
<th>W.A. Small Claims Tribunal</th>
<th>QLD. Small Debts Court</th>
<th>N.Z. Small Claims Tribunal</th>
<th>A.C.T. Petty Sessions (Small Claims)</th>
<th>N.T. Local Court (Small Claims)</th>
<th>S.A. Local Court (Small Claims)</th>
<th>England County Court (Small Claims)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumers</td>
<td>Anyone</td>
<td>Anyone</td>
<td>Anyone</td>
<td>Anyone</td>
<td>Anyone</td>
<td>Anyone</td>
<td>Anyone</td>
</tr>
<tr>
<td>Traders</td>
<td>Anyone</td>
<td>Anyone</td>
<td>Anyone</td>
<td>Anyone</td>
<td>Anyone</td>
<td>Anyone</td>
<td>Anyone</td>
</tr>
<tr>
<td>Maximum amount of claim</td>
<td>Less than $1,000</td>
<td>$450</td>
<td>$500</td>
<td>$1,000</td>
<td>$1,000</td>
<td>$500</td>
<td>£100</td>
</tr>
<tr>
<td>Is there requirement to conciliate?</td>
<td>Yes</td>
<td>Optional</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Optional</td>
<td>No</td>
</tr>
<tr>
<td>Is there any appeal?</td>
<td>No</td>
<td>No</td>
<td>Limited right of appeal</td>
<td>No in nuisance cases. Otherwise leave to appeal may be given in special cases</td>
<td>Leave to appeal given in special cases</td>
<td>Only in special cases</td>
<td>No</td>
</tr>
<tr>
<td>Is official obliged to assist claimants complete documents?</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Not specifically</td>
<td>Not specifically</td>
</tr>
<tr>
<td>Is legal representation permitted?</td>
<td>Only with consent of parties and referee</td>
<td>Only with consent of parties</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Generally only with consent of parties and Court</td>
<td>Yes</td>
</tr>
<tr>
<td>Are hearings in private?</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Not unless Court orders</td>
<td>Not unless Court orders</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Is body bound by rules of evidence?</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Must body apply the law strictly when adjudicating?</td>
<td>Yes</td>
<td>No (in cases under $150)</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Are costs allowable?</td>
<td>No</td>
<td>No</td>
<td>Only if claim vexatious or frivolous</td>
<td>No</td>
<td>No</td>
<td>Only if all parties represented or in special circumstances</td>
<td>Yes</td>
</tr>
<tr>
<td>Can defendant bring a counter-claim?</td>
<td>No - but if claimant seeks relief from payment he can be ordered to pay</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Other matters.</td>
<td>-</td>
<td>-</td>
<td>Express power given to appoint investigator</td>
<td>Express power given to appoint investigator</td>
<td>Express power given to appoint investigator</td>
<td>Express power given to appoint investigator</td>
<td>Express power given to appoint investigator</td>
</tr>
</tbody>
</table>

Note: The table does not contain information about small claims legislation in New South Wales and Victoria. This is because the relevant legislation there does not make special provision for claims by non-consumers: see the Consumer Claims Tribunal Act 1974 (NSW); the Small Claims Tribunals Act 1973 (Vic).
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, though not yet to
an extent which is throwing a strain on the system. 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
by consumers. Persons who have studied these tribunals have noted the marked degree to
which they have tended to become "small debts" tribunals, dominated by trade creditors.
This is largely because business claimants who have frequent recourse to the tribunal become
increasingly familiar with the format and procedure and tend to squeeze out individual
claimants. The tribunal becomes more and more adapted to the ends of business and less to
the ends of private individuals. The present Small Claims Tribunal is well adapted to suit the
needs of consumers. Any enlargement of the jurisdiction may adversely affect its operations.

