RTA Industry Development Forum

9.30 am, 17 September 2004

presentation by

His Honour, Judge Irwin, Chief Magistrate of Queensland

In this presentation I will look at some issues which are often raised by those who are appearing in the Small Claims Tribunal, particularly those who appear frequently in the tribunal and who are likely to be members of the groups represented at the Forum.

I will do this in the context of my role as Chief Magistrate and the principle of judicial independence so as to explain the scope of my authority when issues are raised with me about the conduct and results of Small Claims Tribunal proceedings.

I will also look to the future and provide some idea of what can be expected in Brisbane with the move to the new building at 363 George Street.

THE CHIEF MAGISTRATE'S ROLE AND THE NATURE OF JUDICIAL INDEPENDENCE

In 1991, when the *Magistrates Act* was passed, the intention of the legislation was to change the Magistrates Court from an arm of the public service to a fully independent part of the judicial system. As a result magistrates emerged from the public service to become independent judicial officers. They were no longer graded, but were all given equal standing with the Chief Magistrate simply the first among equals.

The make up of the magistracy also commenced to change. In the past magistrates had come up through the ranks of the public service. Now

magistrates are also appointed from the private legal profession. Of the 80 magistrates who will be appointed as at 11 October 2004, 40 will have been external appointments. With some retirements expected it is likely that the scales will be tipped in the near future. Because there is no legal representation permitted in the Small Claims Tribunal these new appointments are unlikely to have previous experience of the tribunal and the legislation that it frequently applies.

The long title of the *Magistrates Act 1991* is "An Act relating to the office of magistrates, the judicial independence of the magistracy, and for related purposes". The principle of judicial independence includes not only independence of the judiciary from the executive, but also the principle that judges and magistrates are independent of one another. This is often referred to as internal independence.

In 2003, Mr Justice McKenzie of the Supreme Court[1] said this about judicial independence:

> *That is one of the cornerstones of the free society and legislative incursion upon it could only be achieved by the clearest words.*

In the High Court Decision of *Re: Colina; ex parte Torney* (1999) it was said:

> *The Chief Justice of a court has no capacity to direct, or even influence, judges of the court in the discharge of their adjudicative powers and responsibilities.*

Those words apply equally to magistrates, so that a Chief Magistrate's function for ensuring the orderly and expeditious discharge of the business of the court does not extend to directing or influencing or even seeking to direct or influence magistrates as to how they will decide cases that come before them.

In that 2003 decision, Mr Justice McKenzie, found it was incompatible with the principle of judicial independence to require a judicial officer to discuss issues

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[1] *Cornack v Fingleton* [2003] 1 Qd R 667

concerning the way in which the officer conducted court hearings or to compel a judicial officer to modify how that officer conducted the hearings by threat of sanction.

That case was decided when the Chief Magistrate had a power of reprimand. Such power is more consistent with managing the public sector department than organising the court. Last year the Chief Magistrate's power to discipline magistrates by way of reprimand was removed by the *Magistrates Amendment Act 2003*. The Attorney-General said at the time:

> *Such powers are inconsistent with judicial independence and the principle that the head of a jurisdiction is to be regarded as the 'first among equals'.*

It is important to remember the true role of the Chief Magistrate as being the first among equals when you or those whom you represent complain to me about proceedings before the tribunal.

I frequently have to deal with correspondence from people who are disappointed with decisions made by the court, just as they are disappointed by decisions that they lose in any court. However, I do not have authority to overturn a decision based on such complaints, nor can I review a decision of a magistrate. The only avenue open to dissatisfied litigants is to seek an appeal, or in small claims matters, to apply for a review based upon the grounds of either lack of jurisdiction or denial of natural justice.

BROAD JURISDICTION OF MAGISTRATES COURT

Queensland is currently experiencing a population growth far in advance of anywhere else in Australia. According to budget papers, Queensland's population growth was 2.3% or 86,000 people during 2003. About 80% of that growth was in the south east corner. With this population growth, some of our courts are already experiencing significant pressures on their lists, especially in areas serviced by the courts at Southport, Inala, Beenleigh, the

Sunshine Coast and Hervey Bay. Cairns is one area outside the south east corner that has also experienced a population growth with the associated pressures on court lists.

