

THE SMALL CLAIMS TRIBUNAL

AN EFFECTIVENESS STUDY



CONSUMER COUNCIL OF FIJI

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CONSUMER COUNCIL OF FIJI

The Small Claims Tribunal: An Effectiveness Study

A Consumer Council of Fiji Report 2009

A Report by:

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Executive Summary

- 1.0 This research examines the effectiveness of the Small Claims Tribunal (SCT).
- 2.0 The first Small Claims Tribunal was established in 1996, five years after the Small Claims Tribunal Decree 1991 was promulgated by the President. The SCT was to provide prompt and inexpensive relief to claimants. The primary function of a SCT is to attempt to bring the parties to a dispute to an agreed settlement in certain specified types of disputes involving monetary claims upto a specified maximum sum. The limit on the establishment of the Tribunal was \$2,000. The current limit is \$5,000. SCT facilities are now available in Suva, Lautoka and Labasa, the last of this being established in 2007. During the recent years, however, there have been no targeted public educational or awareness campaigns on the utility of SCT.
- 3.0 This study shows that the SCT Decree needs significant clarification and/or amendment.
- 3.1 The Attorney General and the Minister for Justice could disestablish a SCT. This provision needs to be amended to keep the functioning of courts within the jurisdiction of the Office of the Minister for Justice only.
- 3.2 The provision disallowing contracting out of the SCT jurisdiction (s13(3)) is not clear and needs to be simplified.
- 3.3 The provisions on the place for filing claims (which currently is restricted to the Tribunal nearest the residence of a claimant) needs to be re-examined and made more flexible.
- 3.4 While disallowing barristers and/or solicitors from appearing in the SCT has a sound basis, the exception provided for corporations and/or public bodies to be represented by barristers/solicitors if they are employees of these organisations, creates an uneven playing field in the Tribunal. Disallowing the Consumer Council of Fiji from utilising its employee(s) who may be lawyers from representing consumers in the SCT further lop sides the field.
- 3.5 The SCT Decree disallows appeals except where the proceedings were conducted by the Referee in a manner which was unfair to the appellant and which prejudicially affected the result of the proceedings, or where the Tribunal exceeded its jurisdiction. There is a need to put in place mechanisms for parties aggrieved by the decisions of the SCT, to appeal on grounds of law and/or facts. This could be done through the creation of a Small Claims Appeal Tribunal. The mechanism ought to also prevent abuse of appeals mechanism to delay justice by tying a party in rings of appeals which could take years to be finally determined.

- 3.6 Sections 33 of the SCT Decree, which states that appeals are possible only against an order made by the Tribunal under section 15(6) [claims that are not disputed] or section 31(2) [work orders], needs to be reviewed and clarified.
- 4.0 The SCT's current budget is less than \$0.5m. The average expenditure per case filed with the SCT is less than \$100. This is regarded as an expenditure that is far lower than the average expenditure in the Magistrates Court. There is budgetary provision for 5 referees each in Suva and Lautoka and 1 in Labasa. However, over the past few years, there have been only 3 referees each in Suva and Lautoka, and one in Labasa. Contrary to this, in 1996 there were 7 referees appointed for Suva alone.
- 5.0 Under the SCT Decree a referee ought to be capable by reason of his special knowledge or experience for performing the function of a Referee. A referee need not have legal qualifications. Yet, the matters brought to the Tribunal are, essentially, matters of contract. Contracts are legal matters. Where referees appointed do not have legal qualifications, they need to be trained adequately to handle matters that essentially revolve around contracts.
- 6.0 When the Tribunal was initially established, referees were trained by experts (sourced from the New Zealand Disputes Tribunal, which was the model on which the SCT was developed). Now new referees are trained on appointment, and given a Referee's Manual that, inter alia, lists the 'dos and donts' for referees, provides the job description for Referees, and provides a guide to being a good referee. However, the frequency and intensity of training over the years have declined. There is no established programme for people to go through before they are confirmed as referees. Nor is there any rigorous screening process which includes formal examination of processes and matters pertinent to the function of a referee, before referees are appointed. There is also no pre-scheduled continuing education programme for the referees. In the absence of quality on-going training of referees, the risks to sub-optimal outcomes are significant.
- 7.0 A major problem now also concerns the fairly low number of referees. While budgetary provision exists for 5 referees each in Suva and Lautoka, currently there are only 3 each in each of these locations.
- 8.0 Regular adjournments indicate that there may be a tendency for some referees to create a system that may see them in engagement virtually on a full-time basis; each referee is paid an allowance of \$160 per full day and \$80 per half day.
- 9.0 Referees make decisions on the basis of what they have heard and understood of a claimant's case and the respondent's response. There is no formal recording of deliberations. Unlike the other courts, referees do not write any formal case judgments that can be provided to the parties or to which the public has access.
- 10.0 Normally there is no written submission by a claimant or a respondent for the referee to consider, other than for any documentary evidence of payment, receipt, etc., submitted by any party. This makes it important for referees to record their

understanding of the case before them. Such records become important in cases of appeals. Case recording is a skilled exercise. The SCT ought to develop a standard template for case recording by all referees. Referees ought to also be trained in utilising this template.

- 11.0 A major problem facing the SCT is the delay in serving documents to respondents. This is especially the case with the bailiffs that the SCT utilises to serve documents. Lack of timely service of documents leads to adjournment of hearings, thereby delays, increased costs, and inefficiencies. It also tends to discourage claimants, leading to cases being closed without hearings. Claims lapse if documents remain unserved for a period of at least 12 months after the date of lodgement.
- 12.0 On average approximately a half of all claims filed in the Suva Tribunal between 1997 and 2008 were claims by businesses. Claims from private citizens (individuals) comprised 40% of all claims during this period. 86% of all claims were against individuals. Claims against businesses comprised only 12% of all claims.
- 13.0 Since significant portion of the SCT resources are spent on cases that deal with debt recovery, the issue that arises is whether the SCT was intended to be a debt recovery instrument in the first place. The primary function of a Tribunal is to attempt to bring the parties to a dispute to an agreed settlement. Debt recovery claims are not always matters of dispute. Given this, the question on appropriateness of public funding for commercial debt recovery arises.
- 14.0 There are at least three probable ways out of this dilemma of interpretation:
 - amendment of the SCT Decree to clarify the objective of the SCT and to clearly delineate the functions and perimeters of the SCT;
 - raising the lodgement fee for claims that are in the nature of debt collection/recovery from the current \$5.65 per claim to a cost recovery fee and/or cost+ fee; and
 - establishment of two separate divisions of the SCT, one being a household consumer claims division and the other being a commercial small claims division where a cost+ fee could be levied.
- 15.0 Further analysis of the claims lodged in Suva show that of all claims lodged by individuals between 1996 and June 2008, 58% were by ethnic Indians and 36% by ethnic Fijians. A gender decomposition shows that 74% of all claims were by males. A relatively greater proportion of female claimants from the ethnic Fijian community compared to the ethnic Indian community was also evidenced.
- 16.0 Of all claims filed in the Suva SCT between 2006 and June 2008, 38% of the claims were against ethnic Indians and 57% of the claims were against ethnic Fijians. 83% of all claims were against male respondents and 17% against females. About 8% of all claims against ethnic Indians were against ethnic Fijian females, while 20% of all claims against ethnic Fijians were against ethnic Fijian females.

