

# small CLAIMS

---

Eugene Clark

## *Providing information to disputants in Small Claims Courts and Tribunals: a guide to good practice.*

Small Claims Courts or tribunals exist in every jurisdiction in Australia.<sup>1</sup> In the vast majority of disputes, the disputants conduct their own cases and are not represented by legal counsel. Accordingly, small claims disputants will usually require assistance from the court/tribunal in the filing, preparation and conduct of their case. Various types of brochures, videos and other information have been prepared to assist small claims litigants in the preparation and presentation of their cases. The most vital assistance for many disputants no doubt comes from the personal contact which such disputants have with judicial personnel. While a litigant handout can never replace personal advice from court/tribunal staff, nevertheless, brochures and other handouts can help a great deal. This article is derived from the author's work on a small claims project on behalf of and as a member of the Consumer Law Committee of the Law Council of Australia. Having reviewed the small claims literature in various Australian and overseas jurisdictions and having conducted and empirical investigation of the Tasmanian Small Claims Court,<sup>2</sup> I consider the question of what types of material ideally should be provided to small claims disputants. The analysis is based on a set of criteria which has evolved from studies, conducted in Australia<sup>3</sup> and overseas,<sup>4</sup> on Small Claims Courts and tribunals. Hopefully these criteria will lead to some reflection on the adequacy of information provided by Small Claims Courts and tribunals in Australia and suggest some ways by which the system might be improved.

### **Small claims brochure/handbook**

The following elements<sup>5</sup> should be included in brochures or handbooks for users of Small Claims Courts:

#### *Description of the Small Claims Court and how it works on a typical day*

Many disputants will be utilising the small claims procedure for the first time. In addition, this may be the first encounter which disputants have ever had with the judicial system. It is important that such disputants understand how the system works, that they know what to expect and what not to expect from the small claims process. Judicial administrators and employees need to realise that for many of these disputants, their attitudes towards the judicial system itself will be strongly influenced by their experience with the Small Claims Court or Tribunal. One of the best ways to educate disputants about small claims procedures is the use of a video. For example, the Tasmanian Small Claims Court has produced its own video which enacts a typical small claims case and explains the procedures involved. Disputants can 'check out' the video for a small deposit which is refunded when the video is returned. Consumer Affairs, school groups and other organisations have purchased the video thus further educating the public about the accessibility and proper use of small claims procedures.

---

Eugene Clark teaches law at the University of Canberra.

### ***Types of actions allowed in Small Claims Courts***

Disputants may think that the small claims procedure is available to all parties and for all types of minor disputes. In fact, the Small Claims Court/Tribunal jurisdiction is limited both by dollar amounts involved and the types of cases which may be decided. The monetary limits range from \$2000 in Tasmania and South Australia to \$10,000 in NSW (building claim \$25,000) and \$5000 in Queensland, Western Australia and Victoria. There are also considerable differences among jurisdictions in the type of cases which may be heard in small claims. In some jurisdictions, like Victoria, the small claims procedure is only available for consumer versus trader disputes. In most jurisdictions, the small claims procedure is not available for debt collection; there must be a legitimate dispute between the parties. The point is that brochures and other handouts must clearly set forth the types of cases which may be heard. It would also be useful to include some illustrations of the types of cases which may and may not be appropriate for small claims.<sup>6</sup>

### ***Who to sue and how to determine who is a proper defendant***

Disputants are often confused and need advice about the proper party to bring an action against. This most often occurs in actions against corporations, and traders who utilise a business name. A good example is the South Australian brochure which provides:

You must sue the correct defendant

check any quotes or receipts or advertisements to see how the trader's business is described.

If the defendant is an individual you should try to give his/her full name and correct address (ie, not just Mr Smith, but Robert Smith or at least Mr R Smith.).

Where the business is run as a Company (ie it has 'Ltd' in its title) you must give that full name and the company's REGISTERED ADDRESS - you may need to do a 'Company Search' to find this out (see below).

Where the business is simply a firm with a business name (ie, any business name without 'Ltd' in its title) you will need to do a 'Company Search' to find out the name(s) and address(es) of the proprietors — they are the defendants. Give their full name(s) and address(es) and add 'trading as 'XYZ Plumbing' or whatever.

#### **Company search**

You can do your own company search at the office of Corporate Affairs Commission; 8th floor, Grenfell Centre, 25 Grenfell Street, Adelaide. (Telephone 226 0111) at a small cost.

Explain your requirements to the office staff and they will help you with the procedure.

If you are still in doubt contact the Office of Fair Trading (226 8211) for advice.

