

## *'It's More Like Judge Judy' - Self-help in a hybrid legal forum*

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### *Introduction*

This paper reports on part of a project which aims to improve understanding of the experiences of people who represent themselves in legal processes. In particular, it reports on a case study of the experiences of people pursuing or defending claims on their own behalf before the Small Claims Tribunal (SCT) in Queensland. The SCT is currently an important part of the Queensland civil justice system and, like similar tribunals elsewhere in Australia, does not permit parties to be legally represented.<sup>1</sup>

The title of our paper refers to the SCT as a hybrid legal forum. It is an adjudicative body presided over by referees who are judicial officers (magistrates and, since early 2008, judicial registrars) and are required to promote the settlement of claims without being bound by the rules of evidence. Proceedings must be conducted in private and there are very limited rights of appeal from SCT decisions. Our title also includes an observation about the operation of the SCT, that it involves a process like that followed by 'Judge Judy' on television. Two of the SCT users we interviewed made almost identical observations about not being able to tell their story to the referee who kept cutting them off.

Information on how to conduct an SCT matter is available from several sources: the SCT itself (either in person or its website), a guide produced by Legal Aid Queensland (LAQ) or resources produced by community legal centres (CLCs). While legal representation is not permitted before the SCT, people can obtain legal or other advice on pursuing or defending a claim. This case study was specifically concerned with the use parties made of the guide

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<sup>1</sup> See *Small Claims Tribunal Act 1973* (Qld) s.32. Legal representation before the SCT can only be approved if all parties agree and the tribunal is satisfied that no party will be unfairly disadvantaged. It is proposed that the SCT will be subsumed within the Civil Disputes Division of the new Queensland Civil and Administrative Tribunal in the second half of 2009. See Tribunals Review Independent Panel of Experts, *Queensland Civil and Administrative Tribunal: Stage 1 Report on Scope and Initial Implementation Arrangements* 63. Accessible at [http://www.tribunalsreview.qld.gov.au/QCAT\\_stage\\_one\\_report.pdf](http://www.tribunalsreview.qld.gov.au/QCAT_stage_one_report.pdf)

produced by LAQ, the *Small Claims Tribunal: A Consumer Guide* and involved seeking the views of parties about how they prepared for their encounter with the tribunal.

We consider this case study to be important because it involves an examination of self-help in a forum where the self-helper is not permitted to have a lawyer represent them. In other words, people are expected to help themselves and it is assumed that they have the capacity and knowledge to do so effectively. While the 'legal fluency'<sup>2</sup> of citizens appears to be taken as a given, our research suggests it should not be taken for granted. This raises the question of how can people help themselves in a forum they cannot observe ahead of time and in which they cannot have an experienced and knowledgeable agent (ie. a lawyer or the like) act for them?

The case study also raises questions about the ability of agencies to develop comprehensive self-help materials in jurisdictions in which those agencies themselves may have limited or no experience – in this case because that jurisdiction specifically excludes the participation of agents. It suggests that in addition to assumptions being made about the legal fluency of self-helpers, those responsible for developing self-help materials may understandably make assumptions about how a particular aspect of the legal system or a particular jurisdiction should operate, rather than how it actually operates in practice.

An increasing number of decision-making bodies do not permit parties to have legal representation.<sup>3</sup> Parties to such proceedings have a clear need for guidance as to both the process and the substance of the decision making yet there is no obvious entity to provide such guidance. While such bodies are structured on the basis that consumers are able to represent themselves, and processes are apparently simplified to allow for this, there are assumptions made by those responsible for establishing and operating such tribunals about the skills and abilities of self-helpers. For example, even a simplified claim form requires a claimant to be able to distinguish between facts and evidence, relevant and irrelevant materials, indicating the need for some basic understanding of evidentiary requirements. Small claims tribunals are prominent in a range of jurisdictions and people accessing such bodies require support in order to be effective in preparing their claim or responding to the claims of another. While parties access support from a range of sources, some may not be receiving adequate support and information. They also require knowledge of the nature and structure of the process used by the

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<sup>2</sup> This is derived from Michelle Le Baron's description of 'cultural fluency' and 'conflict fluency' in her discussion of international dispute resolution. See Michelle Le Baron, *Bridging Cultural Conflicts: A New Approach for a Changing World*, (2003).

<sup>3</sup> Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System*, February 2004 accessible at <http://www.lawcouncil.asn.au> See also P. Latimer, M. Hocken & S. Marsden, 'Legal Representation in Australia Before Tribunals, Committees and Other Bodies' (2007) 14 (2) *Murdoch E-Law Journal* 122.

tribunal to determine claims, including its responsibility to promote efforts to reach a negotiated settlement.

This paper includes background material on both this research project and the nature and jurisdiction of the Queensland SCT. It then provides an outline of the case study - the methods used and what the research revealed in relation to the operation of the SCT and the use which parties to SCT claims made of the LAQ Guide to the Small Claims Tribunal.

