



# **Report on the review of the jurisdictional limit and legal representation in the *Small Claims Act***

## **Consultation Outcomes**

**June 2014**

This paper has been prepared for internal government discussion purposes only and any views expressed are not to be taken to represent the views of the Northern Territory Government, the Northern Territory Attorney-General and Minister for Justice or the Department of the Attorney-General and Justice.

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## **1. RECOMMENDATIONS**

- 1.1. It is recommended that the small claims jurisdiction of the Local Court should be incorporated into the new Northern Territory Civil and Administrative Tribunal's jurisdiction.
- 1.2. It is recommended that the jurisdictional limit of small claims should be increased to \$25,000.
- 1.3. It is recommended that claims, that fall within the definition of a small claim, can only be commenced in the Northern Territory Civil and Administrative Tribunal
- 1.4. It is recommended that the rules for representation follow those of the Northern Territory Civil and Administrative Tribunal, namely parties can be represented by a legal practitioner or, with leave of the Tribunal, by another representative.

## 2. BACKGROUND

### 2.1. Background to release of Issues Paper

The *Small Claims Act* creates a small claims jurisdiction in the Northern Territory. Section 5 of the *Small Claims Act* provides that a claim not exceeding \$10,000 may be instituted in the Local Court under the *Small Claims Act*. Section 14(7) of the *Local Court Act* provides that a claim under the value of \$5,000 must be commenced under the *Small Claims Act*. Proceedings between \$5,000 and \$10,000 can either be commenced under the *Small Claims Act* or the *Local Court Act*.

Possible amendments were proposed to the *Small Claims Act* to allow for:

- an increase in the jurisdictional claim limit;
- the removal or amendment of provisions of the *Local Court Act* that give litigants a discretion to commence proceedings under the *Local Court Act* or the *Small Claims Act* where a matter involves a claim over \$5,000; and
- the exclusion of legal practitioners and representatives, subject to limited exceptions in the discretion of the court, such as where a party suffers a disability, a party is a body corporate or government agency, or the matter involves complex questions of law or fact.

### 2.2. Release of Issues Paper

In June 2013, an Issues Paper entitled 'Legal Representation and Jurisdictional Limit in Small Claims' was released to the public. Comments were sought in writing with the document being published on the website of the Department of the Attorney-General and Justice. The Issues Paper was also sent out to targeted stakeholders.

The Issues Paper invited comment on the following four options:

Option 1 – Take no action on the existing structure for small claims

Option 2 – Exclude lawyers or representatives and leave the jurisdiction limit at \$10,000

Option 3 – Allow lawyers or representatives to be involved and increase the small claims jurisdiction to an amount over \$10,000

Option 4 – Exclude lawyers or representatives and increase the small claims jurisdiction to an amount over \$10,000.

### **2.3. Submissions received**

The Department of Attorney General and Justice received submissions regarding the options in the Issues Paper from:

Roussos Legal Advisory;  
North Australian Aboriginal Justice Agency;  
Chief Magistrate;  
CridlandsMB;  
Northern Territory Law Society; and  
Mr Lucio Matarazzo.

Copies of the submissions made are at Attachment A.

### **2.4. Report on the Consultation**

This report sets out the results of the consultation. This report also takes into account the introduction of the Northern Territory Civil and Administrative Tribunal Bill 2014 in the May 2014 Sittings of the Legislative Assembly and comments that have been made suggesting that the small claims jurisdiction transfer to the new Tribunal.

### 3. JURISDICTIONAL COMPARISON

#### 3.1. Northern Territory

##### ***Small Claims Act (NT)***

The *Small Claims Act* creates a small claims jurisdiction in the Northern Territory. Section 5 of the *Small Claims Act* provides that a proceeding may be commenced in the Local Court with respect to a claim for:

- (a) the recovery of an amount not exceeding \$10,000;
- (b) the performance of work of a value not exceeding \$10,000;
- (c) relief from payment of money of an amount not exceeding \$10,000; and
- (d) the return or replacement of goods to a value not exceeding \$10,000.

Section 14(7) of the *Local Court Act* provides that a claim under the value of \$5,000 must be commenced under the *Small Claims Act*.

Proceedings for claims between \$5,000 and \$10,000 may be commenced under either the *Local Court Act* or the *Small Claims Act*.

Rule 4.06 of the Small Claims Rules provides that anything that can be done by a party may be done by the party's legal practitioner or, with leave of the Court, by some other person.