The Magistrates Court is the most public face of Queensland's judicial system. It is the court that the greatest majority of people who come before the courts in Queensland will have contact. Magistrates deal with a great volume of matters every day. They can have hundreds of matters to deal with in the course of a busy list. They deal with a great variety of legal issues from the most basic to the most complex.

To appreciate the extent and the diversity of the jurisdiction of the Magistrates Court, it is only necessary to go to last year's Annual Report. One of the Appendices there sets out some, but not all, of the state legislation that magistrates work with. If you count them up, there are about 160 there. It is a growing list and there is a growing pressure upon magistrates to keep up to date.

According to a Commonwealth Report that was issued this year on Government service provision, Queensland has the lowest number of judicial officers per capita and the largest number of matters going before courts at all levels. In fact, the filings before the Queensland Magistrates Court are second only after the Magistrates Court in New South Wales.

Given that Queensland's population is increasing and that the number of pieces of legislation with which magistrates deal are also increasing, it will be a challenge for the Magistrates Court to maintain its effectiveness in finalising matters.

Being a large and decentralised state, magistrates sit in 30 different centres and circuit to about 74 other centres around Queensland. So there are over 100 courts that magistrates attend on a regular basis, including courts in indigenous communities in the Cape and the Gulf.

In many places, like Mt Isa, Charleville and Emerald, there is a single magistrate only who constitutes the court. Many of these magistrates must travel large distances to cover their circuit courts. The Emerald Magistrate,

for example, would spend nearly half of his time on the road. His itinerary reads something like that old song “I’ve been everywhere man” as he travels to Alpha, Barcaldine, Blackall, Blackwater, Clermont, Longreach, Moranbah, Springsure and Winton.

Every magistrate in Queensland is a Small Claims Referee. It is only in Brisbane that we have designated one magistrate, Mr Bill Randall, to have that as his exclusive function. Magistrates, particularly in single-magistrate centres and especially those outside the south east corner, are on-call 24 hours a day, 7 days a week. For most magistrates, small claims matters, although important, represent only a small component of their broad workload. Residential tenancy matters are again only a portion of small claims matters.

In the 2003-2004 financial year, there were over 344,000 criminal charges dealt with in the Magistrates Court with just over 26,000 of these being dealt with in the Childrens Court. There were nearly 59,500 civil claims. Small claims represented just fewer than 19,000 of these, with over 7,000 of these being dealt with in Brisbane. Other centres that deal with a large number of small claims matters include Southport with over 2,000, and then Cleveland, Townsville, Cairns, Ipswich, Caboolture, and Maroochydore, with between 1,000 and about 600 small claims matters in the financial year. Mackay, Toowoomba, and Nambour had between 360 and 405 matters. The remaining 69 centres where statistics were recorded had less than 230 small claim matters during the year, that is, less than one for each working day. These figures will be available in our next Annual Report, which will also demonstrate a 7.1% increase in small claims matters over the previous financial year.

Although small claims matters represent a relatively small proportion of most magistrates’ daily workload, they are each expected to have a working knowledge of the legislation relevant to this jurisdiction. Considering that the Small Claims Tribunal is a “lawyer free zone”, the increasing number of magistrates who, like myself, are appointed from the private legal profession, will not have experience of the jurisdiction prior to appointment. Further, the exposure of a magistrate to the relevant legislation may vary with the extent of

tribunal work at the particular places where the magistrate has been previously appointed to sit. Accordingly there may be people who deal with such legislation daily who have a more comprehensive knowledge of the detail of the legislation than a particular magistrate.

So it is possible that there will be people appearing before a magistrate with greater practical experience in the small claims jurisdiction than the magistrate. It is to everyone's advantage if these people provide appropriate and respectful assistance to the magistrate in dealing with these matters.

Going back to our figure of 19,000 small claims matters being dealt with in the Magistrates Court over the last financial year, this number would be made up of the different claims before the Tribunal. Unfortunately I do not have a breakdown of those figures, but it would include:

- disputes between consumers and traders,
- disputes between traders and traders;
- claims for payment of money for damages to property caused by, or arising out of, the use of a motor vehicle;
- disputes under the *Dividing Fences Act 1953*;
- tenancy disputes under the *Residential Tenancies Act 1994*;
- tenancy disputes under the *Residential Services (Accommodation) Act 2002*; and
- warranty claims under the *Property Agents and Motor Dealers Act 2000*.