### *Background to the research*

This case study is part of a larger Australian Research Council-funded research project looking at the experiences of self-helpers in a range of legal contexts. Our case studies have been selected to enable examination of the impact of three key variables: (1) the nature and complexity of the legal work to be attempted; (2) the context in which self-help legal work is to be performed, including whether it is adversarial and litigious in nature; and (3) the variable characteristics of the self-helper themselves. A second objective is to analyse the relationship between legal self-help and existing support services (such as 'unbundled services'<sup>4</sup>) provided in particular settings, to determine the circumstances in which special forms of assistance are in fact needed, and what those forms should be.<sup>5</sup>

Each of the case studies seeks to illuminate different types and levels of legal self-help which might occur in the Australian legal system, from relatively straightforward non-litigious tasks such as making an application for probate through to the highly complex legal processes of child protection matters. It is intended that, by examining such diverse instances of self-help, some broader observations can be made about the circumstances in which it is appropriate (or inappropriate) to expect people to be responsible for the resolution of their own legal issues.

### *The Small Claims Tribunal*

Queensland was the first Australian state to introduce a Small Claims Tribunal, in 1973.<sup>6</sup> The tribunal is not bound by the rules of evidence and 'may inform itself on any matter in such manner as it thinks fit'.<sup>7</sup> Until recently, all referees for the SCT were also magistrates. Since January 2008,

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<sup>4</sup> These are partial services, sometimes offered in the context of litigation.

<sup>5</sup> For example, some legal aid commissions are currently developing 'discrete task services' to provide limited aid to clients who do not qualify for representation services, on the grounds that 'something is better than nothing'; Legal Aid Congress, Brisbane, November 2004. An example of this is the Brief Services Unit (BSU) of LAQ. The BSU provides additional assistance to the most vulnerable of LAQ's clients beyond that which is normally available in basic legal advice services (including checking of documents, assisting with drafting forms etc). It extends to civil matters and is particularly targeted towards providing a greater level of assistance for those who are unable to effectively advocate for themselves but who would not get a grant of legal aid to have a solicitor act for them. One of the objectives of this research is to test the 'something is better than nothing' assumption.

<sup>6</sup> W. Guild, 'Small Claims in Queensland' (1985) *Australian Business Law Review* 127

<sup>7</sup> *Small Claims Tribunal Act 1973* (Qld), s. 33(3)

judicial registrars have also been appointed to hear SCT matters. While it is a separate jurisdiction to the Magistrates Court, the SCT effectively operates under the Court's umbrella, using the same personnel and infrastructure. The tribunal's primary function is to attempt to bring parties in dispute 'to a settlement acceptable to all the parties'<sup>8</sup> and proceedings not relating to a tenancy matter are to be taken in private.<sup>9</sup> Where such a settlement cannot be reached, the tribunal's function is to make such an order 'as is fair and equitable to all the parties'.<sup>10</sup>

The official government website for Queensland Courts describes the functioning of the SCT as follows:

'The Small Claims Tribunal is sometimes called a consumers' court because it is generally concerned with disputes between consumers and traders.

As lawyers are not permitted in the tribunal unless the claimant, respondent and the referee agree to it, the tribunal is a low cost, do-it-yourself way to resolve your dispute.'<sup>11</sup>

From a government perspective, the SCT is an attractive and presumably cost-effective option for the resolution of disputes. As Byrne, J., of the Queensland Supreme Court noted:

*The popularity of the tribunals, with government and the community, is influenced by the informality of the proceedings and the finality of outcomes. Small Claims Tribunals function without the usual formalities of a court, are not bound by the rules of evidence, and before a lawyer may be heard, all parties must agree. Finality is an important characteristic of orders of the tribunals. Several legislative provisions combine to restrict the scope for challenges to determinations of referees: no official record of evidence is kept; "no appeal shall lie in respect" of a settlement or order."*<sup>12</sup>

The number of claims dealt with by the SCT is considerable. In its' most recent publicly available annual report it was noted that some 15,600 claims were filed with the Tribunal in the 2007/8 financial year, representing 27% of all civil claims filed within the broad jurisdiction of the Magistrates Court. Notably, for the same period a further 13,000 claims (or 23% of all civil claims) were filed in the Small Debts Court, a division of the Magistrates Court which also does not ordinarily allow for legal representation<sup>13</sup>. This means 50% of

<sup>8</sup> *Small Claims Tribunal Act 1973* (Qld), s. 10(1)

<sup>9</sup> *Small Claims Tribunal Act 1973* (Qld), s. 33(1)

<sup>10</sup> *Small Claims Tribunal Act 1973* (Qld), s. 10(2). This can include dismissing the claim where the circumstances require.

<sup>11</sup> <http://www.courts.qld.gov.au/136.htm>, accessed 24 February 2009

<sup>12</sup> *W&T Enterprises (Q) P/L v K O Taylor, Referee, Small Claims Tribunal & Ors* [2005] QSC 360 at 361.

