LEGISLATIVE COMMENTS

THE VICTORIAN SMALL CLAIMS TRIBUNAL

The *Small Claims Tribunals Act* 1973 (Vic.)[1] provides for the setting up of special tribunals for the prosecution of small claims in Victoria. The first, and as yet the only, tribunal began to operate at 110 Exhibition Street, Melbourne on 4th February 1974.[2] It is one of several new Australian tribunals or courts[3] designed to help the consumer bring a simple action against a trader. The purpose of the Tribunal is to provide an inexpensive conciliation service to consumers, and, should conciliation fail, a forum which a consumer need not be afraid of using. For the major deterrents[4] to litigation—high costs, complicated procedure and ritualistic legalism—have been eliminated from the Tribunal.

Unlike the new Small Claims Court of the A.C.T., the Victorian Small Claims Tribunal does not have all the attributes of a court. It does not, for instance, possess enforcement machinery. (An award is in fact enforceable in the Magistrates' Court.[5]) Moreover, the referee is specifically instructed to bend the rules of evidence.[6] Although the testimony of the parties must be given on oath, there is no examination and cross-examination. The referee is expected to conduct the proceedings in an inquisitorial manner. Expert witnesses need not be present, or swear affidavits. Documents do not have to be "discovered". The referee may attend the site, and, in practice, does so more often than is usual in traditional courts. On the other hand, the orders that the Tribunal may make are more circumscribed than in the traditional courts.[7]

But neither is it an arbitration tribunal, as, for example, the experimental

1 Act No. 8486, as amended by *Small Claims Tribunals (Amendment) Act* 1974 (Act No. 8633).

2 As from July 1975, the tribunal will move to premises at 35 Spring Street, Melbourne, where there will be two hearing rooms.

3 Others have been established in Brisbane, Perth, Hobart, Adelaide and Sydney.

4 See "*Justice Out of Reach: A Consumer Council Study*" (H.M.S.O. 1970) for an analysis of the factors which deter small claimants from using English county courts. A comparable and excellent Australian critique is contained in an unpublished thesis of an Honours student of the Faculty of Law, Monash University: W. Hazlett, *The Recovery of Small Debts* (1973).

5 *Small Claims Tribunals Act* 1973, s. 20(3).

6 Ibid. s. 31(3).

7 Ibid. s. 18(2), as amended. Originally, the only types of order that might be made were: (a) order requiring payment of money; (b) order requiring respondent to remedy a defect in goods or services; (c) order dismissing the claim. Now, the Tribunal has been given jurisdiction in disputes as to an amount of payment sought from a consumer by a trader, provided that the consumer lodges the equivalent of the amount claimed with the Registrar: *Small Claims Tribunals (Amendment) Act* 1974, s. 5(1). But the Tribunal has no jurisdiction to make an order returning goods wrongfully retained.

Small Claims Scheme at Manchester, England.[8] For in Victoria, the consent of the respondent is not a prerequisite to jurisdiction. Provided the respondent comes within the statutory definition of "trader", he is compelled to answer a claim. The jurisdiction of the Tribunal is not dependent on agreement of the parties.

Limitations on Jurisdiction

The jurisdiction of the Victorian Small Claims Tribunal is concurrent with that of traditional courts, to this extent, that a claimant has the choice of suing in the traditional court or in the Tribunal. But when once a claim is referred to a Tribunal the issue is not justiciable in another court.[9] Conversely, once a dispute has been brought in a court, neither party can apply to have it transferred to the Tribunal.[10] This is no doubt a sensible provision, for it would be unfortunate to have the Tribunal competing for business! But it means that a consumer who buys unsatisfactory goods on credit, and is *sued* for failing to keep up payments, is unable to pursue his defence in the Tribunal. The Tribunal is thus serving actively, not passively, discontented consumers. The passive ones, however, are, of course, the majority.

The jurisdiction of Small Claims Tribunals is more limited in a number of ways than that of traditional civil courts.

First, a claim must not be for more than $500.[11] But a person with a claim for more than that sum may use the Tribunal if he is prepared to forfeit the balance of his claim above $500. This figure of $500 is quite arbitrary, and an interesting contrast with the A.C.T.'s conception of a "small claim"—$1,000.[12] But, happily, there is no claim so small that the Victorian Tribunal will refuse to handle it. It would have been socially most undesirable to adopt the policy of the Westminster Small Claims Court in England, which refuses to adjudicate on claims below £10, on the apparent ground that the general public should be educated into realizing that some claims are too small to be worth pursuing.[13]

Only a "consumer" may bring a claim. "Consumer" is severely defined in the Act.[14] It excludes corporations and, in most circumstances, businesses or firms. It includes hirers as well as buyers. It probably includes persons acting jointly, such as a husband and wife who furnish their house out of their joint earnings. The purpose of this limitation is to prevent the court from being used as a debt collecting agency.

8 This is fully described in a report by the author entitled: "*Small Claims Tribunals: A Challenge to the County Court*" (Institute of Judicial Administration, University of Birmingham, November 1973). See also Turner, "*Small Claims in England*", (1974) 48 A.L.J. 345.