So it can be seen that residential tenancy disputes would only represent a portion of those 19,000 claims.

There are a very large number of rental properties in Queensland. Using the number of rental bonds held by the RTA as at 30 June 2004 as a guide, there are well over 330,000 rental properties throughout the state. The increase from the same time in 2003 is over 17,000, so it is obviously a growth area.

There were just over 14,000 Dispute Resolution Requests made through the RTA in the last financial year. This shows that the number of disputes arise in only a small proportion of property rentals, less than five per cent.

Most of these disputes are resolved through dispute resolution processes. So the numbers of matters reaching the Small Claims Tribunal represent only a small percentage of these. These figures may only provide an indication, but I believe they present a realistic picture.

In dealing with these matters the Small Claims Tribunal operates in a different matter in comparison to most other Magistrates Court jurisdictions.

Unlike other jurisdictions, the Small Claims Tribunal is not bound by formalities. Relevantly, section 33(3) of the *Small Claims Tribunal Act 1973* provides:

> *A 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 legislature set up the Small Claims Tribunal to provide a speedier cheaper and less formal alternative for people claiming relatively small amounts of money than the Magistrates Court which is more formal and often requires representation by qualified, and sometimes expensive, legal practitioners. In order to meet these goals, matters need to be dealt with expeditiously to prevent any backlog.

This is recognised by the Supreme Court, as emphasised by a decision in 2003, where the Chief Justice, Justice de Jersey said:

> *[T]he proceedings before this sort of Tribunal are conducted quite differently from proceedings before a Court of law. They are attended by a degree of informality both as to the taking of evidence and the ordering of procedure which is considered appropriate in order to bring about the determination, once and for all, of smaller claims with a view to limiting cost and delay.*

> *One sees that reflected in various provisions of the Small Claims Tribunal Act*[2]

I have already referred to the limited avenues of review open to dissatisfied parties. Section 18 of the Act provides that a Referee's decision is final and binding on all parties. Section 19 operates to prevent any challenge to such decisions except in cases where there is a lack of jurisdiction or there has been a denial of natural justice. This might be seen as a bit harsh from the view of a disappointed litigant. In the same case, the Chief Justice took the opportunity to comment on these provisions by saying:

> *One of the reasons why the Small Claims Tribunal mechanism has been established as it has is to avoid further speculation or examination or analysis as to the precise nature of the proceedings before that Tribunal on appeal or on any sort of review such as has been attempted here this morning. This proceeding here this morning is a good illustration of how further inconvenience, delay and expense may be incurred through an attempt minutely to examine a proceeding which is intended by the legislation to be conducted in a broad brush way resulting in an order which is ultimately considered to be generally fair to the parties.*

Needless to say, the application on that occasion was unsuccessful. But the case does go to show that the Higher Courts have accepted that the legislature intended the review processes for small claims matters to be a deterrent against delaying a resolution of the issue involved in the proceedings.

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[2] *Collier v Cynthia Dyke Realty t/a Raine & Horne Bay Islands Real Estate & Ors* (Supreme Court of Queensland, de Jersey CJ, 8 September 2003).

DIFFERENCES IN PROCEDURES AND ORDERS

One of the common complaints that I get is that there are inconsistencies in procedures and orders of Magistrates Courts across the state.

Earlier I painted a picture about the number of magistrates, the number of courts visited by them, and the breadth of their jurisdiction. This may go some way to explaining the differences in processes followed by magistrates in the Small Claims Tribunal and the orders that they give.

However, some of the issues that are raised relate to the procedures adopted by different registries around the state. One thing that I must make clear is that I have no authority over registry staff and cannot issue directions about registry procedures. Supervision of counter staff is not the jurisdiction of the Chief Magistrate or any other magistrate. This responsibility rests with the local Registrar who is responsible to the Court Administrator.

As shown earlier, the number of small claims matters lodged in each registry varies significantly across the state. Obviously, staff in certain centres will have more experience in processing small claims files than those in others.