4.16 It may be the case that in Western Australia traders would not generally avail
themselves of any right of access given them to the Small Claims Tribunal to the exclusion of

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12 See paragraph 2.11 above.
13 See the Senior Referee's 1977 annual report in the Appendix below.
14 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.
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 $50\(^ {16}\) 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 individual\(^ {19}\) 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

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\(^{15}\) 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.\textsuperscript{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 -

\begin{itemize}
  \item[(a)] by limiting the number of claims which a trader could take to the Small Claims Tribunal each year;\textsuperscript{22}
  \item[(b)] by excluding corporate bodies,\textsuperscript{23} or
  \item[(c)] by requiring a trader, as a condition of commencing proceedings in the Tribunal, to declare that the claim is genuinely in dispute.\textsuperscript{24}
\end{itemize}

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 became a mere debt collecting agency. The Commission doubts

\textsuperscript{21} In 1975, 62,561 actions were commenced in the Local Court in Western Australia. In only a proportion of these is any further step taken. The figures given in paragraphs 4.18 and 4.19 are not intended as more than educated guesses, based on limited spot checks.

\textsuperscript{22} This was suggested in connection with a proposal to set up a Small Claims Tribunal in Tennessee: see the article referred to in note 14 above.


\textsuperscript{24} As New Zealand has done: see paragraph 4.6 above.
whether this would in fact be successful, because the making of the required declaration would almost inevitably become a mere formality.  

(b)  A special Small Claims Tribunal confined to traders

4.22 The obvious disadvantage with this proposal is that it involves the creation of a further judicial body outside the court system. Such a step would be expensive, since further referees, registrars and administrative staff would be required. The Commission is not aware of any such tribunal having been set up in any country.

4.23 Jurisdictional difficulties would be created because of the possibility of each party to the dispute suing in different tribunals. A trader may decide to commence proceedings in a "traders" tribunal, but the consumer may at the same time commence proceedings against him in the Small Claims Tribunal over the same contract. It would clearly be inconvenient if each tribunal continued to deal with the case before it. But if consolidation were to be permitted, which tribunal should be chosen as the one to hear both claims? At present the Small Claims Tribunals Act does not give a general power to the referee to order that a consumer pay money, so that the Act would need to be altered in this respect if counterclaims by traders were to be included in that jurisdiction.

(c)  Creating a special division of the Local Court

4.24 This was the method adopted in Queensland. That State was faced with a similar problem of attempting to provide a special forum to which traders and other non-consumers could apply. It wished to make provision for such claims, although not at the expense of possibly damaging the Small Claims Tribunal system.

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25 An additional difficulty would be that the registrar would be required to peruse carefully any declaration and demand supporting evidence if necessary.

26 For example, a plumber may sue for payment for the repairs he had done while his customer may sue him for water damage which he claims was due to faulty repairs. A dispute may have three or more parties. If so, the possibility would arise of one party suing in the Small Claims Tribunal, another in the "Traders' Tribunal" and the third in the Local Court.

27 See paragraph 4.10 above.

28 There is, however, nothing in the legislation which limits the sort of person who can be a claimant: see paragraph 4.11 above.
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" arising out of a breach of contract. 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.

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.
4.29 On the other hand, there is possibly something to be said for limiting the jurisdiction of the special division of the Local Court (should a decision be made to establish it) to a relatively narrow range of claims in the first instance. The situation could be reviewed in the light of experience. Most traders' claims would probably be for non-payment of the purchase price of an article or for non-payment of the sum owing under a contract for services. As such they would come within the definition of "debt" or "liquidated demand" and fall within the division's jurisdiction. Some common types of claim would, however, fall outside. For example, a claim by a firm against a carrier for the loss of an article which the latter had contracted to deliver would fall outside the jurisdiction, unless the contract of carriage had stipulated a specific sum payable upon the loss.  