- 17.0 In terms of awareness of SCT, 55% of all households in the random sample were aware that there exists an institution called Small Claims Tribunal. This is in sharp contrast to the expected universal awareness of the existence of other courts in the country.
- 18.0 Of those who were not aware of SCT, a vast majority (67%) relied on the police to resolve their disputes involving money. This was followed by relying on chiefs, village leaders or religious leaders (20%), and lawyers (8%). 2% relied on other courts, while 1% each relied on bailiffs, thugs and witchdoctors. However, only 48% of all these had any overall success in their disputes.
- 19.0 In terms of the sources of awareness, newspapers, TV, schools, radios, and friends proved roughly equal in importance.
- 20.0 On the basis of the survey, it is estimated that 3.7% of all residents in Fiji had cases filed against them sometime during 1996-2008.
- 21.0 Of those who sought redress through the SCT, 58% succeeded in getting a positive outcome. Of those who did not succeed, 34% indicated that they had either appealed the decision, or were going to appeal (if the decision was more recent).
- 22.0 User survey also shows that people take the SCT seriously, and that language is not a barrier to seeking redress through the SCT.
- 23.0 A significant advantage of the SCT system in Fiji is that it does provide a non-intimidationist environment in which claimants and respondents can interact to resolve their monetary disputes.
- 24.0 Of those who utilised the SCT, two-third stated that the services of the SCT were satisfactory. But 40% of those who had utilised the services of the SCT claimed lack of satisfaction with the speed with which SCT resolved their cases. A quarter of the respondents utilising SCT services also expressed unhappiness with the professional competence of the referees. Overall, however, 23% have rated SCT services between unsatisfactory and extremely poor.
- 25.0 Of those who heard of the SCT, the overall perception is overwhelmingly positive; 92% perceive the SCT as worthwhile overall.
- 26.0 This study shows that the major accomplishment of the SCT is the vastly increased access of ordinary people to the judiciary. However, there is a large potential risk as well, in that the raising of the SCT's claim jurisdiction to \$5,000 also raises the prospect of the SCT being used more intensively by the commercial sector as a debt collection mechanism. This matter needs to be addressed urgently.

Introduction

This research examines the effectiveness of the Small Claims Tribunal (hereafter also referred to as the SCT). The research focuses on the Tribunal's role as the primary judicial consumer redress mechanism in Fiji. It also examines the level of access to justice for Fijian consumers within the civil justice system. The review assesses whether the Tribunal is serving the interests of consumers and providing substantial justice to them, and whether it provides a platform for the Consumer Council's future lobbying for reform in the area of consumer redress.

The terms of reference for the study required the study to be conducted within the framework of the Consumer Council's general mandate, that attention be paid to access consumer redress by the poor, disenfranchised and consumers in remote areas of Fiji. The study was to assess the Tribunal's workings from various points of view including government, Tribunal staff, and users of Tribunal services. The review was to encompass the following aspects:

- a. The Tribunal's accomplishments and failings;
- b. The Tribunal's strengths and weaknesses;
- c. The timeliness of redress;
- d. The results for consumers (both success and failure rates, and rates of actual recovery of awards and judgments);
- e. The procedures and rules, including an analysis of the enabling legislation;
- f. The degree of accessibility to the tribunal, especially access without legal representation, geographical access, and costs of access.
- g. Analysis of legal aspects – including the 'quality' of judgments, with analysis of the staffing expertise and levels;
- h. Tribunal funding issues;
- i. Tribunal outreach and support; and
- j. Perceptions of the Tribunal by the public.

II

The Empowering Legislation

The first Small Claims Tribunal was established in 1996, five years after the Small Claims Tribunal Decree 1991 was promulgated by the President. The SCT was to 'provide prompt and inexpensive relief to claimants' (long title). The primary function of a SCT is 'to attempt to bring the parties to a dispute to an agreed settlement' (s15) in certain specified types of disputes involving monetary claims upto a specified maximum sum.

2.1 Establishment

The Decree (s3) empowers the 'Attorney General and Minister for Justice' to, after consultation with the Chief Justice, establish such number of tribunals as he thinks fit. Each such tribunal established becomes a division of a specified Magistrate's Court. The Attorney General (A-G) and the Minister for Justice could also disestablish a SCT; this can be done without consultation with the Chief Justice.

Issue: the authority for the establishment and/or disestablishment of a SCT lies in the hands of the 'Attorney General and the Minister for Justice'. This provision is fine as far as one person holds the two portfolios of Attorney General and Minister for Justice. There, however, is no necessity that the two portfolios be held by the same person. In the event that different persons hold these two positions, there would be confusion on which office can create or disestablish a SCT. The possibility of the portfolios being split is strengthened under any likely political power sharing arrangement. Thus a clear legislation is needed which keeps matters of the functioning of courts within the jurisdiction of the Office of the Minister for Justice.

2.2 Jurisdiction

2.2.1 Exercise of jurisdiction

The jurisdiction of a SCT is exercised by a Referee or by a Resident Magistrate (s4). Referees are appointed by the Chief Justice after his consultation with the A-G and the Minister for Justice. Persons so appointed need to be 'qualified'. S6(2) states that a 'person is qualified to be so appointed if he is capable by reason of his special knowledge or experience of performing the functions of a Referee'. As such, a Referee need not have legal qualifications, or be qualified to practice as a barrister or solicitor. Appointments are for a term of

3-years, with provisions for re-appointments for further 3-year terms.

A Referee may at anytime be removed from office by the Chief Justice (CJ) after consultation with the A-G and the Minister for Justice, for the following reasons provided to the satisfaction of the CJ and the A-G/Minister for Justice:

- disability,
- bankruptcy,
- neglect of duty, and
- misconduct.