<sup>13</sup> Queensland Magistrates Court Annual Report 2007/2008, 68

all civil claims dealt with by the lower level of the court system in Queensland involve matters in which parties are required to self-help.

The small claims jurisdiction in Queensland has increased in prominence over the past decade, with the number of claims increasing from 3,500 in 1996<sup>14</sup> to 7000 in 2003<sup>15</sup> then 15,672 in 2007.<sup>16</sup> The statistics available from the Magistrates Court record different data sets from year to year and this makes it difficult to conduct any substantial analysis. In some years all small claims are combined while in other years residential tenancies matters are separated out. In 2005, residential tenancies matters accounted for almost 90% of small claims.<sup>17</sup> This lack of consistency makes it somewhat difficult to track changes in the jurisdiction.

From the perspectives of parties, the main recent development in the operation of the SCT has been the increasing use of 'abbreviated mediation' in circumstances where the tribunal referee would otherwise conduct a full hearing.<sup>18</sup> This service is now available across much of Queensland for small claims matters and is considered to have reduced waiting times and resulted in a 40% increase in the number of claims which are resolved without recourse to a full hearing.<sup>19</sup>

There is surprisingly little recent coverage of the SCT in the academic literature. What has been written tends to be very lawyer-focussed and was written more than a decade ago.<sup>20</sup> Little attention has not been paid to developing an understanding of the experiences of users of the tribunal yet this appears to be a key source of information in any efforts to enhance the operation of the tribunal. A survey of 1670 users of the Victorian SCT conducted in 1984 found that the elderly, people with limited formal education, people living in rural areas, women and recent migrants were all under-represented amongst users of the tribunal.<sup>21</sup> The survey results indicated that 63% of claimants were satisfied with the outcome of their claim while 26% expressed dissatisfaction.<sup>22</sup>

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<sup>14</sup> *Queensland Magistrates Court Annual Report 2002*, 34

<sup>15</sup> *Queensland Magistrates Court Annual Report 2003/2004*, 59

<sup>16</sup> *Queensland Magistrates Court Annual Report 2005/2006*, 44

<sup>17</sup> *Queensland Magistrates Court Annual Report 2005/2006*, 46

<sup>18</sup> *Queensland Magistrates Court Annual Report 2005/2006*, 45

<sup>19</sup> *Queensland Magistrates Court Annual Report 2005/2006*, 46. The early operation of the Abbreviated Mediation service is outlined in A. Eastall & P. Condliffe, 'Abbreviated Mediation: Trial of a New Process' (1999) 1 (9) *ADR Bulletin* 1

<sup>20</sup> W. Guild, 'Small Claims in Queensland' (1985) 13 (3) *Australian Business Law Review* 127, D. De Vaus, 'Small Claims Tribunals: An Effective Alternative to the Court system?' (1987) 22 (4) *Australian Journal of Social Issues* 597

<sup>21</sup> D. De Vaus, 'Small Claims Tribunals: An Effective Alternative to the Court system?' (1987) 22 (4) *Australian Journal of Social Issues* 597, 603

<sup>22</sup> De Vaus, 'Small Claims Tribunals: An Effective Alternative to the Court system?' (1987) 22 (4) *Australian Journal of Social Issues* 597, 605

The Australian scholarship on tribunals focuses on more formal tribunals which consider the merits of administrative decisions. Those tribunals have a more inquisitorial role than that performed by the SCT. The SCT is relatively informal yet potentially highly adversarial depending on the approach taken by the referee. In this context, the LAQ Guide and other information sources have potentially important roles to play in informing people seeking to access the tribunal.

#### *Inquisitorial Tribunal Processes*

Robin Creyke has examined the operations of inquisitorial tribunals in Australia and identified the common objectives that they are to be 'economical, informal and quick' as well as being 'fair and just'.<sup>23</sup> Courts have recognised a problem here as such objectives 'will often be inconsistent as between themselves'. Mechanisms that are 'economical, informal and quick' may well not be 'fair' or 'just'.<sup>24</sup>

In Australia, the past decade has also seen a proliferation of industry-based complaints resolution schemes, operated by industry groups with limited external scrutiny.<sup>25</sup> The work of these schemes overlaps with that of tribunals like the SCT. While there have been landmark studies conducted into consumer complaint behaviour in Australia, such studies have not considered consumer satisfaction with industry-based complaint frameworks.<sup>26</sup>

We have referred elsewhere to the way in which the effectiveness of legal self-help resources is usually measured through evaluations focussed on the objectives and performances of the service provider or government funding body that produces them.<sup>27</sup> There is very little literature considering the operation of tribunals of this kind which can be attributed in part to the difficulties faced in conducting research related to hearings conducted in private.