The general policy of the Magistrate Court Registries is that no legal advice should be given to parties over the counter or telephone. However, the *Small Claims Tribunal Act* clearly places an onus on the Registrar to assist parties making an application. Section 24(2) states:

> *It is the duty of the registrar to give his or her assistance to a person who appears to the registrar to be competent to be a claimant and who seeks it in completing the prescribed claim form.*

Therefore, it is appropriate for counter staff to provide assistance to potential applicants before the Tribunal as to what form to use and how to complete that form. Given that counter staff may be of varying degrees of experience around the state, it may be that the level of practical assistance which can be given will also vary.

THE GIVING OF NOTICES TO APPEAR

Many complaints arise from the delivery of notices to appear. It is often the case in residential tenancy matters that the last known address is the property which is the subject of the dispute and which the tenant has already vacated. Section 41 of the *Small Claims Tribunal Act* provides for the mode of giving notices etc. It states:

> *Where by this Act a registrar is required to cause any notice or copy order to be given to any person it shall be taken—*
>
> *(a) that the notice or order has been duly given to that person upon evidence that the same has been sent by prepaid mail to the address last known to the registrar as the place of residence or place of business of that person or, where that person is a body corporate, as the registered office within the State of that body corporate; and*
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> *(b) that the notice or order was received by the addressee at the time when the mail would have been delivered at the address to which it was sent in the ordinary course of post.*

If the notice to appear is sent to the last known address in accordance with this section, then it is appropriate for the Magistrate to proceed to hear the matter. If the address to which the tenant has moved after vacating the tenancy is known, it is this address which should be given to the registrar for the notice or order to be sent to. The respondent retains a right to apply for a re-hearing.

THE GRANTING OF RE-HEARINGS

This leads to another common complaint. That is where one party rings the registry after the hearing and claims that not to have received the notice and wishes to apply for a re-hearing. Such application needs to be made in writing, generally within 28 days of the initial hearing. I am advised that this scenario is not limited to one type of party, but that both tenants and real estate agents seek re-hearings on the basis that they did not receive notice.

Section 34(2) provides that, where an issue in dispute has been resolved in the absence of any party to the proceeding, a referee may, if satisfied that there was sufficient reason for the party's absence, order that the claim be reheard. Therefore the decision whether to grant a re-hearing, or not, will depend upon the reasons given to support the application.

These concerns can be seen to arise from the nature of the Tribunal, specifically its goal to deal with matters expeditiously.

EARLY HEARING DATES

Another area of concern that is commonly raised relates to the ability to get an early hearing date. The *Residential Tenancies Act 1994* distinguishes between urgent and non-urgent applications.

The tribunal cannot process non-urgent claims unless the parties have been to the RTA for conciliation and a "notice of unresolved dispute" has been issued and presented by the claimant.

The urgent claims can be filed without the parties attempting conciliation with the RTA and include claims:

- by a lessor to terminate the tenancy due to breach by tenant;
- by a tenant for emergency repairs;
- by either the lessor or the tenant to terminate the tenancy due to excessive hardship; and

- by a tenant to be removed from a tenant database.

Currently in Brisbane at the moment urgent matters are being set down within six working days and non-urgent matters can be scheduled within one month.

I refer to Maryborough as an example of what is happening outside Brisbane. In the last financial year, there were 103 small claims lodged in Maryborough. Small claims matters are heard there every Tuesday afternoon. Urgent applications can usually get a hearing date within 7 to 14 days. Urgent applications involving property damage, or injury, or objectionable behaviour, are assessed on an individual basis in consultation with the magistrate and a suitable date obtained usually within five days. Non-urgent matters can generally obtain a hearing date within 14 to 28 days. I am told that in both cases it is usually the lower end of the scale that applies.

Even though the goal of the legislation is to deal with matters expeditiously, we cannot forget that parties need to be afforded natural justice, which would include giving them adequate notice of hearings. Given this, I believe that the timeframes that I have referred to are reasonable.