Referees receive a remuneration by way of fees, salary and allowances as determined by the Public Service Commission. However, they need not be full-time employees of the judiciary, and may hold, with the consent of the CJ, any other office or be employed elsewhere (s6(5)).

2.2.2 Limits of Jurisdiction

A SCT has a jurisdiction in respect of any claim which does not exceed a specified sum in value (s8). Upon first establishment, the limit of the jurisdiction was \$2,000. In 2007, this limit was increased to \$5,000. A claim for an unliquidated sum is deemed to be for a maximum value of \$5,000. If claims concern chattels or value of work done that is under claim, and it becomes necessary for the dispute to be resolved to establish their values, this would be done by the Tribunal in such manner that it thinks fit.

The Decree allows a person to abandon so much of a claim as exceeds the limit (now \$5,000) in order to bring the claim within the jurisdiction of a Tribunal (s11). If this were done, any order of the Tribunal in relation to the claim shall operate to discharge from liability the sum so abandoned.

There, however, is one exception to the requirement to abandon any claim over the \$5,000 limit: in certain circumstances, a Magistrates Court or a High Court could transfer proceedings filed with them to a SCT. If any of these courts did so without the consent of the parties, the requirement that a claimant abandon any claim exceeding the limit are dispensed with (s23(4)).

The Decree also disallows a cause of action to be divided into 2 or more claims for the purpose of bringing it within the jurisdiction of a Tribunal.

A Tribunal is also empowered to have such other jurisdiction as is conferred upon it by any other law. However, a Tribunal has no jurisdiction in respect of any claim:

- (a) for the recovery of land or any estate or interest therein;
- (b) in which the title to any land or any estate or interest therein, is in question;
- (c) which could not be brought in a Magistrates' Court; and

(d) which is required by any law to be brought only before any other specified court.

Thus, matters concerning wage claims, or those related to employment contracts of service, can not be taken to a SCT; these need to be addressed as per the mechanisms established under the Employment Relations Promulgation. However, matters related to contracts for service fall within the jurisdiction of the SCT.

Issue: the distinction between contracts of service and contracts for service needs to be clearly spelt out in the laws of Fiji. Different legislations provide different interpretation of contracts for service. The FNPF Amendment Act (2005), for example, deems certain contracts for service as being contracts of service.

The SCT Decree provides for a respondent to counterclaim against the claimant if the counterclaim is within the jurisdiction of the Tribunal (s10). A counter claim is treated in all respects as if it were a claim².

A provision in any contract or agreement that excludes or limits either the jurisdiction of a Tribunal, or the right of any person to involve that jurisdiction, is deemed to be of no effect (s13). The Tribunal has jurisdiction even where agreements contain provisions that provide for submission of any dispute or difference to arbitration. The decree, however, provides for an exemption from contracting out where 'a cause of action has accrued, or is believed to have accrued, to a person and he had agreed to the settlement or compromise of the claim based on that cause of action' (s13(3)).

Issue: S13(3), which provides for the exclusion from the provision of contracting out of the jurisdiction of the Tribunal, is not clear and needs to be simplified.

The Decree also disallows the consideration of the issues of dispute in a matter that is before a Tribunal by any other Tribunal or Court (s14). The only exceptions to this law are:

- if the claim before the Tribunal is withdrawn, abandoned, or struck out; or
- an order is made by the Tribunal to transfer the case to the Magistrate's Court; or
- the proceedings before that other Court or Tribunal were commenced before the claim was lodged with or transferred to the Tribunal.

Similarly, if a matter of dispute is before another Court or Tribunal, a claim can not be filed in a Tribunal between the same parties, unless the matter were transferred from the Court to a Tribunal, or from one Tribunal to another, or unless the claim before the other Court or Tribunal were withdrawn, abandoned, or struck out. Thus, if a claim for money is struck out in a Magistrate's Court, the claimant can file a claim in a SCT.

The law on SCT binds the state (s43).

² The Referee's Manual (2006: 24) provides a guide to referees on the treatment of counterclaims. If two claims are lodged on the same matter, the referee will have to decide which is a claim and which a counter claim. The rule to apply, generally, is that the claim lodged first is the claim and the one lodged later is a counter claim. A counter claim may also be lodged after the tribunal makes a decision on the claim; in this case, the matter would be reheard, and the counterclaimant asked to explain the reasons for not raising the counterclaim as a part of the first hearing.

2.3 Procedures & Evidence

2.3.1 Lodging Claims

To commence a proceeding in a SCT, the aggrieved party is required to lodge his/her claim in writing in a specified form. Four copies of this completed form are to be lodged, together with the payment of appropriate fees. The fees on establishment of the SCT were \$5 (excluding VAT) to lodge a claim or counterclaim; \$10 for re-hearing and \$10 for lodging a notice of appeal. To date, the fee schedule has remained the same to date. If the claimant wants to engage bailiffs provided by the SCT to deliver the summons to the other party, an additional bailiff's fee is to be paid.

The Clerk or Deputy Clerk of the Magistrates' Court is required to ensure that 'assistance is reasonably available from himself or his staff to any person who seeks it in completing the forms required' in relation to the lodging of a claim, an application for a rehearing, an appeal against an order of a Tribunal, or the enforcement of an order (s37). There is no mention of any fee charged for this service, thus the assistance is to be given to claimants or appellants without any charge.

It is a requirement that claims be lodged at the Tribunal nearest to the claimant's residence (s18(2)). This requirement does not relate to the place of the event or activity causing the claim. For example, if a claimant resides in Suva, but a claim deals with an activity, like non-payment of rent for a property the claimant has in Labasa, the claim is to be lodged in Suva.

Issue: The provision on the place of the claim can work against the interest of the respondent, and could prove to be a huge burden if the claim finally turns out to be faulty. There is no provision in the Decree for costs, except for cases where the claim is frivolous or vexatious (s28). This provision needs to be re-examined. Requiring a claim to be lodged at the location where the activity leading to the claim takes place, may not be ideal. A claim arising from a motor vehicle accident would be a case in point. If the parties resided in a location different from the one where the accident took place, for example, the most convenient location for the claim would be the Tribunal close to their residence. The filing location requirement, therefore, needs to be flexible.