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<sup>23</sup> R. Creyke, 'Inquisitorial Practice in Australian Tribunals' (2006) 57 *Admin Review* 17

<sup>24</sup> Creyke, 17-18

<sup>25</sup> P. O'Shea, 'Underneath the Radar: The Largely Unnoticed Phenomenon of Industry Based Consumer Dispute Resolution Schemes in Australia' (2004) 15 *ADRJ* 156, P. O'Shea, 'The Lions Question Applied to Industry-Based Consumer Dispute Resolution Schemes' (2006) 25 (1) *The Arbitrator and Mediator* 63.

<sup>26</sup> The lead studies include a series of surveys conducted by the Society of Consumer Affairs Professionals. See TARP *American Express/SOCAP study of complaint handling in Australia*, (1995) Melbourne, Society of Consumer Affairs Professionals

<sup>27</sup> See M. Lawler, J. Giddings & M. Robertson, 'Maybe A Solicitor Needs To Know That Sort Of Thing But I Don't': User Perspectives On The Utility Of Legal Self-Help Resources', 2009 (forthcoming). In Australia, for example many self-help products and services developed and provided by CLCs are evaluated by reference to a standard form prepared by the Commonwealth Attorney-General's Department reflecting that funding body's concerns in relation to numbers of people accessing the service or product, period of delay in receiving the service or product and ease in obtaining access to the product or service. Such indicators might be more appropriately categorised as measures of "service or product efficiency" rather than the utility of those services or products to the legal self-helper.

It is interesting to draw a comparison with the substantial research done about another private process, namely mediation. Mediation continues to attract considerable scrutiny, particularly in terms of how it is and should be practised, its relationships with other dispute resolution processes and the experiences of those involved in such mediation processes. In the Australian context, the ongoing work of the National Alternative Dispute Resolution Advisory Council (NADRAC)<sup>28</sup> and research by a range of academics<sup>29</sup> are the best illustrations of this continuing strong interest in mediation practice and policy. It would be constructive to see closer attention paid to the operation of the SCT.

### *Methods*

Semi-structured interviews were conducted with 15 participants who had self-identified as coming within the ambit of the study. Recruitment was more difficult than was anticipated. The original intention was to target people who had specifically used the LAQ guide. The SCT has a protocol with LAQ to post out the guide to people who contact the Tribunal for forms. However, when the case study began the guide had recently been reprinted such that many people involved in proceedings before the SCT had not received it through the normal process). Study participants fell into three broad groupings: those who had utilised the LAQ manual; those who had accessed it but found it not relevant to their matter; and those who had no knowledge of the LAQ manual, including people who identified themselves as outside LAQ's client base.

Most participants were recruited by a member of the research team who attended at the SCT both on hearing days and in the registry when people were filing documents. Even in that process, few people approached were willing to be interviewed, most saying they were 'too busy'. Several participants were referred to the research team by community legal centres – significantly these people generally had seen the manual or had accessed other self-help resources. Flyers publicising the research were placed in the foyer and waiting area of the SCT. These drew very little response and indeed, those people who responded to the flyers tended to fall outside the ambit of the study (these people were mistaken in their belief that their matters had been through the SCT).

While some participants were available to be interviewed at the time they were approached, more than half were interviewed at another mutually

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<sup>28</sup> See [www.nadrac.gov.au](http://www.nadrac.gov.au) In particular, note the biennial research conferences convened by NADRAC.

<sup>29</sup> Each of the following texts includes a strong focus on the principles and practice of mediation: H. Astor & C. Chinkin, *Dispute Resolution in Australia*, 2002, 2<sup>nd</sup> ed., Lexis-Nexis L. L. Boule, *Mediation: Principles, Process, Practice*, 2005, Lexis-Nexis, P. Condliffe, *Conflict Management: A Practical Guide*, 2002, LexisNexis Butterworths, Sydney, T. Sourdin, *Alternative Dispute Resolution*, 2008, 3<sup>rd</sup> ed., Lawbook, Sydney, D. Spencer & T. Altobelli, *Dispute Resolution in Australia*, 2005, Thomson Lawbook, Sydney & G. Tillett & B. French, *Resolving Conflict: A Practical Approach*, 2006, 3rd ed., Oxford University Press, Melbourne.

agreed time and away from the confines of the SCT. Users were asked about the nature of their SCT proceedings, any previous experiences with court and lawyers, their knowledge (if any) of the LAQ guide, sources of guidance and assistance used, the steps and tasks they had to complete and the degree of ease or difficulty involved as well as whether they would have obtained legal representation if that had been possible. Those people who had made use of the LAQ guide were also asked for their views on its usefulness.

Interviews were recorded and transcribed then the transcripts were analysed to identify the scope and limitations for use of the LAQ guide. While this is a relatively small number of respondents, we consider useful insights can be drawn from these user perspectives. The analysis paid particular attention to the impact of the three key variables referred to earlier in this paper: (1) the nature and complexity of the legal work attempted; (2) the context in which self-help legal work is to be performed, including whether it is adversarial and litigious in nature; and (3) the characteristics of the self-helper themselves.