Costs cannot be ordered in respect of a matter under \$5,000, although disbursements reasonably incurred are recoverable (regulation 6).

##### **Northern Territory Civil and Administrative Tribunal Bill 2014 (NT)**

The Northern Territory Civil and Administrative Tribunal Bill 2014 establishes a new tribunal in the Northern Territory with jurisdiction to hear and determine a broad range of matters with a focus on resolving disputes and reviewing decisions. The Tribunal will have both original and review jurisdiction.

This Bill sets out the structure, membership and other provisions that are required to facilitate the establishment of the Tribunal but does not confer any jurisdiction on the tribunal. The Tribunal is led by a legally qualified President supported by Deputy Presidents and also has ordinary members who may be legally qualified or experts from different fields or vocations. The President determines the composition of the Tribunal for particular matters or unless specifically specified in an Act. The Tribunal is to be constituted by no more than three members. The President may also appoint the Registrar to constitute the Tribunal for certain matters.

The Bill sets out principles for conducting proceedings (s53), including to act fairly and according to the substantial merits of the matter, comply with the rules of natural justice, inform itself in any way it considers appropriate, act with as little formality and technicality and as much speed as proper consideration of the matter permits, and



decide on all relevant facts. The Tribunal can hold private compulsory conferences (s107).

In general, parties are to bear their own costs, unless there are reasons for the Tribunal to order otherwise (s131).

Parties to the Tribunal's proceedings can appear in person and represent themselves or be represented by a legal practitioner (s130). With leave of the Tribunal, parties may be represented by persons who are not legal practitioners. Unless otherwise determined by the Tribunal, a party appearing may be assisted by another person as a friend. A person who is not a legal practitioner cannot act for fee or reward in relation to a proceeding before the Tribunal.

Persons aggrieved by a decision of the Tribunal in its original jurisdiction can apply for a review of the decision. Appeals from decisions of the Tribunal lie to the Supreme Court on a question of law, with leave of the Supreme Court.

### **3.2. Australian Capital Territory**

#### ***ACT Civil and Administrative Tribunal Act 2008 (ACT)***

The ACT Civil and Administrative Tribunal (ACAT) hears and determines civil disputes for not more than \$10,000.00 (unless excess abandoned or by agreement).

A party:

- may appear in person before the ACAT or be represented by a legal practitioner or another person; and
- must bear their own costs unless the ACAT makes an order for the filing fee in favour of a successful applicant or makes an order for reasonable costs where a party caused unreasonable delay or obstruction or a party contravenes an order of the tribunal.

### **3.3. South Australia**

#### ***Magistrates Court Act 1991 (SA)***

South Australia has a small claims limit of \$25,000 (amended by the *Statutes Amendment (Courts Efficiency Reforms) Act 2012 (SA)* on 1 July 2013). Minor civil actions include small claims being a monetary claim for \$25,000 or less and claims for relief in neighbourhood disputes such as trespass and nuisance and minor statutory proceedings such as applications under the *Fences Act*. Matters are dealt with without formality.

A party is not entitled to legal representation but the court can permit representation in special circumstances, such as if the other party is a lawyer, if all parties agree or if a party would be unfairly disadvantaged by not having a lawyer.

Costs in relation to filing fees, attendance and witnesses can be recovered.

### **3.4. Victoria**

#### ***Victorian Civil and Administrative Tribunal Act 1998 (Vic)***

In Victoria, small claims are dealt with through the Victorian Civil and Administrative Tribunal. The jurisdictional limit is \$10,000.

A party may appear personally or may be represented by a professional advocate (including a legal practitioner) if the party is a child, council, state, statutory officer or some other entity or another party is a professional advocate or another party is represented or all parties agree; otherwise a party needs the Tribunal's permission to be represented.

### **3.5. New South Wales**

#### ***Local Court Act 2007 (NSW)***

In NSW, if a matter falls under the small claims limit of \$10,000, it must be filed in the small claims division of the Local Court and will be dealt with according to the case management directions of the Chief Magistrate. Upon, application, the matter can be transferred to the general division if the matter is a complex, difficult or important one.

While a party can be represented by a legal practitioner or representative, they cannot generally get an award for costs in relation to legal fees.

The NSW small claims division is based upon the principle of being cheap, quick and cost efficient. In achieving this, all small claims matters are dealt with by way of written evidence filed and served. While an order can be made for oral evidence to be given at a hearing, generally decisions are made by magistrates in chambers and delivered in open court on a set date.