9 *Small Claims Tribunals Act* 1973, s. 15.

10 Cf. ibid. s. 15(1)(a).

11 Ibid. s. 2(1). There has been a suggestion from the Minister for Consumer Affairs that this be increased to $700, but this would in fact exceed the jurisdiction of the Magistrates' Courts. (Cf. "The Age", 5.5.'75.)

12 (A.C.T.). The figure is $450 in Queensland!

13 This experimental court is also described both in the Report and in the article referred to in note 8, *supra*.

14 *Small Claims Tribunals Act*, 1973, s. 2(1).

A third limitation is that the claim must arise out of a contract for the supply of goods or the provision of services.[15] Whether to limit the advantages of small claims tribunals to parties to a contract is a thorny question. The social need for a speedy, informal hearing may be just as great in a road accident case, or in a landlord/tenant dispute. There may, moreover, be situations when it will be very difficult to categorize a particular dispute as sounding in contract, and whether it is for the supply of goods or the provision of services.

Already, a case has been decided in the Victorian Supreme Court[16] which has come down in favour of a narrow construction of the words, "provision of services". In that case, the claimant claimed for damage done to his car while it was parked at a Melbourne car park, conducted by the respondent. It was argued by the respondent that the Small Claims Tribunal had no jurisdiction, in that conduct of a car park did not constitute the provision of services. Murray J. upheld the respondent's argument, on the ground that the words, "rendering of services to persons", mean doing work of some kind for those persons. In this case, the respondent undertook no such service. He merely undertook obligations under a contract of bailment.

A further restriction is that the respondent must be a "trader", which is in fact widely defined.[17] But this will prevent an individual from claiming in respect of used goods bought from a private source.

There are also geographical restrictions. But these are rather nebulously set out in the Act. It seems that any consumer may file a complaint in the Registry at Exhibition Street, Melbourne, or at any Magistrates' Court Office outside that area.[18] There seems to be nothing to prevent a New South Wales resident from availing himself of the Tribunal. Nor does there seem to be anything to require a consumer to file a complaint in his *nearest* Magistrates' Court. Is it possible that a Mildura consumer with a complaint against a Mildura trader might come up to Melbourne for the Football Grand Finals and take advantage of his visit to file a claim which he knows his opponent will never venture to Melbourne to defend? The only provisions that throw any light on the question of venue are, first, a blanket section that provides that "A Small Claims Tribunal may be constituted at any place in the State"[19] and secondly, the mandate that the "convenience of the claimant" shall be had regard to in arranging the time and place of the hearing.[20] It is by no means clear, however, who shall decide the question of *forum conveniens*. It is, of course, quite proper that country folk should not be denied the advantages of the Tribunal. At present, the referee makes special visits to country centres

15 Ibid. s. 2(1).
16 *The Queen* v. *Walsh and Taylor*, 19.3.'75, unreported. It is understood that an appeal has been lodged.
17 Ibid. s. 2(1). "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."
18 Ibid. s. 22(1).
19 Ibid. s. 10.
20 Ibid. s. 23(b).

to adjudicate on a dispute there—even though it may be the only one on the list. Since the only cost recoverable by the State is the $2 fee on filing the claim, this is surely Rolls Royce justice for country consumers.

Two time limitations are imposed. The first, that the claim must have arisen not more than two years previously,[21] is obviously sensible. It means, presumably, not necessarily that the contract must have been made or completed two years before, but that the breach (or, *quaere*, the discovery of the breach) must have occurred within the two preceding years. The other time limitation is that the Court will not take jurisdiction where the claim arises from a contract made before the commencement of the Act, i.e. before 4th February 1974.[22] This provision, which has no parallel in either the Queensland or the A.C.T. statutes, is hard to justify.

Referee's Function

The personnel of the Court presently consists of two full-time referees, a registrar and clerical staff.

The referee is given the "primary function" of settling disputes. Only if this is impossible is he to make an order.[23] This on its face is a little strange. It would seem that the referee is obliged to press the parties to a settlement even when he realizes that the law is entirely on one party's side. However, it appears that the possibility of getting parties to "shake hands" is rather remote at this stage.[24]

Hearings are held in private (a provision which prevented the writer from observing a hearing). Unlike A.C.T., the Victorian Act provides that practising lawyers shall not normally be permitted to represent parties.[25] Other agents also are not to represent parties unless the Tribunal approves, and it is "a matter of necessity". The agent, moreover, must have a "personal knowledge" of the issue. In theory, the embargo on solicitors and barristers may be lifted if all parties agree and the referee is satisfied that none of them will be unfairly disadvantaged. In practice, since the Act came into operation, there has been no case[26] in which a lawyer has appeared as advocate. While this writer acknowledges that lawyers add to the cost of small claims, he is suspicious of tribunals in which lawyers have no right of audience—especially where the hearings are in private. The apparent acquiescence of the legal profession in what is really a striking deviation from its customary attitudes to secret tribunals is remarkable. This feature of the tribunal is the most controversial, in this writer's view.[27]