4.30 The Commission has formed no firm view on the matter, and welcomes comment.  

4.31 When discussing the possibility of extending the jurisdiction of the Small Claims Tribunal to deal with non-consumer claims, attention was drawn to the danger of the Tribunal being overwhelmed by the additional number of traders' claims. It could be argued that the same danger could arise if a special division were created in the Local Court. One way of avoiding this possibly would be to ensure that the court fee payable in respect of such a jurisdiction was at least as much as for a default judgment. Although it would be impracticable to distinguish between claims in this way in the Small Claims Tribunal, there would seem to be no objection if it were used as a device to prevent traders, who would normally use the default judgment procedure, from using the "small debt" procedure.  

4.32 A possible way of dealing with actions for debts or liquidated demands in relation to the proposed special division could be as follows. A person suing in respect of a debt or liquidated demand would commence proceedings in the Local Court in the ordinary way, paying the ordinary court fees that were prescribed. If the defendant filed a notice of defence, the proceedings would be transferred to the special division unless, on the application of either party, the magistrate ordered that the claim be dealt with in the Local Court in the  

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32 Also excluded would be tort claims by private individuals involving damage to property in motor vehicle accidents, which are provided for in New Zealand: see paragraph 4.5 above.  
33 See paragraphs 4.14 to 4.21 above.  
34 The device could not, therefore, be used to stop the Tribunal becoming a "debt collection agency".  
35 The emphasis in any such procedure should be on simplicity and ease of understanding. It might be thought that the procedure outlined in this paragraph is much more complicated than the procedure in the Small Claims Tribunal.
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. 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 for non-consumer claims, rather than extending the jurisdiction of the Small Claims Tribunal.

4.36 However, if a decision were made to set up a special forum to deal with non-consumer claims the enactment of different rules would be feasible. The Commission assumes that the creation of a separate tribunal for non-consumer claims would be undesirable. Accordingly it has confined its discussion in what follows to the only practical alternative to extending the jurisdiction of the Small Claims Tribunal, namely, the creation of a special division of the Local Court.

36 See paragraphs 2.2 to 2.9 above.
37 See paragraph 4.22 above.
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 figure\(^{39}\) 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 between the fee for filing a claim in the Small Claims Tribunal and for commencing proceedings in the special division.

Assistance by clerk

4.39 There should be a further difference if non-consumer claims were dealt with in a special division of the Local Court. The clerk of the Local Court should not be obliged to assist in the preparation of claims by non-consumers, except perhaps in special circumstances.\(^{41}\) If assistance were not so limited, the clerk and his assistants could find themselves involved in drafting a substantial proportion of the many thousands of debt or liquidated demand claims filed in that Court annually. Possibly the best course may be to leave the decision whether to assist, to the discretion of the clerk.

Conciliation

4.40 It would seem undesirable to set up a special forum for non-consumer claims but not to adopt perhaps one of the most significant features of the Small Claims Tribunal procedure, namely the obligation of the referee to attempt conciliation.\(^{42}\) As an incidental feature,

\(^{38}\) See paragraph 1.2 above. Claims for $1,000 or more are excluded.

\(^{39}\) Namely, so that the Tribunal can deal with a substantial proportion of cases where disputes involving consumers are likely to arise. The cost of repairing a motor vehicle can be as high as $1,000, and claims arising out of building disputes can in fact be higher.

\(^{40}\) See paragraph 4.30 above.

\(^{41}\) In the case of the Small Claims Tribunal, the registrar is bound by statute to give assistance if required.

\(^{42}\) See paragraph 2.4 above.
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 costs\(^{43}\) 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) the losing party pays,
(b) both parties pay in equal shares,
(c) the claimant pays, or
(d) the Government pays.

The Commission's provisional view is that, as in the Small Claims Tribunal, expert assistance should be afforded at Government expense. To adopt any of the first three possibilities would significantly increase the cost of the proceedings to the party concerned. To that extent it would negate one of the main purposes of setting up a special forum, namely inexpensive adjudication. If it were decided to provide expert evidence at Government expense, this could be done by making available employees of the Consumer Affairs Bureau or, alternatively, by giving the proposed special division of the Local Court access to a Government Fund, to defray the cost of employing an outside expert.