#### ***Consumer Claims Act 1998 (NSW)***

Matters previously heard in the Consumer, Trader and Tenancy Tribunal are now heard in the Consumer and Commercial Division of the NSW Civil and Administrative Tribunal (NCAT) which commenced operating on 1 January 2014 replacing many of NSW's existing tribunals, including the Consumer, Trader and Tenancy Tribunal.

The Consumer and Commercial Division of NCAT resolves a wide range of everyday disputes such as tenancy and other issues relating to residential property, and disputes about the supply of goods and services, including consumer claims under the *Consumer Claims Act 1998*. A consumer's claim about the supply of goods or services in NSW must be against a supplier carrying on a business and not a private person.

The Consumer Claims Regulations 2014, which came into effect on 9 May 2014, increased the monetary limitations of NCAT's jurisdiction in respect of consumer claims, within the meaning of the *Consumer Claims Act 1998*, from \$30,000 to \$40,000 (depending on the date the application is made).

### 3.6. Queensland

#### ***Queensland Civil and Administrative Tribunal Act 2009 (QLD)***

Queensland's Civil and Administrative Tribunal hears small claims matters that do not involve an amount greater than \$25,000 and relate to a limited range of matters including debt, consumer and property damage disputes. The Queensland limit was increased in 2009.

Parties are to represent themselves unless the interests of justice require otherwise. A party may be represented by an appropriate person if for example they are a child or person with impaired capacity. Matters to be considered in deciding whether to give a party leave to be represented include whether one party is a state agency, the matter involves complex questions of fact or law, another party to the proceeding is represented or all parties have agreed.

Each party usually bears their own costs, unless the Tribunal considers the interests of justice require it to make the order, for example because a party to a proceeding is acting in a way that unnecessarily disadvantages another party or because of the nature and complexity of the dispute. The only costs that can be awarded for a minor debt claim are fees paid.

### 3.7. Tasmania

#### ***Magistrates Court (Civil Division) Act 1992 (Tas)***

A minor civil claim is any dispute claiming \$5,000 or less (including a consumer credit dispute), residential tenancy claim, a claim to access neighbouring land and is heard in the Magistrates Court.

The general rule for minor civil claims is that lawyers are not allowed at the hearing. A legal practitioner is not to represent a party to a proceeding in respect of a minor civil claim unless, for example one party is a solicitor, or both parties agree, or if the court thinks a party would be unfairly disadvantaged if not represented.

Costs for getting the action up to trial or by way of counsel fees are not to be awarded unless all parties to the action were represented by counsel or the Court is of the opinion that there are special circumstances justifying the award of costs. The Court may also award compensations to a party if it considers it is a frivolous or vexatious claim.

### **3.8. Western Australia**

#### ***Magistrates Court (Civil Proceedings) Act 2004 (WA)***

The jurisdictional limit in Western Australia to commence what are termed minor case claims is \$10,000.

Parties are not entitled to be represented in Western Australia unless a party is a corporation or, if the party is a police officer or a public authority, the case involves statutory jurisdiction, or if the court gives leave for a party to be represented by an agent which:

- where the agent is not a legal practitioner, the court considers that a party will be unfairly disadvantaged as a result of the lack of representation;
- where the representation is by legal practitioner, if all parties agree or the court is satisfied that it is in the interests of justice.

A party is only entitled to a limited range of costs (court fees, service fees and costs of enforcing the judgment). The court does have discretion to order costs where it is satisfied that exceptional circumstances would result in an injustice if an order for costs was not made or a parties claim or defence was wholly without merit.

## **4. POSSIBLE JURISDICTION OF THE NORTHERN TERRITORY CIVIL AND ADMINISTRATIVE TRIBUNAL**

### **4.1. Proposal**

It has recently been proposed that the small claims jurisdiction transfer to the new Northern Territory Civil and Administrative Tribunal.

### **4.2. Submissions**

This was not an issue raised in the Issues Paper.

It is noted however that the Law Society Northern Territory in its submission acknowledged that reform of the small claims jurisdiction may be required to ensure it more directly meets the community's need to access an effective and low cost dispute resolution mechanism. The Law Society submitted that the small claims jurisdiction could be significantly improved if it encouraged or required parties to work towards resolution of their dispute prior to the court hearing. It suggested that some causes of inefficiencies in the jurisdiction included the lack of emphasis in the small claims jurisdiction on mechanisms that directly encourage parties to resolve their disputes prior to the court hearing and the incompatibility of an adversarial based Court in dealing with the needs of the public to access a participatory based, low cost dispute resolution mechanism. It supported consideration of the use of mediation, conciliation, settlement conferences and improved case management systems.