2.3.2 Notice of claim and hearing

Upon receipt of a claim, the Registrar is required to immediately fix a time and place of hearing. The hearing date shall be not less than 15 days nor more than 30 days from the date of lodgment of the claim if all respondents live within 6 hours of normal traveling time from the Tribunal, or not less than 30 days nor more than 45 days from the date of lodgment of the claim if all respondents live further than 6 hours of normal traveling time from the Tribunal (s3, Small Claims Tribunal Rules, 1994). For both cases, adequate

notice is to be given to the respondents; for the former case, at least 10 days and for the latter, at least 15 days before the hearing.

On receiving the claim, the Registrar is also required to give notice to the claimant by endorsing the details on the same form, of the time and place of the hearing. He is also required to, as soon as reasonably practicable, give notice of the claim and of the time and place of hearing to the respondent and every other person who appears to the Registrar to have a sufficient connection with the proceedings of the claim in the capacity of a claimant or respondent. The latter is done by delivering a sealed copy of the claim with the details of the hearing endorsed on it (s19).

Issue: While the law requires the Registrar to give notice to the respondents by delivering a sealed copy to the same, in practice, the office of the Registrar requires the claimants to make this delivery either in person or through a bailiff. The claimant could pay a fee to engage a bailiff on the SCT's list for delivery of the same³.

A person is regarded as having a sufficient connection with the proceedings on a claim if his presence as a claimant or respondent is necessary to enable the Tribunal to effectually and completely determine the questions in dispute in the claim or to grant the relief which it considers may be proper.

Only if a notice of the claim has been delivered to the respondent can a claim proceed before a Tribunal. If no such notice was given, the Tribunal is required to ask the Registrar to provide such a notice⁴. There is no provision on which party is to bear the costs of the Registrar providing the notice to the respondent.

A Tribunal may at any time, order that the name of a person who appears to it to have been improperly joined as a party, be struck out from the proceedings.

If a minor (someone who has not attained the age of 18 years) is a party to any proceeding in a Tribunal, whether as a claimant or a respondent, the Tribunal may, if it considers that it would be in the interests of the minor to do so, appoint someone, except a barrister/solicitor, to represent the minor.

³ In 1994, the CJ published the Small Claims Tribunal Rules, under which Rule 5 deals with service of documents. In essence this rule states that the service of process in SCT is 'to be generally the same as in a Magistrates' Court'. Thus Order VII of the Magistrates' Court Rules apply for service. The issue is whether this Order varies the requirements under the SCT Decree. The SCT is a division of the Magistrate's Court. As such one may accept that the schedule of fee shown in the Magistrate's Court Rules (s65, Schedule B). However, the Magistrate's Court Rules are a part of the Magistrate's Court Act. The SCT Decree is another legislation, equivalent to the Magistrate's Court Act. The SCT Rules are issued by the CJ. There, thus, needs to be a clearer provision on the process of service and the fee to be charged in the SCT legislation itself.

⁴ The exact specification in law is 'may direct the Registrar'. However, a contextual interpretation makes it mandatory for Tribunal to require that a notice be given to the respondent of any claim against him/her.

If a party to any proceedings in a Tribunal is a person of unsound mind then the Public Trustee is required to control the conduct of the claim on that person's behalf⁵. A person empowered to control the conduct of the case of another person may do all such things in the proceedings as he could do if he himself were a party to the proceedings in place of that other person.

2.3.3 Transfer of Proceedings

If any proceeding has been commenced in a Tribunal which the Tribunal has no jurisdiction to hear and determine, it may, instead of striking out the proceedings, order that it be transferred to a Magistrate's Court in its ordinary civil jurisdiction. Similarly, if a proceeding has commenced in a Tribunal which in the opinion of the Tribunal would more properly be determined in a Magistrate's Court, the Tribunal may order that the proceedings be transferred to a Magistrate's Court in its ordinary civil jurisdiction. This applies only to the extent that there is no agreement related to a claim that requires any disagreement to be submitted to arbitration.

In like manner, if proceedings within the jurisdiction of a Tribunal have been commenced in a Magistrate's Court which has a Tribunal as a division of it, the Magistrate may order that the proceeding be transferred to the Tribunal. Similarly, if proceedings within the jurisdiction of a Tribunal have been commenced in a High Court, the Court or a Judge may order that the proceeding be transferred to a Tribunal. For all such claims transferred to the SCT, the Tribunal can take notice of evidence given in the courts in lieu of fresh evidence before the Tribunal.

2.3.4 Hearing

At the hearing of a claim every party is entitled to attend and be heard. One overriding limitation is that no party can appear by a representative unless it appears to the Tribunal to be proper in all the circumstances to so allow, and the tribunal approves such representative (s24).

The following parties may appear by a representative who is approved by the Tribunal:

- the State, if the representative is a servant of the State;
- a corporation or an unincorporated body of persons, if the representative is an employee or member thereof;
- a person jointly liable or entitled with another or others, if the representative is one of the persons jointly liable or entitled or, in the case of a partnership, is an employee of those persons;

⁵ Alternatively, if a Committee of the estate of the person of unsound mind has been appointed under the Mental Treatment Act, this Committee is to represent the person.

- a minor, or other person under a disability.

In deciding on allowing for a representative of a party the Tribunal is required to satisfy itself that the person proposed:

- is acting in the best interests of that party,
- has sufficient personal knowledge of the case, and
- has sufficient authority to bind the party⁶.

A Tribunal can not approve a representative who is, or has been admitted as a barrister or solicitor or who, in the opinion of the Tribunal is, or has been, 'regularly engaged in advocacy work before Tribunals' (unless the person is himself a claimant or a respondent) or is an employee of a party to a claim. Under Rule 7 of the SCT Rules 1994, the Tribunal may approve a person to act as a representative of a party (including a wife acting on behalf of her husband or vice versa) at any time, either before a hearing or after a hearing has commenced.

The Consumer Council of Fiji may, by its employees, servants or agents, represent any claimant in proceedings before a Tribunal if the claimant so consents. However, such a representative shall not be a barrister or solicitor.

Issue: while corporations may be represented by barristers and/or solicitors if they are employed by the corporation, the same provision does not apply to the Consumer Council. Thus a barrister or solicitor employed by the Consumer Council can not be a representative of a claimant if the claim were through the Consumer Council. The consequence could be significant. For example a claim where the Consumer Council assists a claimant against a corporation, could see the corporation send a solicitor but the Consumer Council can not nominate its own employee who may be a solicitor to represent the claimant. This is an anomaly in the legislation.

Proceedings before a Tribunal may be held in private if all of the parties agree thereto. The onus of a public hearing, therefore, is with either of the party to a claim.