Disputants also need court/tribunal assistance in regard to service of process to ensure that the defending party has proper notice.

### ***Venue requirements if parties and transaction not from same locality***

Separate from the question of jurisdiction is that of venue, the particular location of the Small Claims Court or Tribunal which may hear the dispute. Venue issues most often occur in jurisdictions which utilise the small claims procedure to recover property damage resulting from a motor vehicle accident where the accident involves disputants from different localities. Such questions also arise when one of the

parties has since moved to another locality within the jurisdiction or to another jurisdiction.

### ***Filing the claim***

Assuming the dispute is one which is within the jurisdiction of the court/tribunal, the next step is to file a claim. All information packages given to claimants have a copy of the claim form. The form should be written in plain English and be easy to complete. An extra copy of the form should be enclosed in case the claimant makes a mistake. It is also useful for claimants to have a 'sample' of a completed form which may serve as a model. The South Australian small claims manual and a 'Guide to the Small Claims Tribunal' produced by the Queensland Legal Aid Office are exemplary in this regard.

### ***How to file (in person, by post etc.)***

The information provided to disputants must state clearly the manner in which a claim may be filed. This includes what forms must be filed, whether filing has to be done in person, by mail etc., the nature of any filing fee, and so on.

### ***Encouragement to settle***

One of the major functions of Small Claims Courts and Tribunals is to encourage parties to settle their dispute themselves and without the necessity of a hearing. Accordingly, it is important that brochures emphasise this role, encourage the parties to settle and indicate any means of assistance (for example, dispute resolution services, consumer affairs) available to parties who want third party help in settling their dispute. In many jurisdictions, the court/tribunal is empowered to hold 'conferences' in which a court officer, such as a registrar, will explore opportunities for settlement. In Tasmania, the Small Claims Registrar has undertaken special training in mediation and has increasingly utilised settlement conferences with significant success.

### ***Available assistance from the court and other agencies, complete with contact persons and phone numbers***

Depending on the jurisdiction involved, various forms of assistance will be available. Among the most important of these will be the availability of translators and the provision of child care services. Other services include access to parking, telephones, etc. Small Claims Courts and Tribunals are also part of a network of agencies which handle minor civil disputes. These include Consumer Affairs Offices, community legal centres, legal aid and so on. The brochure should provide information about these various services together with contact numbers.

### ***Legal advice***

While small claims officials can provide general information and assistance, the legislation in most jurisdictions explicitly prohibits them from giving legal advice. Brochures should make this point, but at the same time provide a list of sources and contact numbers where legal advice may be sought.

### ***Costs, including time commitments, need for childcare, etc.***

Disputants who utilise the small claims procedure will typically be asked to pay a small filing fee. In some jurisdictions, the fee can be waived in needy cases. In some jurisdictions, a successful claimant is able to recover the fee as awarded costs. Brochures and handouts must clearly inform disputants of any costs associated with using the small claims procedure and the possibility, if it exists, of recovering such costs from the other party. Disputants should also be informed about the personal costs involved in utilising the

small claims procedure. These include time commitments, need for childcare, etc.

#### ***Witnesses and evidentiary requirements***

Claimants must realise that they must prove their case. Brochures and handouts should inform disputants about the importance of witnesses and how to produce evidence to prove their claims. Registrar and pre-hearing conferences can also be utilised to assist parties in preparing for their case and ensuring that a case is ready for hearing.

#### ***Default judgments explained***

Some small claims jurisdictions have special procedures in the case of a default by either party. The small claims brochure should outline these procedures and explain their effects.

#### ***Collection Procedures***

Many inexperienced disputants hold the mistaken view that all they must do is prove their claim and they will 'automatically' recover the awarded sum. Brochures and handouts should caution disputants that being awarded a judgment and collecting on the judgment are two different things, especially when the judgment debtor has few or no assets. The available collection procedures should be explained together with any costs to the claimant who seeks to utilise those procedures.