The Law Society also suggested that improvements in the level of awareness and understanding of potential litigants about the small claims jurisdiction could improve the jurisdiction in the short term without the need for legislation or a significant injection of funds and gave examples of easily accessible information specifically prepared for unrepresented litigants such as forms, handbook and other information written in plain-english, guidelines, accessible legislation and an information and resource website.

The Law Society further noted that a more effective small claims jurisdiction would directly improve access to justice for the community and submitted that any decisions on amendments should await the findings of the Productivity Commission's inquiry into "Access to Justice Arrangements". (It is noted that the draft report was released in April 2014 with comments by 21 May 2014 and a final report in September 2014).

Mr Matarazzo also noted in his submission that a significant consideration overlooked in the Issues Paper was that: "Interstate in Australia there are a plethora of administrative tribunals where citizens in those states can pursue small claim debts at accessible and low-cost service to resolve everyday disputes which due to practical and economies of scale reasons do not exist for citizens and businesses in the Northern Territory."

### 4.3. Discussion

In a ministerial statement on 27 August 2013, the Attorney-General indicated a desire for the establishment of a tribunal consistent with the recommendations of the Law Reform Committee reports of 1991 and 2004 and for the tribunal to deal with both civil and administrative disputes. He noted that the thinking at the time favoured “a bias towards a larger ambit and, perhaps, some matters which are currently determined by the Small Claims Court”.

The Northern Territory Civil and Administrative Tribunal Bill 2014 was introduced in the Legislative Assembly on 15 May 2014 and sets out the structure, membership and other provisions that are required to facilitate the establishment of the Tribunal but does not confer any jurisdiction on the Tribunal. Conferral of jurisdiction will be the subject of a series of separate bills. The Attorney-General in his Second Reading Speech noted for example that it is intended to transfer the small claims jurisdiction of the Local Court to the Tribunal in due course.

Incorporation within the new Tribunal provides the possibility of enhancing access to justice for small civil matters. Currently small claims matters vie for priority with more substantial criminal and other matters before magistrates' courts.

Furthermore, a tribunal exercising civil claims jurisdiction in lieu of the Local Court could potentially be of significant benefit to consumers who are in dispute with traders and provide a better fit as a one-stop shop for a range of 'like' claims presently associated with civil matters such as residential tenancy, consumer and trade, building, property damage and debt disputes. In situations where a trader is recalcitrant and conciliation between Consumer Affairs and the trader has not been successful, it would provide a less daunting path for a consumer to follow instead of the current requirement of applying to the Court under the *Small Claims Act*. The Commissioner for Consumer Affairs has advised that it is his belief that more consumers will take this path as most consumers are currently daunted by seeking redress through the Court.

The claims procedure is different for small claims in that the Local Court in exercising small claims jurisdiction is not bound by the rules of evidence and it may inform itself in any manner it thinks fit. The Tribunal similarly may inform itself as it considers appropriate, determines its own procedures, must act fairly and with as little formality and technicality and as much speed as proper consideration of a matter permits. The Law Society in its submission noted the incompatibility of an adversarial based Court in dealing with the needs of the public.

The Law Society also focused on the need for a dispute resolution mechanism and improved assistance for self-represented litigants. The Attorney-General in his Second Reading Speech noted that an important emphasis is placed on the role of alternative dispute resolution in the Tribunal, with the Tribunal able to hold compulsory conferences to identify and clarify issues and promote settlement of disputes or refer the matter to mediation by a person specified as the mediator by the President. It is also noted that the Tribunal must take reasonable steps to

ensure the parties have a reasonable opportunity to understand the nature of the matter under consideration, the nature of assertions made and their legal implications and must explain any aspect of the procedures of the Tribunal or any decisions or directions made. Further, there is an obligation on the Registrar of the Tribunal to ensure that a person intending to commence a proceeding is given any reasonable assistance required.

Finally it is noted that a number of other jurisdictions have transferred their small claim jurisdictions to similar tribunals.

Jurisdiction	NT	NSW	Qld	Vic	WA	SA	ACT	Tas
	Local Court	Local Court & NCAT	QCAT	VCAT	Magistrates Court	Local Court	ACAT	Local Court

#### 4.4. Recommendation

It is recommended that the small claims jurisdiction of the Local Court should be incorporated into the new NT Civil and Administrative Tribunal's jurisdiction.