The primary function of a Tribunal is to attempt to bring the parties to a dispute to an agreed settlement. If an agreed settlement is reached, the Tribunal is empowered to make the agreed order; this order is not limited to the monetary limits of the jurisdiction of the SCT. Thus, if the parties agree that one owes and would pay another a sum over \$5,000, the order would be so made. The Tribunal in such cases only gives effect to the agreements reached between the parties.

⁶ The Referees Manual provides two additional grounds that Referees can consider in deciding to allow 'support persons' before the Referee:

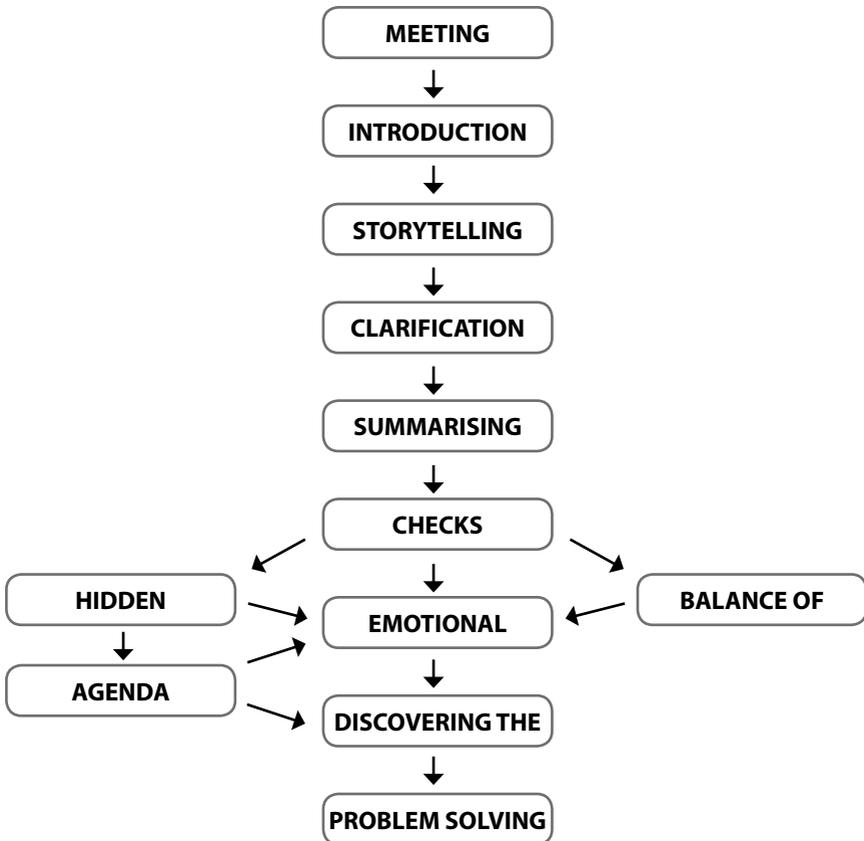
- the number of support people in attendance and the composition of the support group, and
- any power imbalance which may arise as the result of the attendance of support persons (2006: 23-4).

There is no provision in the Decree or the SCT Rules (2004) providing the referees this authority.

However, if it appears to the Tribunal that it would be impossible to reach a settlement within a reasonable time, the Tribunal shall proceed to determine the dispute (s15). This is done according to the substantial merits and justice of the case. In doing so the Tribunal is required to have regard to the law but is not bound to give effect to strict legal rights or obligations or to actual forms or technicalities.

Given that the primary aim of the SCT is to bring the parties to a dispute to an agreed settlement, the Referee's manual provides a mediation process for referees to adopt. The mediation model is shown in Figure 1. It is after the utilization of the processes listed in Figure 1, that the Tribunal ought to proceed to determining the case.

FIG 1: MEDIATION



2.3.5 Language of the Tribunal

The proceedings of the Tribunal are to be conducted ‘in a language that the Tribunal considers is best suited to the parties, but the record of the Tribunal... and the Order of the Tribunal, must be in English’ (Rule10, Small Claims Tribunal Rules, 1994). The Tribunal is empowered to use ‘any trustworthy person’ to translate proceedings of a party or the Tribunal.

2.3.6 Evidence

The rules of evidence that are necessary for courts of law (under Evidence Act), are not binding on the SCT. A Tribunal may receive and take into account any evidence or information submitted to it. In addition, evidence tendered to a Tribunal by or on behalf of a party need not be given on oath, but the Tribunal may at any stage of the proceedings require that such evidence, or any specific part thereof, be given on oath whether orally or in writing (s26). The law also allows a Tribunal to, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it thinks fit. All evidence and information so received or ascertained need to be disclosed to every party.

If the case of any party is not presented to the Tribunal after reasonable opportunity has been given to him to do so, the issues in dispute in the proceedings may be resolved by the Tribunal (and decision so made) on such evidence or information as is before it, including evidence and information obtained by the Tribunal on its own.

If, however, a respondent does not appear at a hearing, the Tribunal can only adjourn the case unless it is satisfied of the claimant’s case by calling witnesses (s9, SCT Rules 1994).

An order made by the Tribunal if a party does not attend a proceeding can not be challenged on the ground that the case of the party was not presented to the Tribunal. The party, however, may apply for a rehearing on the ground that there was sufficient reason for his failure to present his case (s27).

Except for any explicit or implicit provision on procedure contained in the Decree, a Tribunal can adopt such procedure as it thinks best suited to the ends of justice (s29).

The SCT Rules makes a fuller provision on witnesses and evidence (s8, 9). S8 authorises the Tribunal to summon any person to attend before the Tribunal at the specified date and time to give evidence or to produce documents in that person’s possession or control, if the Tribunal decides that the attendance of the witness is reasonably necessary to properly determine the case. Such witnesses would be paid expenses and fee as determined by the Tribunal. S9 authorises the Tribunal to call its own witnesses, including expert witnesses, to give evidence.

2.4 Orders

A Tribunal may make one or more of the following orders and may include therein such stipulations and conditions as it thinks fit:

- make an order that the party to the proceedings pay money to any other party;
- declare that a person is not liable to another in respect of a claim or demand for money, the delivery of goods or chattels, or work he performed;
- order a party to deliver specific goods or chattels to another party to the proceedings;
- make a work order against any party to the proceedings;
- make an order varying any agreement, or setting it aside (either wholly or in part) if it appears to the Tribunal that an agreement between the parties, or any of its terms, is harsh or unconscionable, or that any power conferred by an agreement between them has been exercised in a harsh or unconscionable manner;
- make an order varying or setting aside any agreement, or writing (either wholly or in part), if it appears to the Tribunal that an agreement between the parties has been induced by fraud, misrepresentation, or mistake, or that any writing purporting to express the agreement between the parties does not accord with their true agreement; or
- make an order dismissing the claim (s16).