Anyone may be appointed as referee who is or has been or is qualified

[21] Ibid. s. 2(1).
[22] Ibid. s. 2(1).
[23] Ibid. s. 9(1) and (2).
[24] This is the view of the referee expressed in conversation on 12.9.1974.
[25] *Small Claims Tribunals Act* 1973, s. 30(3).
[26] As of 20th May 1975. It is, however, understood that a "test case" is imminent, in which a New South Wales firm will ask to be represented by a lawyer.
[27] This argument is fully canvassed in the writer's Report on small claims in England. See note 8, *supra*. It is interesting that this aspect of Tribunal aroused the criticism of Murray J. in *The Queen* v. *Walsh and Taylor* (note 16, *supra*).

to be a stipendiary magistrate or is or has been a solicitor or barrister, and is under the age of 72.[28] Considering the importance of the referee's function, and especially the fact that he is exercising "closed justice", the extreme width of this provision is surprising. Surely, at the very least the referee should have practised law! It is, in fact, a criticism of certain kindred tribunals elsewhere that referees or arbitrators are chosen who have no experience either in consumer or contract law, or in the art of judging.[29] It is this writer's strong view that this type of tribunal stands or falls by its personnel—especially as there is no right of appeal and review by means of certiorari or other prerogative writ is limited.[30] On the other hand, some of the strange suggestions of certain advocates of small claims tribunals, such as that judges should be social workers, under 33 and equipped with "walkie-talkie" sets, have rightly found no favour.

As yet, only two referees have been appointed. The first is a retired public servant and qualified solicitor who has spent much of his career as a clerk of courts. The second, who at the moment of writing has not yet taken up office, is a thirty year old solicitor who formerly practised as a partner in a Melbourne firm.

The Registrar

The function of the registrar is all-important, and once again it is vital to appoint the right person. For, especially in the early stages of the development of the Tribunal, he has much discretion and it falls on him to "set the tone" for the future. He is first and foremost the liaison between the tribunal and the public. It is therefore probably wisest that his functions are not comprehensively defined. He certainly has the duty of seeing that a claim is served on the respondent trader and on arranging the time of hearings. He is, very significantly, (for this is certainly not a duty of registrars or masters of traditional courts or their staffs) given an express duty to give assistance to a claimant who seeks it in completing the claim form.[31] What about those claimants who do not actually *seek* help? Should he volunteer it—if so, in all cases, or only some cases? Is there a distinction between helping a man to complete a form and advising him on the law appropriate to the claim? How can you *phrase* a complaint if you do not *frame* it?

These are questions unsolved by the legislation, and very much in the discretion of the registrar. Fortunately, it appears that the present incumbent, a lively and humane man in his early thirties, is taking a wide view of his functions.

The Future

The Small Claims Tribunal in Melbourne is being quite widely used and undoubtedly fulfils a social need for speedy, cheap justice.

[28] *Small Claims Tribunals Act* 1973, s. 6.
[29] See, e.g., the writer's account of the Manchester Arbitration Scheme for Small Claims in his Report (Note 8, *supra*), para. 369.
[30] *Small Claims Tribunals Act* 1973, s. 17.
[31] Ibid. s. 22(b).

There will soon be a need further to increase the number of referees, and possibly to set up tribunals in country areas. Small Claims Tribunals are still very experimental in this country and it would be useful to review the Act after, say, two years. A careful comparison should be made with the other similar tribunals now set up in Australia and overseas. The areas which, in this writer's view, have not been fully or satisfactorily thought out are:

(a) Legal representation.
(b) The definition of "small claim".
(c) The restriction of tribunals to consumer/contract cases.
(d) The question of privacy of hearings.
(e) The qualifications of referees.
(f) The connexion between the Small Claims Tribunal and other courts. (Should jurisdiction be concurrent? If not, in which circumstances should the Small Claims Tribunal have exclusive jurisdiction?)
(g) The types of order that the Tribunal can make.
(h) Questions of "Conflict of law" (especially jurisdictional).

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FAIR CREDIT REPORTS ACT 1975 (S.A.)

On 20th March 1975, the *Fair Credit Reports Act* (South Australia) was enacted. The original Bill, in a slightly differing form, had been on the books since 1st October 1974. Its stated aim is "to confer on consumers certain rights in relation to accumulated information that might be used to their detriment; and for other purposes".

In reality the legislation has two aims:

(i) to set certain standards with which reporting agencies would have to comply when collecting and transmitting information.
(ii) to give to consumers certain access and correctional facilities, presumably to secure some control by the consumer that what is collected is at least accurate.

The legislation comes to grips with neither aim. Hamstrung by a rather unkind reception by the Legislative Council, Mr L. J. King, the South Australian Attorney-General, finally remarked that the legislation was better than nothing at all in certain respects. The same comment, it is submitted, is probably true as a general statement.

The first aim is clearly designed to upset the more "infamous" and "pernicious" aspects of agency reporting. It relates directly with the privacy aspect of credit reporting—an aspect that had already been foreshadowed to some extent by the tabling of the *Privacy Bill* in 1974.

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