## 5. THE JURISDICTIONAL LIMIT FOR SMALL CLAIMS

### 5.1. Proposal

It was proposed to increase the jurisdictional limit for the small claims jurisdiction which is currently \$10,000.

### 5.2. Submissions

Generally there was support for an increase in the jurisdictional limit.

Roussos Legal Advisory indicated that they supported an increase in the jurisdictional limit to an amount over \$10,000.

The North Australian Aboriginal Justice Agency did not address the specific issue of an increase to the small claims jurisdictional limit.

The Chief Magistrate stated in his submission that it was timely to review the limit and that there is a sufficient basis for increasing the limit to at least \$15,000 – and as high as \$25,000 taking into account the rate of inflation and other relevant considerations. He noted however that any increase in the jurisdictional limit is ultimately a matter of policy and the court was not in a position to express any particular view.

His Honour did state that if there were an increase of the jurisdictional limit, particularly to \$25,000, that such an increase would affect the operation of the Court and raise issues regarding maintenance, promotion and improvement of the quality of the judicial system and other aspects of the administration of justice and that these are issues upon which the Court may properly comment.

In particular, the Chief Magistrate noted that it is the Court's experience that the amount of the claim is not always a true indicator of the complexity of the matter before the court and that this would remain the case if the jurisdictional limit were increased. He also noted the increased workload if the small claims jurisdiction were increased to \$25,000 and at the same time removing legal representation.

CridlandsMB Lawyers submitted that changes proposed in the Issues Paper, other than those it specifically commented on in its submission, should not be implemented. This would seem to include any proposed increase to the small claims jurisdictional limit.

The Law Society Northern Territory did not address the specific issue of an increase to the small claims jurisdictional limit. The Law Society advised that their preliminary enquiries regarding the improvements needed in the small claims jurisdiction indicated quite different reforms to those presented in the Issues Paper. The Law Society was also of the opinion that the options provided for in the Issues Paper were not sufficiently informed or evidence based. The Law Society suggested that further consultation be conducted on the required reforms to improve the small



claims jurisdiction and they have also indicated that they are keen to work with the NT Government to collect any relevant information to assist in future reform.

Mr Matarazzo, who provided his submission in his capacity as a citizen and tax payer of the Northern Territory, supported an increase to the small claims jurisdictional limit. Mr Matarazzo provided an example of a case in which he assisted an applicant, which he felt highlighted his views of the importance of an increase in the jurisdictional limit. The applicant in that case wanted to commence a claim for an amount of \$13,000, however did not have the finances to commence the claim under the *Local Court Act*. Mr Matarazzo stated that the applicant in that case could not pursue his entire long service leave entitlements because of the inadequate and outdated legislation under which his only option was to spend over \$20,000 in solicitor fees to pursue a claim for \$13,000. The applicant won his claim for \$10,000 under the *Small Claims Act*.

Mr Matarazzo expressed his view that reforms to the jurisdictional limit of the small claims court are overdue and will benefit not only workers, but also business owners and independent contractors who are currently at a significant disadvantage when having to pursue outstanding debts that have a significant impact on their cashflow and financial viability.

Mr Matarazzo also noted that the Issues Paper omitted reference to the "... small claims limit in the New South Wales Consumer, Trader and Tenancy Tribunal [which] is \$30,000" (which it is noted has since been increased to \$40,000).

Further, Mr Matarazzo stated that there are currently some industries and businesses in the Northern Territory which he describes as having "preferential legislation" and gave the example of the *Construction Contracts (Security of Payments) Act*. The objects of that Act include providing for the rapid resolution of payment disputes arising under construction contracts and providing mechanisms for the rapid recovery of payments under construction contracts. Mr Matarazzo suggests that a possible reason for the enactment of the *Construction Contracts (Security of Payments) Act* was the recognition by the NT Government that the small claims jurisdiction was not adequate for the construction industry. Mr Matarazzo believes that reforms increasing the small claims jurisdictional limit will provide a more adequate jurisdiction for other sectors to commence claims and settle disputes.

Mr Matarazzo was supportive of increasing the small claims jurisdictional amount to \$25,000 in alignment with Queensland and South Australia. He also submitted that the limit of the small claims jurisdictions in the civil tribunals interstate of around \$30,000-\$40,000 should be a paramount consideration in deciding what limit to increase the small claims jurisdiction to in the NT.