A content analysis of the LAQ guide was also completed involving two members of the research team separately reviewing the content to identify the extent to which the guide addressed the content suggested by the statements made by the interviewees. The analysis considered the accessibility, comprehensibility and relevance of the material in the guide as well as the extent to which it was likely to assist users to advance their claim or response.

### *Overview of the LAQ Small Claims Tribunal Guide*

LAQ has been producing self-help resources relating to the SCT Tribunal since the early 1990's, and indeed the precursor to the current Guide was one of the first self-help resource tools developed by LAQ. Those resources were developed (and continue to be developed) based upon the needs of LAQ's client base as identified through LAQ's broader suite of services, most notably its' client advice services and call centre activities.

*The LAQ Guide* is a 36 page resource available both in printed form and electronically from Legal Aid Queensland. By an arrangement between LAQ and the SCT, hard copies of the Guide are also made available by the SCT to potential claimants who contact the Tribunal. The Guide is developed, updated and published in-house relying upon staff from the LAQ Publications section as well as input from other staff as to its currency. Apart from anecdotal feedback from users, no formal evaluation mechanism exists beyond that of annual reviews of content currency.

The title of the Guide states that it is for consumers and this obviously limits its perceived usefulness to non-consumers. From the provider's perspective, this limiting is appropriate given that the Guide is primarily directed towards the LAQ client-base who are generally one-off consumer claimants rather than traders. Moreover, the use of the word 'consumer' is intended to denote its applicability to the 'consumer' jurisdiction of the Tribunal and to

distinguish it from other jurisdictions (notably the tenancy division of the Tribunal which uses vastly different forms and procedures for dealing with disputes).

The Guide contains headings under which self-help information is grouped. The information is arranged in a way that allows users to work from the beginning introductory pages (which provide a basic overview of the Tribunal and consumer law) through the process of negotiation prior to filing a claim and through the making of a claim, preparing for hearing, presentation of material at hearing and the Tribunal's decision. While the structure in some respects assumes that the user will access the Guide at the earliest stages of their legal problem (and will follow the materials methodically in terms of working through the typical stages of the SCT process) there is nothing in the Guide's structure or content which would preclude a user from accessing it for the first time at some mid-way point in the process (for example, after filing an application with the Tribunal but before the hearing). This is because the Guide deals with each stage within the legal process (from negotiation to decision) as a discrete task (or series of tasks) and does not "refer back to itself".

Information is arranged using a question and answer format in which the provider has anticipated the types of questions a consumer might have (for example, "how do I prepare for the hearing?"). That format is increasingly standard across LAQ self-help publications and was developed in response to recommendations arising from an external review as to the accessibility and readability of LAQ publications in 2004.

While the Guide provides some introductory material about when it is appropriate to use the resource, users are still required to 'locate' their circumstances within the legal information provided. For example, while a user might conceivably satisfy the requirement that they have a dispute involving less than \$7,500 they still need to identify whether they fit within the requirements of being a consumer, having a claim against a trader based upon a contract and what implied warranties apply. While some of those questions are conceivably straightforward (am I a consumer?) others may require a more detailed knowledge of contract law than is outlined in a very brief way (one sentence) within the Guide. The Guide encourages people to obtain legal advice if they are uncertain about the existence of a contract, a recommendation that some potential users may be unable to follow due to their circumstances.

From the perspective of content, the Guide provides a combination of background information about the Tribunal, basic substantive legal information and procedural instructions. It assumes that once a claim is lodged with the Tribunal it will proceed in the "normal" way anticipated by the service provider (a very simplified legal process without problems or delays). As a result it does not anticipate the prospect of adjournments or other deviations from what would be considered a straightforward claim. It

also assumes a reasonable level of legal literacy on the part of the self-helper. For example, in relation to the section of the Guide which deals with preparing for a hearing it directs the user to write down a list of the facts together with the corresponding evidence to support those facts. While examples are given of what might constitute evidence, no attempt is made to identify what constitutes a fact (as opposed to, for example an opinion or mere assertion).

In summary, the Guide is best seen as a basic instruction manual about a standard SCT process. Users are expected to have a reasonable degree of legal literacy in the context of understanding whether the Guide is applicable to their circumstances, an expectation that, at least in straightforward cases might be considered reasonable but which perhaps ignores the potentially more complex cases the SCT may deal with in its' consumer division.

#### *What the Research Revealed*

There were 16 participants in the interviews. All spoke English as their first language and all but one were born in Australia. None identified as being of Aboriginal or Torres Strait Islander heritage. The following table provides a summary of demographic details:

Table 1: Demographic summary of interviewed self-helpers

Gender		Education		Income (Annual household)		Employment	
Female	56%	Early-mid high school	25%	<\$30,000	19%	Retail/Clerical	25%
Male	44%	Late high school	25%	\$30-\$50,000	12%	Pensioner	19%
		Completed high school	19%	\$50-\$70,000	31%	Services	19%
		Trade qualification	6%	>\$70,000	38%	Management	12%
		Tertiary	25%			Professional	6%
						Other	6%

Most people interviewed had not used the LAQ Guide. Several non-users indicated their reason for not accessing the guide was that they would not have been eligible for legal aid.<sup>30</sup> Two interviewees who were aware of the guide but did not access it made the assessment that the Guide was not for them. One was a 'repeat player' trader who considered the guide was designed for one-off users.