Should the proposed jurisdiction be exercisable by all magistrates?

4.45 The Commission does not consider that the proposed jurisdiction should be confined to designated magistrates. One of the advantages of creating a special division of the Local Court is that it could make use of the facilities of Local Court offices and staff throughout the State. Not to empower all magistrates to exercise the jurisdiction could prevent people outside the metropolitan area from having ready access to the forum.
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?
APPENDIX

ANNUAL REPORT OF THE REFEREE, SMALL CLAIMS TRIBUNAL, FOR THE YEAR ENDED 30th JUNE, 1977

During the year, ending June 30, 1977, nine hundred and ten (910) claims were lodged with the Tribunal, there were eleven hundred and ninety five (1195) sittings and nine hundred and thirty one (931) claims were determined.

During the year, ending June 30, 1976, seven hundred and seventy five (775) claims were lodged, there were eight hundred and twenty four (824) sittings and six hundred and seventy eight (678) claims were determined.

There were, therefore, one hundred and thirty five (135) more claims in 1977, three hundred and seventy one (371) more sittings and there were two hundred and fifty three (253) more claims determined, than in the previous year.

Of the cases determined, two hundred and eighty two (282) were settled or roughly thirty per cent. This is satisfactory and as in 1976, shows that the Referees are carrying out the intentions of the Legislature, to endeavour to settle cases, where possible.

There was no jurisdiction in seventeen (17) cases and seventy five (75) claims were withdrawn. One hundred and seventy four (174) were either dismissed or orders totally made in favour of the respondent, one hundred and eighty nine (189) were totally in favour of the claimant, whilst one hundred and ninety four (194) were partially in favour of each.

The settlement figures were actually higher than shown above, because most of the claims withdrawn, were due to settlements being effected and not due to abandonment of the claims themselves.

As there were nine hundred and ten (910) claims during the year, this means that eighteen hundred and twenty (1820) litigants had their cases determined for a cost of $1 820.00. There were really more litigants than this because in some cases, more than two parties were
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 for inspections. This corresponds with the position in the Eastern States and in New South Wales in 1975-1976, thirty per cent of initial hearings resulted in adjournments.

It has to be remembered that parties are not legally represented, some are simple folk, do not understand how to present cases, have no expert evidence available in technical cases and adjournments are necessary to call experts in an attempt to do justice. In this respect, I am most grateful to the Commissioner of Consumer Affairs, Mr. Fletcher, for making expert witnesses available to me. I have received extraordinary assistance in claims involving buildings and motor vehicles from Messrs. Foster, Gorey, Powdrill and Cowan. Without these gentlemen, I would not have been able to determine many cases.

They are absolutely honest and independent in their views, whether their evidence assists a claimant or a respondent.

Annexed hereto as Annexure “B” are particulars showing the monthly number of claims lodged, the total for the year and showing how they were determined.

Annexure “C” sets out the various categories of cases determined.
As will be seen, the pattern of claims lodged was similar to the previous year and every form of activity which arises out of every day contracts, was dealt with by the Tribunal. Individually, motor vehicle cases, of which there were 206, headed the list, closely followed by 192 tenancy bond cases. The highest category were building and kindred claims which contained miscellaneous items including plumbing, painting, wall papering, concreting etc. Altogether, there were 249 of these.

Interminable disputes arise out of concrete and brick work in homes and there were 43 of these during the year.

There were 34 swimming pool cases, twelve more than in the previous year. The erection of pools in Western Australia has by no means reached saturation point and it is astounding, the number of claims, in which claimants with very meagre means are involved.

To show the variation in the type of cases handled, there was one in which a claimant was not satisfied with the standard of proposed spouses supplied by a matrimonial agency. There was another in which the claimant was not satisfied with the type of entertainment provided by a night club and there was another, in which it was alleged, that, the respondent's staff had either eaten or done away with portion of a wedding cake at a wedding reception.