### 5.3. Discussion

The *Small Claims Act* commenced on 2 July 1976 with a jurisdictional limit of \$1,000. This limit was amended on 26 November 1982 to \$2,000, on 5 June 1989 to \$5,000 and on 1 June 1998 to \$10,000.

Some disadvantages noted in the Issues Paper of increasing the limit may be:

- the higher the claim, the more likely that parties may pursue the litigation, rather than exploring avenues to resolve the dispute;
- a relatively low threshold for small claims matters means that self-represented litigants may be discouraged from commencing frivolous or vexatious matters in the Local Court; and
- if the current limit of \$10,000 (which is a significant amount) was increased so that higher claims could be dealt with in the small claims division without the same level of formality and adherence to rules of evidence, together with excluding lawyers, injustice and detriment to parties either lodging or defending a claim could occur.

The small claims jurisdictional limit under the *Small Claims Act* has not changed since 1998. If that figure was amended to take into account inflation, the jurisdictional limit would be around \$15,300.

However recent amendments to the small claims limit in Queensland and South Australia have been to \$25,000 and it is timely for the Northern Territory to similarly increase its limit.

Jurisdiction	NT	NSW	Qld	Vic	WA	SA	ACT	Tas
Amount	10,000	10,000 & \$40,000	25,000	10,000	10,000	25,000	10,000	5,000

An increase in the limit would mean that more claims would fall into the ambit of the small claims division, giving parties the benefit of the less formal procedure of the small claims jurisdiction and the cost free component of the small claims jurisdiction.

As noted by Mr Matarazzo, the legal costs for a claim can exceed the amount of the claim and he gave the example of legal costs of \$20,000 in the Local Court for a \$13,000 claim.

#### 5.4. Recommendation

It is recommended that the jurisdictional limit of small claims should be increased to \$25,000.

## 6. SMALL CLAIMS PROCEEDINGS

### 6.1. Proposal

It was proposed to amend provisions of the *Local Court Act* that give litigants a discretion to commence proceedings under the *Local Court Act* or the *Small Claims Act* where a matter involves a claim over \$5,000.

### 6.2. Submissions

The North Australian Aboriginal Justice Agency, which supports a simplified and informal process for small claims, therefore supported legislative amendment to require proceedings involving a claim under the current jurisdictional limit of \$10,000 to be commenced under the *Small Claims Act*. They also recommended the option of a party seeking leave to transfer proceedings to the Local Court if legally complex or requires more formal procedures.

CridlandsMB Lawyers submitted that they supported amendments to current legislation requiring all claims up to the current small claims jurisdictional limit of \$10,000 must be made through the small claims jurisdiction of the Local Court. They also submitted that the rules which allow costs orders at the discretion of the court for claims over \$5,000 should remain as in their view that discretion provides an adequate motivation for the parties to act reasonably in the circumstances of most cases.

The Chief Magistrate indicated that, with any increase in the jurisdictional limit, there needs to be consideration as to whether any provisions should be made for allowing litigants latitude to commence proceedings under the *Local Court Act* or the *Small Claims Act* where the claim exceeds a certain amount, or giving the Local Court the power to order proceedings commenced under the *Local Court Act* to be dealt with as if the proceedings had been commenced under the *Small Claims Act* and vice versa. He noted the options in the Issues Paper did not cover these provisions.

His Honour noted the practicality of a simplified process of having all claims within the small claims jurisdictional limit commenced under the *Small Claims Act*, dealt with under that Act. That is to say that no claims within the small claims jurisdictional limit would be dealt with under the *Local Court Act*. His Honour stated though that such a simplification of process would need to consider matters of practice and procedure and the issue of legal representation.

Submissions were also made on improving the process for small claims.

Roussos Legal Advisory submitted that the management of small claims could be streamlined and gave the example of disputed debts being dealt with summarily on the papers as in NSW where oral evidence is not permitted unless the court makes such an order and proceedings are determined on the basis of written statements and documentary material that is filed.

The Chief Magistrate noted that the Court's experience is that many small claim matters lend themselves to being dealt with on the papers, without the need for a hearing or inquiry. In his view, the NSW processes (of filing evidence and only having formal hearings in the discretion of the magistrate for more complex matters) could easily be adopted. He noted that this would lead to faster and cheaper dispositions of simpler disputes and those involving complex questions of law and/or fact being case managed to hearing.