ALLOWING TENANCY ADVOCATES AND ADVICE WORKERS TO ACCESS THE TRIBUNAL

Returning to an area of inconsistency, I often hear complaints that a particular magistrate will not allow a Tenant Advocacy and Advice Workers access to tribunal whereas others have. There are two common scenarios where such workers will be seeking access. The first is where they are appearing without the tenant. Provided they produce an appointment of agent form there would usually be no real problem in allowing them to appear on behalf of the tenant. The second scenario is where the worker appears with the tenant. The question then arises as to what role the worker will actually play. They cannot appear as an agent in those circumstances. Some magistrates will allow the worker to be present as a support person, in which case the worker will not be allowed to speak on tenant's behalf but will be allowed to provide advice to the tenant. Some magistrates take the view that if the tenant is present, they

should appear on their own, that is, without being accompanied in the room. Ultimately the decision of who is allowed in to the hearing is that of the referee.

The terminology used to describe the role or job of the tenancy advice and advocacy worker may present difficulties. The term "advocate" is often seen to indicate some sort of legal qualification. If the person does not hold legal qualifications, then this term should be avoided. A more appropriate description may be social worker or adviser. The use of this description may make it more likely that the worker will be permitted to remain at the hearing as a support person.

THE VALUE OF ENTRY AND EXIT REPORTS AS EVIDENCE

Another query that has been raised with me relates to entry and exit reports in tenancy disputes. The questions that have been posed are how much notice is taken of these and what evidence can be shown from them. I understand from Referee Randall that the entry condition report is a very important document and is crucial to bond disputes. It must be completed by both parties and should be as detailed as possible. He advised that exit condition reports are often not completed by exiting tenants and where completed by tenants are unlikely to indicate negative aspects. Therefore, it is common that the agent's written report is the significant document on exit.

COUNTER CLAIMS IN DISPUTED BOND MATTERS

I am told that some magistrates have adjourned some disputed bond matters where counter claims have been made. It appears that such adjournments have required the respondent to lodge their cross claim so that the claimant is advised in writing, purportedly to provide adequate notice to the other party. It has been suggested that the parties are often fully aware of each other's claims through the dispute process and that this delay is unnecessary. In answer to these concerns, I would advise that where such adjournments are

allowed it is to ensure natural justice to the other party. The best way to avoid this is for as much detail as possible to be included in the initial claim. Further, Referee Randall will often proceed to hear a claim and counterclaim without an adjournment if there is only a small difference between the claims, say of no more that $100, and the parties agree to the matter proceeding.

PROBLEMS WITH DIFFERENT TERMINOLOGY

I understand that the different terminology in the different pieces of legislation has caused some confusion on occasion. Section 10(1) of the *Small Claims Tribunal Act* states clearly that the primary function of the Small Claims Referee is to try to bring the parties to a dispute to a settlement that is acceptable to all the parties. It is only where a particular case is unable to be resolved by settlement between the parties, that the referee will either dismiss the case or make a fair and equitable order in accordance with subsection (2).

The confusion seems to arise from the fact that the *Residential Tenancies Act* refers to making applications to the tribunal for various orders. Settlement of disputes is only conceived of in that Act in connection with the conciliation process prior to any steps taken in the tribunal. Regardless, it is appropriate for any referee to try to assist the parties come to a settlement, in line with their functions as outlined in the *Small Claims Act*. Such outcomes are likely to be more acceptable to both parties than an order that is imposed.

ENFORCEMENT OF MONEY ORDERS

Another area of confusion is the enforcement of money orders. The tribunal can order the party who owes money to be examined on his or her financial affairs. The benefit of applying for an oral examination in the tribunal is that there is no fee involved. A notice is sent to the respondent to attend the Tribunal. If the respondent fails to appear, an arrest warrant will be issued to the Bailiff to bring the respondent before the tribunal. The Registrar will conduct the oral examination. There is no need for the applicant to attend.

He or she will be provided with a copy of the examination and any agreement by the respondent to pay the monies by instalment. If the oral examination shows that the respondent has no funds, then the applicant can apply for a garnishee or attachment order.

The alternative is to register the order of the tribunal as a civil judgement. To do this, the applicant needs to obtain a certified copy of the tribunal's order and register that order in a Magistrates Court registry. Fees are payable for an examination of the respondent in the Magistrates Court. So there is an economic incentive to have the oral examination conducted in the Small Claims Tribunal first. However, the benefit of registering the order as a civil judgement means that monies owing will attract interest from the date of registration of that order.