**Tenancy Bonds**

In 1976, 104 tenancy bond cases were decided and this represented about one sixth of the total dealt with in the year. In 1977, 192 were determined, an increase of 88 over 1976 and this represents about one fifth of the total number of cases decided.

These cases are the most difficult to decide, as I have previously pointed out, due to the very conflicting evidence. I feel, however, that these alone, justify the existence of a Small Claims Tribunal.

The figures show that honours have been reasonably even between landlord and tenant and these appear in Annexure “D”.
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.
I must say, as in 1976, the least trouble in tenancy bond cases is where the agent is a member of the Real Estate Institute. Interest is always paid on bond money where one of these gentlemen is the agent, whereas in other cases, only a fraction of landlords ever credit the tenant with interest. My thanks are again due to the Institute's management for its willing co-operation with the Tribunal.

There are some cases which come before the Tribunal in which we suspect, that, monies paid by way of bond are put by landlords into their own accounts and interest obtained thereon and not paid to the tenants.

In one case, it was admitted by a landlord that he had received interest on the bond money and had not credited the tenant with it.

In another, it was admitted by the landlord that he paid the bond money into his Building Society Account and this helped him to pay off his mortgage on the subject premises.

In other cases, the landlord is hesitant as to what he did with the money and just the other day, one said he could not remember.

In these cases, it is a fair assumption that, it was never intended to return the bond to the claimants. As indicated by the Real Estate Institute, many of these practices are tantamount to stealing. It is no wonder that in such cases, there is difficulty in extracting a penny of the bond money from the landlord.

Another practice is for a dishonest landlord to exaggerate and multiply alleged damage to the demised premises three, four and five fold above the secured sum, hoping that the Referee will then allow him to retain the whole of the bond money. This will not work and an inspection of the premises, generally gives the lie to it.

There are other landlords who would not even know what reasonable wear and tear are. They expect to keep the premises in exactly the same condition as the day they were built but at the tenant's expense.
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 bring the matters within the jurisdiction claimants have had to reduce the amount of the claims. The claimants have done this rather than go to the expense of litigating in the courts.

The proposed increase in jurisdiction will obviate much of this. Experience shows that, these days, repairs to motor vehicles very quickly cost more than $500.00.
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 agreement, pays a deposit and then goes off to try and get a better deal elsewhere. Having obtained a better deal, he then comes back to the original dealer and asks for his deposit to be returned. In one such case, a claimant admitted this, agreed he had paid a holding deposit, that the vehicle was held for him accordingly and he then became very angry when the dealer refused to return the deposit.

2. **Exchange Engines and Gear Boxes**

These are frequently bought from dealers, particularly wreckers and it is alleged that warranties have been given that the engines and gear boxes have recently been reconditioned. It turns out that the purchasers have been sold a heap of junk. The defence is that no warranty was given, that “The engine was running alright when I ran it etc,” or that the engine had been overhauled as distinct from having been reconditioned.

If any such warranty has been given, the purchaser should insist on it being put in writing.

Great care should be taken in buying exchange or second hand engines from wreckers. When the disputes come before the Tribunal, the defence is “We sold them as is”. Nevertheless, if true, high prices are charged.
3. **R.A.C. Inspections**

Repeatedly purchasers are buying motor vehicles which have done high mileages, pay high prices for them in cash or sign up for terms and the vehicles are then taken to the R.A.C. for inspection.

The R.A.C. reports frequently indicate that many hundreds of dollars have to be spent in order to make the vehicles roadworthy.

The purchasers then try to get out of the deals.

The time to have an R.A.C. check is before the vehicle is purchased.

No reasonable dealer will object to this. If he does, then the vehicle should not be purchased.

4. **Warranty and Warranty Period**

Purchasers should not wait till after the warranty period runs out.

As soon as a fault is discovered, they should take it back. If the dealer refuses to do anything about it, a complaint should be made to the Bureau of Consumer Affairs, forthwith.