Where a work order is given, the Tribunal is required to also make an order for payment of money as an alternative to compliance with the work order.

A Tribunal can not make an order that exceeds the monetary jurisdiction of the Tribunal. Nor can it make more than one order if the aggregate amount or value of those orders exceeds \$5,000. Every such order that exceeds the monetary jurisdiction would be of no effect in its entirety.

An order made by a Tribunal is final and binding on all parties to the proceedings.

Costs can not be awarded against a party unless, in the opinion of the Tribunal, a claim made by that party is frivolous or vexatious, in which case it may order that party to pay to another party the reasonable costs of that party in connection with the proceedings (s28).

The orders of the SCT requiring a party to pay money or deliver specific goods or chattels to another party, are treated as equivalent to an order from a Magistrate's Court (s30). As such, the orders may be enforced as orders of a Magistrate's Court are enforced⁷. For orders to pay money as an alternative to compliance with a work order, enforcement requires applications on prescribed forms to the Magistrate's Court; objections may also be filed through prescribed forms. In these cases, the case would be referred back to the Tribunal. A failure to pay the money would entitle the claimant to apply to the Magistrate's Court for any of the following five remedies:

- Judgment debtor summons (under which a magistrate can order for installment or lump sum payment, and in default a committal period)⁸,
- Writ of Fieri Facias (under which a magistrate can order a court sheriff to seize

and sell chattels to satisfy a monetary judgment),

- Distress Warrant (which will entitle a claimant to have a bailiff demand payment from the debtor for the amount owing, and seize his personal possessions and sell them if he does not pay the amount due),
- Garnishee proceedings (under which a Magistrate can order collection of the amount due by reaching the debtor's property/income when it is in the hands of someone other than the debtor), or
- Charging order (under which the property of the debtor in any stock, funds or land stands charged with the payment of the amount of debt due) (Referees Manual, 2006: 57).

Work orders, on the other hand, do not require a claimant to seek Magistrate's court intervention as these orders can be enforced through the Tribunal (s31). If this is done the Tribunal may either vary the work order or make a further work order or any other order which it is authorised to, or grant leave to the party in whose favour the work order was made to enforce the alternative money order provided; or discharge any order previously made. Work orders are to be enforced within 12 months of the date of a work order. Any enforcement after 12 months requires leave of the Tribunal.

2.5 Appeals or Rehearing

2.5.1 Rehearing

A tribunal is empowered to rehear a claim if an application is made for rehearing if either the claim was not disputed, or if it related to enforcement of a work order. The Referee's Manual lists the following additional grounds that a Referee may consider in determining a rehearing application:

- where a party has not received notice, or there has been insufficient notice;
- where a party produces sufficient reason for non-appearance and provides supporting documentation (e.g. medical certificate).
- When a Referee has incorrectly rejected evidence;
- Where there has been an administrative failure on the part of the court;
- When a representative should have been appointed;
- When procedural mistake has occurred; and
- When jurisdiction has been improperly declined (2006: 54).

⁷ Until 1997 (a year after the establishment of the first SCT), no filing fee was payable by a person who sought to enforce an order through the Magistrate's Court (s30(6)). However, this provision was repealed in 1997 (s3, Small Claims Tribunals Degree (Amendment) Act 1997).

⁸ Imprisonment for default of the court order does not cancel the debt. Where a respondent against who a judgment debtor summons has been issued fails to pay and does not appear before the Magistrate's Court, the court can issue a bench warrant for his arrest (Referees Manual, 2006: 57, 66).

When a rehearing is ordered by a Tribunal the 'Registrar shall notify all parties to the proceedings of the making of the order and of the time and place appointed for the rehearing' (s32(4)).

2.5.2 Appeals

Any party to proceedings before a Tribunal may appeal against an order made by the Tribunal in relation to a claim that is not disputed or on the enforcement of a work order, on the grounds that the proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings; or that the Tribunal exceeded its jurisdiction (s33).

The provision on appeals was the subject of two high court actions (Sheet Metal and Plumbing (Fiji) Ltd v. Deo - HBA 7/99, and Chan Long Chong & Ye Hui Fang V. Yen Yain Kai - High Court [1999] 45 FLR0. In Sheet Metal, the judge deliberated on the scope of s33 and ruled that s33 provided a 'rather confined ambit of the right of appeal'. The judge considered two matters that confined the right to appeal. These were:

- (a) the proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings; or
- (b) the Tribunal exceeded its jurisdiction.

The first ground, therefore, concerns specifically the manner in which the referee conducted the proceedings. This is separate from the matters of facts of the case, or the law behind the decision. All that the appeal can base itself on is that the manner in which the tribunal conducted the case was unfair to the appellant. It must also prejudicially affect the result of the proceedings. If either of these conditions is not met, there is no basis to an appeal, despite there being an error of fact or an error of law.

The other ground for an appeal is that the Tribunal exceeded its jurisdiction. This is straightforward, and requires the appellant to prove that the Tribunal acted outside his jurisdiction.

Sheet Metal is now the authority on matters concerning the ambit of appeals from SCTs. In Krishna Murti v Krishna & Company [Civil Appeal No. 24 of 2005, Magistrates Court, Lautoka], a case in which the appellant claimed money from a law firm which he claimed were kept by the law firm illegally, the Magistrate dismissed the appeal on the grounds that appeals can be made only on the grounds of the manner in which the proceedings were conducted which were unfair to the appellant and prejudicially affected the result of the proceedings, and that the tribunal exceeded its jurisdiction, but not on the merits of the decision of a referee. In this case, the appellant had appealed against the lawfulness of the SCT decision.

In this regard, therefore, the SCT functions unlike courts of law. The supposed reasoning for this is that the SCT is not a court of law, and that the Tribunal is to 'determine the dispute according to the substantial merits and justice of the case, and in doing so shall have

regard to the law but shall not be bound to give effect to strict legal rights or obligations or to actual forms or technicalities' (s15(4)).

Redress for those who feel aggrieved by an order of the SCT, therefore, is significantly restricted.

There is yet a further restriction to the right to appeal, which has not been considered by the courts to date. This concerns the condition (s33) that appeals are provided only 'against an order made by the Tribunal under section 15(6) or section 31(2)...'