In cases where the applicant has the oral examination conducted in the tribunal before registering the order as a civil judgement, the applicant may seek to have the Bailiff seize and sell any property of the respondent. The applicant will be required to pay a fee for such action.

WRITTEN REASONS FOR TENANCY APPLICATIONS

Another common complaint from parties appearing in the Small Claims Tribunal is the lack of written reasons for the orders made. Consistently with the less formal and more expeditious approach that the legislature has created for tribunal proceedings, there is no requirement for written reasons. However section 22A of the *Small Claims Tribunal Act*, allows the tribunal to provide written reasons for orders in tenancy applications only if the tribunal considers it appropriate given that the issue is important or that there are significant benefits to be attained from giving the reasons for precedent purposes. If reasons are given, then they must be set out in writing.

ORDER FOR REMOVAL FROM TENANCY DATABASE LISTING WHEN MONEY IS STILL OWING

Another concern that has been flagged with me before the forum is that REIQ members are reporting that agents have received an order to remove a database listing when section 30 of the *Residential Tenancies Regulation 1995* concerning rent arrears applies. That section provides that a tenant may be listed on a tenancy database if there has been a notice to remedy a breach relating to an amount of unpaid rent, and the tenant has failed to comply with that notice in the time allowed, and money is still owing to the lessor. The concern appears to be that the tribunal is ordering that the tenant be removed from the database in cases when the tenant has terminated yet unpaid rent exceeds the bond.

Section 284C of the *Residential Tenancies Act* and section 31 of the *Residential Tenancies Act* are relevant to this issue. Section 284C has the effect that a person must not be listed on a tenancy database unless, amongst other things, there is a reason prescribed under a regulation for doing so. One such reason under section 31 is that the tenant owes an amount to a lessor, arising from an agreement, that the tenant has been ordered to pay under a conciliation agreement or a tribunal order and the time for payment has passed.

Ultimately this issue will depend upon the individual circumstances of each case and the decision whether or not to order the removal of a tenancy database listing will be the responsibility of the magistrate who is sitting on the tribunal in each case.

NEW BRISBANE MAGISTRATES COURT COMPLEX

The Magistrates Court here in Brisbane will be moving to its new home at 363 George Street in mid-November. The first day of operation will be 17 November. At that time, all registries will be combined and there will no longer

be a distinct small claims counter. The Department of Justice is arranging for training of staff across all areas of the court before the move. Undoubtedly there will be a settling in period while we all find our feet in the new surrounds. The rooms that have been set aside for small claims hearings will create an environment that is less formal than most courtrooms. However, you will notice that the benches in the new building will be raised. Although this has not been the case in our current premises, it should not be too concerning. Many small claims hearings around the state are conducted in normal courtrooms. We are fortunate in Brisbane to be able to provide an environment that will continue to reinforce the general intention of the legislature to create an informal process.

CONCLUSION

As has been set out, Magistrates are all of equal standing with the Chief Magistrate simply the first among equals. The principle of judicial independence means that magistrates are independent of each other. It is natural that different magistrates in the proper exercise of their independent decision making power may honestly come to different decisions on the same set of facts. They may also apply different procedures in reaching these decisions.

The Chief Magistrate has no capacity to direct, or even influence, magistrates in the discharge of their adjudicative powers and responsibilities. There is also no power to overturn or review a magistrate's decision. The only avenue to dissatisfied parties in small claims matters is to apply for review based on the grounds of either lack of jurisdiction or denial of natural justice.

This flows from the fact proceedings before the Tribunal are intended to be more informal than a court of law. As the Supreme Court has recognised the legislative intent is for such proceedings to be conducted in a broad brush

way resulting in an order which is ultimately considered to be generally fair to he parties, so as to bring about a determination, once and for all, with a view to limiting cost and delay.

For most magistrates, small claims matters, although important represent only a small component of their broad work load. Residential tenancy matters are in turn only a portion of small claims matters. As such, magistrates will continue to gain valuable assistance from appropriate and respectful assistance form those people with practical experience in residential tenancy mattes, who appear regularly before the tribunal.