5. **Purchase of Vehicles Under $500.00**

These vehicles are not warrantable and great care should be exercised in their purchase. These are often taken by purchasers to the R.A.C. and naturally enough, the report is very adverse.

Many of these purchasers, however, expect work to be done on the vehicle, which if carried out, would make the vehicle worth three or four times the price paid for it.
6. **Roadworthiness**

There is often a big difference between work that is required to make a vehicle roadworthy 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 or conforming to the Act is often very much lower than attending to the majority or items in the R.A.C. Report. Many claims are also based on new parts, when serviceable second hand parts will suffice.

Frequently, a claimant who pays $750.00 to $1000.00 for a vehicle with 90,000 to 100,000 miles on the clock, wants work to be done which will virtually give him a new car.

**Building and Kindred Work**

There were 249 cases of this sort determined during the year, or over twenty five per cent of the total work load. This has necessitated very many inspections by building experts and myself, as Referee. This is, of course, most time consuming but is well worth while.

**Shady Companies**

One alarming feature is the existence of "shady" companies. They engage in contracts, receive their money, carry out required work poorly or not at all, will not complete or carry out rectification work and then go into liquidation or cease to operate without honouring any of their obligations. Husband and wife are often the directors and rectification work could quite easily be carried out.

The next thing is a new company is floated with the same directors, carrying out the same work and operating in the same old manner.
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 company, of which he was Managing Director, registered at the same address and doing the same sort of work. The trader made out the contract in the Company's name, he, himself, did the work and unsatisfactorily and when requested to rectify it, merely said it was the Company's responsibility not his own and the Company was in liquidation. He received all the monies, however, and the poor consumer was left lamenting.

Once again, and I cannot stress the matter too much, consumers should be very careful with so called tradesmen who advertise and merely give their telephone numbers. The answer, once again, is to deal only with reputable tradesmen or to ensure that advertisers are what they purport to be. There is no better way of ensuring this than by checking their credentials.

**General**

Little trouble is experienced with reputable firms and as the Minister has said on many occasions in the past, the honest trader or honest landlord has nothing to fear from the Tribunal.

Another very important thing is, that, the cheapest job very often turns out to be the dearest because it is not done properly.

Sometimes, it is difficult to get real tradesmen to do small jobs and consumers are forced to get self advertised experts, who turn out to be handy men or odd job men, but who charge as much as the experts.

**Acknowledgments**

The Hon. The Minister has taken a very lively interest in the Tribunal and has been most considerate and helpful throughout the year and this is much appreciated by Mr. Burton, myself and the staff.
This consideration and help have been passed right down. The Under Secretary and his staff have been more than co-operative and without this, the Tribunal would not have had the successful year, which we believe we have had.

I would like to give particular thanks to Mr. Bob Barry and his officers of the Factories and Shops Branch for the great help received in serving claims and other documents where this has been necessary. Their co-operation is also greatly appreciated.

I desire to thank Mr. Burton, who has been helping me for two days a week for some considerable time. He has done an excellent job in a very cheerful and helpful way. Unfortunately, his services will no longer be available after August 18. I would be very remiss if I did not take this opportunity to thank him.

Lastly, I desire to thank the two hard working and ever loyal members of my staff, Mrs. Hegarty and Mr. Bastow. There have been occasions, with many hot headed litigants, in sometimes, a very electrical atmosphere, when their patience must have been sorely tried. At all times their sangfroid has amazed me.

There is little doubt that the successful operation of a body such as the Tribunal, is very much dependent on the Registrar. I am most grateful for Mr. Bastow's help, good sense and ever wise counsel.
ANNEXURE “A”
CLAIMS RECEIVED PER MONTH
1-7-76 to 30-6-77
## ANNEXURE “B”
SMALL CLAIMS TRIBUNAL 1/7/76 to 30/6/77

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## ANNEXURE “B”
### PARTICULARS AS TO THE VARIETY OF CASES DETERMINED

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ANNEXURE “D”

TENANCY BOND CASES 1/7/76 to 30/6/77

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