S15(6) states:

'To give effect to its determination of the dispute or in granting relief in respect of any claim, which is not disputed, the Tribunal shall make one or more of the orders which it is empowered to make under section 16 or under any other law.'
(underline added)

A strict interpretation of this would be that appeals lie only against orders made where claims are not disputed. For orders that are made where claims are disputed, there can be no appeal. This would apply even if the manner in which the case was conducted was unfair to the appellant, or if the tribunal were outside his jurisdiction.

S31(2) deals with work orders.

Thus, the right to appeal applies only in cases that involve orders where claims are not disputed, or claims where work orders are issued.

These 2 grounds narrow the grounds for appeal much further, and further limit any redress that a party aggrieved by an order of the SCT may have.

Issue: Under law, appeals to higher courts are normal part of the judicial process. The SCT Decree, however, limits the appeals significantly.

First, there is no appeal on matters of law or on matters of fact.

Second, appeals are limited to orders where claims were not disputed, or where work orders are concerned: 'Any party to proceedings before a Tribunal may appeal against an order made by the Tribunal under section 15(6) or section 31(2)' (s33(1)). S31(2) deals with enforcement of work orders while 15(6) states:

To give effect to its determination of the dispute or in granting relief in respect of any claim, which is not disputed, the Tribunal shall make one or more of the orders which it is empowered to make under section 16 or under any other law (stress mine).

Thus, where a claim was disputed and if it related to an order of paying money, or an order dismissing a claim, there is no legal provision for an appeal. In 1997, a part of s33 (on appeals) was amended, but the amendment was unrelated to the limitations on appeals. It, therefore, remains the case that no order of a Tribunal can be appealed that does not relate to a disputed claim or claims involving enforcement of work orders. This can be considered as a serious weakness in the Decree.

Whether such restrictions are just is a matter of public policy. In this regard, the interest of providing prompt and inexpensive relief ought to be balanced against a right to further redress. For, if rights to appeal are provided for merits of the case, then the process can be significantly delayed as referees would need to pay full attention to the legal aspects surrounding the case. The one firm basis supporting the retention of the current provisions is that the SCT's monetary jurisdiction is limited to \$5,000, thus even if a final outcome were regarded as not strictly according to law, the damage caused to the aggrieved would be limited to a maximum of \$5,000⁹.

It is recognized that if the grounds for appeals are widened, respondents who are ordered to pay monetary sums can utilize appeals against decisions of the SCT to unduly lengthen the process of justice, thereby tiring out claimants where respondents are either well endowed financially or have access to solicitors. Magistrate's Courts and High Courts do not have any restriction on the type of representation that a party in a case may have. Thus, while a claimant may win a case in the SCT, an appeal could see lawyers bringing a whole gamut of technicalities to frustrate a claimant. This becomes a major problem where the normal length of getting cases cleared in the Magistrate's courts is significant. For this reason, one may propose that there are merits in restricting the grounds for appeal from the decisions of the SCT to matters of jurisdiction and unfairness.

One possible resolution of the problem could lie in the creation of a Small Claims Appeals Court, with specific jurisdiction to hear appeals from the SCT¹⁰, and perhaps appeals from other Tribunals in Fiji.

SCT Claim No 2225 of 2004: Case of Prolonging Justice?

In 2002, electrical equipment of a householder were damaged due to a power surge in the area. The householder filed a claim in the SCT in 2004, claiming that the power supply company was negligent in maintaining power cables to standard, which led to the power surge. The SCT decided for the claimant in January 2005. The respondent (Fiji Electricity Authority, FEA) appealed in the Magistrate's Court on grounds that 'the proceedings were conducted by the Tribunal in a manner which was unfair to FEA and prejudicially affected the result of the proceedings'. The 'manner' basis arose from the FEA's claim that the Tribunal had failed to take into account a written submission filed by the FEA. The explanation of the grounds for the appeal are on the law of natural justice. The Magistrate's Court accepted the appeal, despite the Tribunal stating, in the Referee's Appeal Report that the submissions were no more than a record of what transpired during the hearings, and that the Tribunal had traversed all aspects of the submissions. Over 4 years since the decision of the SCT, the appeal has still not been heard.

9 The numerous restrictions to the right to appeal also prevents the Magistrate's Court from rehearing the case, for if appeals were allowed on the merits of the Tribunal's orders, then the courts will, necessarily, have to re-open the case.

10 The possibility of this mechanism emerged from discussions between the author of the report and former referee Ikbal Jannif.

2.5.3 Appeal Procedures

Appeals are made in the first instance to the Magistrate's Court. Appeals need to be lodged within 14 days of Tribunal's order (s33(3)).

The 14 day limitation period seems to emerge from the fact that SCT is mandated to resolve cases with speed and economy, thereby dispensing with the long drawn process of full record keeping. Within 14 days after a notice of appeal has been lodged in the Tribunal's records, the referee who heard the proceedings is required to furnish the Court Registrar with a report on the proceedings and on the manner in which the proceedings were conducted and the reasons therefor. The SCT requires referees to keep records of the proceedings of a Tribunal sufficient to enable him, if required, to furnish such reports. Longer limitation periods may blunt the memories of referees in cases where they do not keep full records of the proceedings¹¹.

A Resident Magistrate or a Judge may, upon hearing an appeal,

- quash the order of the Tribunal and order a rehearing of the claim in the Tribunal on such terms as he thinks fit; or
- if the appeal is heard by a Resident Magistrate quash the order and invoke his authority for him to exercise the jurisdiction of a Tribunal and make fresh orders; or
- quash the order and transfer the proceedings to a Magistrates' Court for hearing; or
- dismiss the appeal.

Appeals are heard in chambers.

2.6 Protection of Referees

The Decree protects the SCT Referees in the same manner as the law protects other judicial officers (s38-39). To ensure that such protection is taken seriously, the Decree declares that the proceedings of a Tribunal are judicial proceedings.

¹¹ Both Sheet Metal, and Chan Long Chong dealt with issues on appeals outside the limitation period, with the Court not waiving the 14-day limitation period, albeit through consideration of matters on grounds of appeal.

2.7 Rules

The Chief Justice is empowered to make rules regulating the practice and procedure of Tribunals, prescribing such things, including fees, as are required by the Decree to be prescribed; and prescribing such matters as are necessary or convenient for carrying out the provisions of this Decree (s41). The rules were enacted in 1994 (Small Claims Tribunal Rules 1994). The rules deal with the following matters:

- date of hearing
- adjournments
- service of documents
- withdrawal of claims
- representatives
- witness summons
- evidence
- language of the tribunal
- amendment of claims
- sealing of documents
- form of orders,
- records, and
- transfer of proceedings.