The North Australian Aboriginal Justice Agency however indicated that it would not support a model of using written evidence in small claim proceedings because that model relies on parties being able to seek legal advice and assistance in the preparation of evidence. The North Australian Aboriginal Justice Agency submitted that such a model would disproportionately disadvantage Aboriginal litigants and present a further barrier in their access to justice due to extensive language and cultural barriers and limited access to free legal advice.

### **6.3. Discussion**

Removing the option to choose the jurisdiction in which to bring a small claim over \$5,000 would simplify the small claims process and ensure consistency.

The jurisdiction of the Northern Territory Civil and Administrative Tribunal is well suited to a simplified, informal and less adversarial process for small claims. The principles for conducting proceedings in the Tribunal include acting fairly and according to the substantial merits of the matter, complying with the rules of natural justice, informing itself in any way it considers appropriate, acting with as little formality and technicality and as much speed as proper consideration of the matter permits, and deciding on all relevant facts.

### **6.4. Recommendation**

It is recommended that claims that fall within the definition of a small claim can only be commenced in the Northern Territory Civil and Administrative Tribunal.

## 7. REPRESENTATION IN THE SMALL CLAIMS JURISDICTION

### 7.1. Proposal

It was proposed to exclude legal practitioners and representatives, subject to limited exceptions in the discretion of the court, such as where a party suffers a disability, a party is a body corporate or government agency, or the matter involves complex questions of law or fact.

### 7.2. Submissions

No submission supported excluding legal practitioners and representatives.

Roussos Legal Advisory indicated that they support lawyers or representatives being involved in small claims and do not believe that reducing choice by excluding lawyers would assist the objective of helping the community resolve small claims. Lawyers provide valuable assistance in understanding legal issues and matters of procedure and ensuring evidence is presented correctly. There are businesses and individuals who do not have the time or expertise to deal with matters in court. There is no reason to curtail the choice to outsource to someone more experienced.

The North Australian Aboriginal Justice Agency also did not support the option to exclude lawyers or representative from the small claims jurisdiction. They noted that while legal representatives may not be required in many small claim matters, the court should have sufficient flexibility to allow legal representation by leave where litigants require assistance and would be placed at a disadvantage if not represented. The North Australian Aboriginal Justice Agency was concerned that the removal of the right to representation would disproportionately disadvantage Aboriginal litigants and that the court should be permitted to consider other factors which may affect litigants being able to present their case to the court – such as literacy and language issues, cultural and remoteness considerations. The North Australian Aboriginal Justice Agency also submitted that any provision as to representation should accommodate any power imbalance and a litigant should be granted leave to be represented where the opposing party is a corporation, government agency or is represented.

CridlandsMB Lawyers submitted that they did not support excluding legal practitioners from the small claims jurisdiction of the Local Court. They noted that in their experience claims resolve more quickly if both parties are represented, unrepresented litigants are more likely to waste court time pursuing vexatious or frivolous claims and represented litigants are more likely to settle a matter. They noted for example that pleadings of self-represented litigants are difficult to understand and slows the court system down as the court is forced to replead, thereby increasing costs of the parties and the court. Finally they submit that excluding legal practitioners may limit individual freedoms.

The Chief Magistrate noted that the proposal to exclude lawyers or representatives potentially affects the operation of the Court, the quality of the judicial system and the overall administration of justice. It is noted the Chief Magistrate's comments were predicated on there being no suggestion in the Issues Paper that the small claims jurisdiction was being taken away from the court – for example by being conferred on a tribunal. While part of the court's jurisdiction, access to legal representation is an important element in ensuring justice to all. His Honour also argued that an increase in the jurisdictional limit, especially to \$25,000, would augment the significance of the rights and liabilities determined by the court and that the right to representation should not lightly be interfered with. He further noted that the Court's experience has been that the amount of a claim is not always a true indicator of the complexity of the matter and complex issues of fact and law warrant legal representation.

The Chief Magistrate also noted the significant practical problems associated with unrepresented litigants. The numbers of unrepresented litigants are growing and they impose a burden on the courts, taking up more resources than matters where all parties are represented. They make greater demands on registry staff, take up more time in pre-hearing processes and more time and effort of magistrates at hearings. His Honour submitted that increasing the jurisdictional limit and reducing legal representation would necessitate more court staff to handle the case load.