Seven of the 15 interviewees were aware of the guide and five of those used it in some way. Each of those five guide users were consumers with four pursuing a claim while the other was responding to a claim by a trader. Those who did use the guide referred to its value as a general resource. They each referred to limitations on the guide's utility in terms of lack of specific detail on matters including evidence and the granting of adjournments<sup>31</sup>,

<sup>30</sup> P7 stated that SCT Registry staff had mentioned 'something about legal aid but I knew I wouldn't get legal aid so I didn't pay much notice to it'. P14 was assisted by her father in making the claim and stated that he would not have gone to legal aid.

<sup>31</sup> P6 referred to the Guide as too vague, with not enough detail on the conduct of the case itself and what happens before the judge. P6 also noted that when he lodged the claim forms, the SCT Registry staff told him 'what would happen next so it was easier just to follow what people were telling me because that booklet is more like "This is the Small Claims Tribunal" and 'You can't go there if your claim is about this" rather than you should do this first and then this'. P8 stated that the Guide made the SCT 'sound like a proper court with evidence and getting to ask questions and that sort of thing'. P13 referred to the lack of detail on adjournments and 'stuff about what happens at the hearing'.

duplication of material available from the SCT Registry<sup>32</sup> and it being tailored to those making rather than responding to a claim.<sup>33</sup>

Interviewees also provided insights in relation to what the guide could usefully include. While they wanted to gain an understanding of the SCT, they were understandably seeking detail specific to their situation. This was expressed by one person as follows:

'I guess really, I just didn't want to look like an idiot. I wanted to look like I knew what I was doing. You know, I think that was the problem with the booklet. I don't need to know the history of the court or why I could or couldn't take my case to court. I just needed to know what forms to use, what bits to fill out and which floor I needed to go to to hand them in.'<sup>34</sup>

The person who made the most extensive use of the guide, in combination with accessing LAQ's Call Centre half a dozen times, was the only interviewee who lodged a claim with the SCT which was not resolved either through a negotiated settlement or a tribunal order in their favour. It was not possible to make an accurate assessment of whether this failure resulted from problems with their claim, a lack of skills or for some other reasons.

Support was sought from a range of sources, often in combination. These sources included SCT and Magistrates Court Registry staff, the Queensland Office of Fair Trading, community legal centres, solicitors, the Queensland Law Society, the Brisbane City Council, the LAQ Call Centre, police and a parent while one trader who was making a claim relied on precedent documents provided by a bookkeeper. Those who accessed legal services (principally, community legal centres) felt better prepared than those who didn't. Whether this is because they then felt more self-confident about the process or whether their actual knowledge of the process was greater is not clear from the research. Several people received what might be described as coaching or, as Melville and Laing characterise it, mentoring.<sup>35</sup> Two interviewees referred to the conduct of their claim having benefited from their preparation of a chronology of relevant events.<sup>36</sup>

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<sup>32</sup> P10 did not find the Guide to be very helpful. 'I'm sure it's a useful thing for some people but it just seemed to repeat a lot of the stuff I'd seen online from the Small Claims Tribunal website. It just...as I look at it now....it seems very basic and I think that's what I thought when it happened, when I saw it online.'

<sup>33</sup> P3 described the Guide as 'not much chop' as it seemed 'more for people who are suing, not for people like me who are the ones getting sued'.

<sup>34</sup> P6.

<sup>35</sup> A. Melville & K. Laing, 'Personal Action Plans: Evaluating Self-Management Initiatives in Family Law, (2008) 4 (2) *International Journal of Law in Context* 149, 155

<sup>36</sup> P10b referred to the importance of 'just getting the facts into a logical order because so much has happened and every time (my partner) read it (he) said I was jumping all over the place'. P13 found it 'very reassuring' to write out all that she wanted to say at the SCT and then have this checked by a lawyer at a community legal centre. 'It made me feel better, more prepared.'

Interviewees were asked whether they could provide an outline of the steps involved in the conduct of an SCT claim. Most were able to provide a clear description of the steps involved, with perhaps the clearest being 'Get the form, fill it out, take it in, pay the fee, go to court.'<sup>37</sup> This was a point of contrast with another case study conducted as part of this project, relating to a Do-it-Yourself Guide to Applying for Probate. In that other case study, interviewees had some difficulty in explaining the process they had recently been successful in navigating. An explanation for this might be that the steps leading up to the determination of a claim are close to people's understanding of court processes more generally.