#### ***Separate booklet for respondents/defendant***

One of the findings from many of the small claims studies is that brochures and handouts are often written exclusively from the viewpoint of the claimant with little advice being given to the respondent or defendant of the action. This is especially unfortunate in jurisdictions, (for example, Tasmania) where a trader can bring a claim and it is the consumer who by way of defence maintains, for example that the product was defective. Accordingly, it is recommended that respondents or defendants be presented with a separate booklet (or at least have a separate section in a single booklet) which, among other information:

- explains what options are available to the respondent;
- points to the possibility of counterclaims and how to prepare one;
- explains the right to seek a continuance;
- provides a list of help/assistance available and contact numbers;
- explains the development of an instalment payment plan and sources of guidance in regard to debt counselling. An example of this is the 'Offer of Settlement' form, utilised in Tasmania, which states:
- To the Respondent:
- In many claims that come before the Small Claims Court the Respondent does not dispute the issues, but only seeks a court order for time to pay.
- Naturally valuable court time is lost together with the wasted attendance of both parties and their witnesses.
- Sometimes an offer by the Respondent to pay the claim by instalments is all that it takes to settle the dispute, or the parties after negotiation reach an amicable settlement and only need the Court to approve their agreement. See over for what to do.

#### ***Checklist to help keep track of what parties should do***

Another useful feature of some small claims information packages is a checklist which parties can use to help keep track of what they should do and in what order.

#### ***Plain English, Good Form Design***

A final important element is that the information provided to disputants should comply with principles of good form design and plain English.<sup>7</sup> Among the principles which should be followed are:

- *Language should be easily understood by the general public.* Thus, latin terms, and unnecessarily technical language should be avoided.
- *Language should be neutral to both parties.* Court forms maintaining language such as 'you are commanded to appear' generally appear threatening and they often create the impression of being anti-defendant.<sup>8</sup>
- *Only essential information should appear on the face of the form.* Forms should not be cluttered with information.
- *Forms should be easily identified.* Forms should be clearly titled with a space for recording individual case numbers in one consistent easily identifiable location on the form.
- *Instructions.* Forms should be self-explanatory and easy to complete.
- *Forms should be designed for easy completion.* Not only should records be easy to understand; they should also be easy to complete. This applies for court staff making entries on the form as well as disputants. Extensive use should be made of check boxes and other devices which facilitate easy form completion.
- *Forms should be designed to expedite handling.* This means that information should not be unnecessarily duplicated and that form design should also consider statistical reporting, case summaries and other functions which must be performed.
- *Form and record size should be standardised.*
- *The number and types of forms and records created by and submitted to Small Claims should be limited.* If Small Claims Courts are to meet their goals then forms must be kept to a minimum.
- *Gender neutral language should be used.*

Again, while a detailed analysis is beyond the scope of this article, it is clear that many of the forms used in Small Claims could be improved. In the author's experience, forms tend to be congested, titles could be more distinctive, and language could be simplified.

#### ***Small claims brochures as one aspect of the system***

While this article has focused on small claims forms and other information provided to disputants, it must be remembered that such assistance is only one aspect of the assistance provided by the judicial system. Moreover, while such brochures are especially important in the pre-hearing stages of a case, continued assistance is required as well at the hearing and enforcement stages. This means that Small Claims Court/Tribunal staff and magistrates must be highly sensitive to the *pro se* nature of small claims proceedings. Two incidents during the author's study of the Small Claims Court in Tasmania illustrate the point. First, on one occasion during my observations, at the end of the hearing and after the magistrate had left the room, the parties turned to me and asked 'Is it over? Are we free to go?'. It was clear that they needed more guidance — sign-posting — to help disputants work their way through the small claims process.<sup>9</sup> On an-

other occasion, the parties, with the aid of the magistrate, were engaged in the process of trying to work out a settlement. However, it was clear that the disputants were confusing the settlement discussion in which they were presently engaged with the hearing which was about to come. Court staff and magistrates must be conscious of the fact that disputants need guidance. Parties need to know exactly what to expect in each phase of the proceedings. They need verbal and written 'signs' which tell them: 'this phase is ending; and another is about to begin'.<sup>10</sup> In other cases, after discussing a complex factual situation, parties need a summary of exactly what it is they have agreed on, or what has been decided.<sup>11</sup> Indeed, it has been argued that parties need a 'celebration or otherwise of the dispute having been resolved.'<sup>12</sup> For example, in a settlement case this might be a simple 'thank you very much, always much better for claims to be settled, everyone wins, thank you for coming'.<sup>13</sup> In short, as the drama of Small Claims Court unfolds for the parties, a denouement is required to let everyone know that the plot has been unravelled and the play is ended.

## Conclusion

This article has attempted to provide a 'guide to good practice' about Small Claims Court/Tribunal brochures/handouts etc. which should be useful to courts and tribunals in evaluating their own material. Moreover, by following these guidelines it is hoped that information about Small Claims Courts and Tribunals will be more useful to disputants and those court officials, legal practitioners, consumer and other groups who serve them.