The Law Society also suggested that unrepresented litigants can be a burden on the limited resources of the Court which would be compounded if jurisdictional limits increased by up to 25%

The Chief Magistrate also noted that the option in the Issues Paper of increasing the jurisdictional limit and allowing representation in a 'costs free' jurisdiction is a significant departure from the current regime which allows the court to order costs if the claim exceeds \$5,000 if fair and reasonable having regard to such matters as complexity. If changed to completely costs free, the Chief Magistrate argues that could be a disincentive to litigants to engage a representative which would deprive the court of their assistance. His Honour suggests utilising legal representation more effectively and making it more affordable by putting a cap on legal costs eg fixed amounts for each stage of the litigation (similar to the SA Workers Compensation Tribunal Rules 2009 or as in a grant of legal aid).

The Law Society was concerned that reforms based on information unsupported by evidence may result in unintended consequences that will heavily impact the users of the court, a significant proportion of which are members of the public. It noted that the assumption that excluding lawyers would result in a level playing field is incorrect as it is aware that some parties are highly sophisticated in the small claims context even though not legally represented and gave the example of insurance companies and government.

Mr Matarazzo also does not support the proposal that lawyers or paid agents should not be allowed to represent parties in the small claims jurisdiction, arguing it goes against the spirit of free enterprise, freedom of choice and a democratic capitalist society. He argued that it is not the role of the legislature to take away the individual's or a business's right to choose who will represent them in the small claims jurisdiction. He further argued that parties should not be subjected to costs orders if they lose a case and that the small claims jurisdiction should remain a 'no costs' jurisdiction. He noted that, anecdotally in the Federal Fair Work jurisdiction, a significant number of workers have decided not to pursue their employment entitlements because costs can be awarded against workers who pursue their small claims in that jurisdiction. He argued that business owners and independent contractors will be detrimentally affected if the small claims jurisdiction in the NT does not remain a 'no costs' jurisdiction.

In a supplementary submission, Mr Matarazzo submits that non-lawyers who are experts in their field (for example an industrial relations or human resource management practitioner) should be able to represent a party for a fee in the small claims jurisdiction, as occurs for 'paid agents' under the Commonwealth's *Fair Work Act 2009*. He argues that excessive numbers of parties choose to self-represent because employing a lawyer is cost prohibitive and they cannot engage an expert of their choice. He noted this leads to an inefficient court system because the presiding magistrate needs to spend inordinate amounts of time with unrepresented parties who are out of their depth.

### 7.3. Discussion

As mentioned by Mr Matarazzo, section 18 of the *Legal Profession Act* prohibits a person who is not an Australian legal practitioner from engaging in legal practice (which would include representing a client in proceedings) for fee, gain or reward. This is (as stated in section 17 of the *Legal Profession Act*) to protect the public interest in the proper administration of justice and to protect consumers by ensuring legal work is carried out only by those who are properly qualified to do so.

It is noted that parties can pay for expert advice to assist them in bringing a small claim. The issue is representation before the Tribunal.

There is nothing special about parties in the small claims jurisdiction requiring representation by paid experts; whereas arguably there is a benefit in industrial relations or human resource management practitioners representing parties in the fair work jurisdiction. It is also noted that the fair work jurisdiction does not provide for representation as of right and permission of Fair Work Australia is required (except for specified written submissions).

The issue of paid agents representing parties should not be considered in respect of the small claims jurisdiction in isolation but is a wider issue which could be subsequently considered in the context of representation generally before the Northern Territory Civil and Administrative Tribunal.

Most jurisdictions do not allow for legal representation as of right in the small claims jurisdiction.

Jurisdiction	NT	NSW	Qld	Vic	WA	SA	ACT	Tas
Legal representation without leave	Yes	Yes	No	No	No	No	Yes	No

Although most jurisdictions do not allow for legal representation as of right, it is considered that the same rule should apply consistently as for other matters in the Northern Territory Civil and Administrative Tribunal – particularly in the initial stages of the Tribunal's establishment.

Parties to proceedings in the Northern Territory Civil and Administrative Tribunal can appear in person and represent themselves or be represented by a legal practitioner. Parties may be represented by persons who are not legal practitioners, with leave of the Tribunal. A party appearing may always be assisted by another person as a friend. However a person who is not a legal practitioner cannot act for fee or reward in relation to a proceeding before the Tribunal.

Costs should similarly follow the general rule in the Northern Territory Civil and Administrative Tribunal ie parties generally bear their own costs. Therefore if a party has chosen to be represented by a legal practitioner, they pay their own costs of representation.

#### 7.4. Recommendation

It is recommended that the rules for representation follow those of the Northern Territory Civil and Administrative Tribunal, namely parties can be represented by a legal practitioner or, with leave of the Tribunal, by another representative.