Several people expressed particular concern about the manner in which the proceedings were conducted in the SCT. This related specifically to the tribunal referee cutting them off when they were speaking in support of their claim. One interviewee described how the referee:

'just kept cutting me off and didn't want to hear my side of the case but the smarmy git from [defendant's name] just turns up in his suit and the referee just let him go on and on.'

Another emphasised how the referee's approach was unexpected:

'We didn't know how it would work and we didn't get to say half of what was wrong with the work [respondent's name] did. The judge kept saying "I don't need to know that" and things like that. We thought we were going to lose because we didn't really get to say what we wanted and all but obviously the judge thought [respondent's name] was a shonk too so we won.'<sup>38</sup>

The process of pursuing a claim through the SCT was described by a series of interviewees as being stressful.<sup>39</sup> One described the situation as follows:

'It's just too stressful and it is a lot of money we're talking about and while we save money by doing it ourselves, I'm just not convinced it's worth the stress... It would just be so much more efficient and less stressful to be able to just trust that a solicitor was doing it for you and doing it properly.'<sup>40</sup>

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<sup>37</sup> Interview P8

<sup>38</sup> P1

<sup>39</sup> P2 stated 'There have been some restless nights worrying about whether I've filled out the forms right and done everything I needed to.' P6 referred to having 'a pretty restless night beforehand just worrying about how it would go'. P15 referred to the 'nerve-wracking' nature of the process and uncertainty about the process in the 'courtroom itself'.

<sup>40</sup> P10a had worked with her partner in preparing and conducting an ultimately successful SCT claim.

Several interviewees also expressed the need for information on what should happen after an SCT hearing, in particular in relation to the enforcement of orders made by the tribunal.<sup>41</sup>

Significant difficulties were faced by two older consumers who believed, mistakenly, that they were pursuing claims through the SCT. Both had complained to the Office of Fair Trading (OFT). One was genuinely surprised to learn that her matter had not actually 'been to court'. She did not understand the difference between OFT and SCT and different roles they play. The other older consumer had complained to the OFT and been advised that she did not have a good case. She appeared to believe that this amounted to a decision in relation to her claim and had not sought any further advice.<sup>42</sup>

### *Discussion of Findings*

Insights from our interviewees are useful in considering the content of the LAQ Guide. The Guide is designed for use in a forum which does not allow lawyers and is conducted in private. This reinforces the need for content to be informed by users as well as being designed to be as relevant and accessible as possible. Comments from several respondents raised the issue of the logic of LAQ producing such a resource. They associated legal aid with lawyers and legal assistance and tied the use of an LAQ-produced guide to eligibility for legal aid. Of course, this is not the case and LACs provide a range of services and resources which have been designed to make legal aid accessible to a broader sector of the community.<sup>43</sup> The challenge here is for LACs to educate members of the public that legal aid can be relevant even for claims which do not involve legal representation. The existing protocol with the SCT regarding provision of the LAQ guide to claimants is an important platform for such efforts. The protocol is also useful in addressing any concerns regarding resource duplication. Given the range of people and organisations to which our interviewees turned for information on SCT claims, it appears important to have information available from a wide range of contact points.

If the SCT does not or (perhaps due to independence concerns) cannot provide sufficient support to parties pursuing matters before the tribunal, then agencies like LAQ which have a strong access to justice mission can play a role in enabling tribunal users. The current LAQ Guide is directed to consumers who are making a claim before the SCT. This raises the issue of

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<sup>41</sup> P1. P9 referred to the biggest issue they faced with their claim being 'making sure I got my money (arising from a pre-hearing settlement agreement) before the case was due to be heard. I was not going to let it go on the promise of payment'.

<sup>42</sup> De Vaus noted in 1987 that one of the arguments made in the Victorian Parliament in favour of establishment of an SCT was that the elderly were more likely to use it because of their fear of courts. De Vaus, 'Small Claims Tribunals: An Effective Alternative to the Court system?' (1987) 22 (4) *Australian Journal of Social Issues* 597, 600

<sup>43</sup> C. Banks, R. Hunter & J. Giddings, *Australian Innovations in Legal Aid Services: Balancing Cost and Client Needs*, 2006, Socio-Legal Research Centre, Griffith University which included case studies of 10 legal aid services available in relation to matters for which standard legal aid grants of assistance were not available or to people not eligible for standard grants of legal assistance.

whether a corresponding guide for respondents should be developed, either by LAQ or some other agency.

Our interviews revealed concerns on the part of some users regarding the tribunal not operating as they had expected. These users expected to be given the opportunity to present their case but found themselves being cut off by the SCT referee. Given that the SCT has a substantial case load and has been at the forefront of efforts to improve the accessibility of civil justice, this mismatch between the expectations of users and the practice of the tribunal raises important issues, particularly when parties are not able to have legal representation for their hearing.