Making Small Claims Courts and Tribunals more accessible to those who utilise them is both a challenging and on-going task. Perhaps Dean Roscoe Pound was closest to the mark when he concluded that there is a 'continual movement in legal history back and forth between justice without law, as it were, and justice according to law'.<sup>14</sup> In this respect, the present status of small claims procedures represents but the latest development in what has been an ongoing process of adjustment and re-adjustment. It is hoped that this article has facilitated a dialogue which will enable all those involved with small claims to come to a better understanding of the nature of Small Claims Courts/Tribunals and how we can best make the necessary reforms and counter reforms so that the legal system will be responsive to the needs of society.

## References

1. For a description of the Small Claims Courts and Tribunals in the various Australian jurisdictions, see Clark, E.E., 'Small Claims Courts and Tribunals in Australia: Recent Developments and Emerging Issues' (1991) 10 *University of Tasmania Law Review* 201.
2. See Clark, E.E., 'The Tasmanian Small Claims Court: An Empirical Study' unpublished PhD Thesis, University of Tasmania, 1993.
3. See Clark, E.E., 'The Tasmanian Small Claims Court: An Empirical Study' unpublished PhD Thesis, University of Tasmania, 1993; deVaus, D., 'Small Claims Tribunals: An Effective Alternative to the Court System?' (1987) 22 *Australian Journal of Social Issues* 597; Ramsay, R., 'NSW Consumer Claims Tribunals: Access to Justice' (1987) *Legal Service Bulletin* 145.
4. See e.g., Vidmar, N., 'The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation' (1984) 18 *Law and Society Review* 515; Whelan, C.J., *Small Claims Courts: A Comparative Study*, Clarendon Press, Oxford, 1990; Welsh Consumer Council, *Courting the Consumer: A Study of Access to the County Courts in Wales*, 1988; Yngvesson, B. and Hennessey, P., 'Small Claims, Complex Disputes: A Review of Small Claims Literature' (1975) 9 *Law and Society Review* 260; Elwell, S. and Carlson, C.D., 'The Iowa Small Claims Court: An Empirical Analysis' (1990) 75(2) *Iowa Law Review* 433.
5. See generally, Ruhnka, J and Weller, S., *Small Claims Courts: A National Examination* (1978) (Williamsburgh, Va, National Center for State Courts).
6. Latimer, P., *Australian Business Law*, Law Book Company, 1995, pp.505-59.
7. See Wolf, R.P., *Small Claims Courts: Records Management and Case Processing*, National Center for State Courts, Williamsburgh, Va, 1980.
8. Wolf, above, p. 4.
9. See Ingleby, R., *In the Ball Park: Alternative Dispute Resolution and the Courts*, Australian Institute of Judicial Administration, Carlton, Victoria, 1991 pp.94-95. ('In the Small Claims cases which were not settled by agreement, or adjourned to another hearing, the referee had to make it clear that they had finished the questioning of the parties in the arbitration phase. This might be done, as in SCTI, by asking the parties it [sic] they had, "anything more to say?" and then proceeding to give the decision immediately—"I've pretty well decided . . . accept industry evidence . . . satisfied not the fault of the trader . . . claim dismissed because not substantiated"').
10. In the Victorian Small Claims Tribunal, for example, there are large plastic cards on the table in front of disputants which outline and explain the order of proceedings and what to expect at each stage. If a disputant becomes disoriented, the magistrate can point to the card and indicate 'Mr Smith, we are now at point four.' Developing such skills as verbal sign-posting, is one aspect which should be part of small claims training.
11. Ingleby, above, ref. 9, p.95, citing G. Kirkpatrick, 'The Good, the Bad, the Indifferent' (1988) 21 *Mediation Quarterly* 37, 44.
12. Ingleby, above, p.95.
13. Ingleby, above, p.95.
14. Pound, R., *An Introduction to the Philosophy of Law*, Yale University Press, New Haven, 1954, p.54.

### TO SUBSCRIBE Alternative Law Journal (Includes Aboriginal Law Bulletin)

Concession (full-time students, unemployed)	\$33	<input type="checkbox"/>
Individual	\$48	<input type="checkbox"/>
Institutions (offices, schools, libraries etc.)	\$63	<input type="checkbox"/>

Cheque enclosed \$ .....  
or please charge my Bankcard/Mastercard/Visa

No .....

Signature .....

Expiry date .....

Return to: LSB Co-op., C/- Law Faculty, Monash University, Clayton 3168

Tel. (03) 544 0974 Fax (03) 905 5305

Name .....

Address .....

..... Postcode .....

Occupation .....