Significant challenges are faced by LAQ and the SCT Registry in providing material for users which is sufficiently specific to be useful to individuals while also being relevant across the range of matters and circumstances encountered by the SCT. When asked what information would be useful in a guide in order to assist them to advance their claim or response, several people responded in very general terms. One interviewee referred to being able to 'find out about it all'<sup>44</sup> while another stated that they were attending the SCT in order to 'just find out what the go is, what it's all about'.<sup>45</sup> The provision of such information seems straightforward to the person seeking it yet is actually very complex. These general questions appear to the user to require a straightforward answer yet they actually require the provision of answers to a series of specific questions which are implicit in the general question. The answers to the specific questions will depend on the particular context of each civil claim. Every claim is different and it is particularly difficult to anticipate and address what may occur in every possible instance. Any attempt to cover every contingency would result in a vast guide being produced which would be particularly difficult to follow.

The interviewees indicated clearly that they wanted and needed details on the hearing process. The challenge appears to be to provide when little detail is available regarding the hearing process and the variability that must be part of a forum that includes a panel of part-time decision-makers. Several users indicated that they had not been able to run their claim in the way they had expected, indicating a significant mismatch between expectations and reality.

*People need support from somewhere*

Many of the people interviewed had obtained support from somewhere and reference was made earlier to the range of support sources utilised. Several interviewees also noted that they had worked on their claim with the involvement of their spouse or partner and had talked through the issues. LAQ could usefully promote Guide users seeking support from a range of sources, integrating the experiences of actual users, those who have

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<sup>44</sup> P1 stated that her husband had asked her 'to ring the Small Claims Tribunal and find out about it all'.

<sup>45</sup> p3

personally been through the process rather than the perspectives of self-help providers.

*Insights from mediation intake processes*

Given the challenges articulated by the people we interviewed in relation to their lack of understanding of the processes used by the SCT, there may well be useful insights to be gained from the nature of the substantial intake processes used to prepare people to participate in mediation,<sup>46</sup> a process which, like SCT hearings, takes place in private and is confidential. Astor and Chinkin refer to the educative function played by intake and note the particular importance of such processes where parties are obliged to participate in mediation.<sup>47</sup> As well as assessing the suitability of a matter for mediation, the intake process advises people of the need to get documentation ahead of the hearing. Intake also considers the issue of whether support people are required and suggests to parties that they think through what they would require in order to settle their claim.

***Our conclusions***

Resources like the LAQ *Small Claims Tribunal Guide* can make a contribution to the challenging task of preparing people for the effective conduct of SCT claims. The protocol which provides for copies of the LAQ Guide to be provided to claimants by SCT Registry staff is an important support for LAQ efforts to inform SCT users. The protocol may also assist in promoting the guide to those who do think of themselves as eligible for legal aid services.

Our research indicates that the LAQ Guide would be enhanced by use of a framework which sought and integrated insights from SCT users, particularly in terms of how proceedings take place as this was a source of anxiety to several of the SCT parties we interviewed. Those seeking to provide support to SCT users need a clear picture of the needs of those users.

The case study raises questions regarding the lack of research in this area. The lack of the involvement of professional third parties (whether as advocates or independent facilitators) appears to have resulted in this jurisdiction receiving far less attention than it should from scholars and policy makers. The very limited nature of appeal rights available to parties heightens the need for other forms of scrutiny of this jurisdiction.

*Important questions for further research - Challenges for Older Consumers*

The effectiveness of links between the Office of Fair Trading and the SCT along with the advice provided by the OFT warrant closer examination. It is obviously of great concern that both of the elderly people we interviewed mistook the process of complaining to the OFT for the commencement of a small claim through the SCT. This was not something we expected. These two

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<sup>46</sup> L. Boule, *Mediation: Principles, Process, Practice*, 2005, Lexis-Nexis, 175-176, C. Moore, *The Mediation Process* 3<sup>rd</sup> ed., 2003, Jossey-Bass, 94-95

<sup>47</sup> H. Astor & C. Chinkin, *Dispute Resolution in Australia*, 2002, 2<sup>nd</sup> ed., Lexis-Nexis, 140-141

people both approached our project team and self-identified as having matters before the SCT.

Several people referred to the lack of fit between what they expected to happen during the tribunal hearing and what they actually encountered. Two drew the same parallel to the *Judge Judy* television, expressing concern that they were continually cut off by the referee during the hearing. This raises important issues regarding the effective preparation of people for the conduct of their claims in the SCT. While these users comment that the experience for them was very much like being on *Judge Judy*, the very big difference is that *Judge Judy* is a very open forum, airing internationally while SCT proceedings all take place in private.

The session at which this paper will be presented at the ILAG Conference is titled 'Living on a Tight Budget'. Even when the budget is tight, the fit still needs to be good. We will not be sure that the fit is good without an understanding of the interests and perspectives of those seeking to use the item in question. Gaining this understanding will require direct engagement with users, a task which is made both more challenging and more important by the lack of scrutiny of the workings of tribunals like the SCT.