III

Finance and Administration

The SCT is administered through the Judicial Department's Budget and Human Resource heads. Until 2005, the budgets and staffing were incorporated within the Magistrate's Court activity. From 2006, the SCT received a separate Activity recognition, with a clearly demarcated budgetary line. This augurs well for the SCT as a separate activity line provides a firm indication of budgetary independence.

3.1 Funding

The SCT commenced with a budget of no more than \$50,000. It was expected that the only cost of operating the tribunal was the cost of referees and the cost for providing limited support services. Over the years, however, the budgetary allocation for the SCT has been increased. But the increase has been confined to, as Table 1 shows, a total expenditure of no more than \$0.5m.

	Budget	Revised Budget	Actual
1996	Na	Na	Na
1997	Na	Na	39,700
1998	Na	90,000	83,800
1999	95,000	95,000	94,700
2000	100,000	82,800	44,800
2001	150,000	150,000	110,900
2002	150,000	150,000	143,000
2003	150,000	150,000	149,800
2004	150,000	150,000	150,000
2005	415,800	415,800	315,600
2006	427,100	427,100	442,700
2007	469,900	459,700	527,800
2008	366,100	366,100	Na
2009	367,200	-	-

With this level of expenditure, the average expenditure per case filed with the SCT is less than \$100. This is regarded as an expenditure that is far lower than the average expenditure in the Magistrates Court.

3.2 Staffing

The established staffing position in the SCT comprises administrative staff and referees. Administrative staff are responsible for the administration of the office and the claims. The referees form the engine box of the SCT. There is budgetary provision for 5 referees each in Suva and Lautoka and 1 in Labasa. However, over the past two years, there have been only 3 referees each in Suva and Lautoka, and one in Labasa¹². In 1996, on the other hand, there were 7 referees appointed for Suva alone; this number continued to 2001¹³. Table 2 shows the staffing position in the SCT.

	Administrative Staff			Referees				Total
	Suva	Lautoka	Labasa	Suva	Lautoka	Labasa	Total	Staff
1996	4	na	0	7	na	0		11
1997	4	na	0	7	na	0		11
1998	4	na	0	7	na	0		11
1999	4	na	0	7	na	0		11
2000	4	na	0	7	na	0		11
2001	4	na	0	7	na	0		11
2002 - 2005	na	na	0	na	na	0	na	Na
2006	11	7	0	4	3	0	7	25
2007	11	7	0	4	3	0	7	25
2008	11	7	5	3	3	1	7	30
2009	11	7	5	3	3	1	7	30

¹² The single referee in Labasa handled 450 cases in 2008, and approximately 17 per week on average during the first 12 weeks of 2009.

¹³ The first lot of referees were: Ikkal Jannif, Temo Stuart, Fred Achari, Donald Santa Dass, Merewalesi Rokowawa, Ayesha Shameem and Susan Douglas. The referees at the date of the dissolution of the court system of 9 April 2009, were: John Tevita, Isaac Peter and Lote Buinimasi (Suva); Panapasa Matailevu, Sita Ram, and Josefa Rakaseta (Lautoka), and Keshwan Padayachi (Labasa). No name has been gazetted after the new legal order came into force in Fiji (May 2009).

3.3 Referee Training and Remuneration

The SCT Decree provides for the appointment of referees. A referee ought to be 'capable by reason of his special knowledge or experience for performing the function of a Referee'. A referee need not have legal qualifications (s6(2)).

While the SCT is a division of the Magistrate's Court (s3(3)), the objective of the SCT is to provide 'prompt and inexpensive relief to claimants' (long title, SCT Decree 1991).

The issue here is whether the referees are to interpret the case before them as a legal issue or as an issue that needs a fair, just and acceptable outcome. The prevailing interpretation is that the aim ought to be a just and acceptable outcome. As such, the skill of arriving at a just solution is more important than legal knowledge of the skills of a lawyer. Former referee, Ikbal Jannif stated that referees' decisions ought to be based on 'justice rather than the law' thereby requiring skilful referees. This view is on the basis of s15 of the SCT Decree. This section states that Tribunal 'shall determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to actual forms or technicalities'.

Yet, the matters brought to the Tribunal are, essentially, matters of contract. Contracts are legal matters. Where referees appointed do not have legal qualifications, they need to be trained adequately to handle matters that essentially revolve around contracts. The referees appointed in Fiji to date have all been persons who are non-lawyers. Numerous persons appointed as referees have extensive experience in business, bureaucracy or social service. Those with experience in business would tend to have some understanding of contracts. However, those coming from a social service background, would generally tend to have a lower degree of understanding of contracts.

When the Tribunal was initially established, referees were trained by experts (sourced from the New Zealand Disputes Tribunal, which was the model on which the SCT was developed). A former referee from the first group of referees, Ikbal Jannif affirms that the initial training of referees was rigorous and prepared the referees well for their responsibilities.

In 1996, under British Aid, a SCT Referee's Manual was developed that placed the responsibility of training SCT staff on the Chief Registrar (2006: 11). The manual listed the 'dos and don'ts' for referees. It also provides the job description for SCT Referees, and states that appointees 'who are not legally qualified will be required to complete training in relevant law', albeit in 'elementary' legal knowledge specific to the jurisdiction of the Tribunal (2006: 14, 18).

However, both the frequency and intensity of training over the years have declined. Today there is no established programme for people to go through before they are confirmed as referees. Nor is there, for appointment of referees, any rigorous screening process, which includes formal examination of processes and matters pertinent to the functions of a ref-

eree. There is also no pre-scheduled continuing education programme for the referees.

In the absence of quality on-going training of referees, the risks to sub-optimal outcomes are significant. The tendency for some referees to delve in issues of law, and therefore, to behave like judges, is strong where there is a lack of continuing education and training of referees. This not only creates confusion and reduces efficiency, but it also reduces the confidence that people have in the SCT.

A major problem now also concerns the fairly low number of referees. While budgetary provision exists for 5 referees each in Suva and Lautoka, currently there are only 3 in each of these locations. There are 2 hearing rooms each for the SCT. This means that each referee's cycle can be repeated more often than was possible during the early days of the SCT.

Each referee now is paid an allowance/honorarium of \$160 for a full day's hearing and \$80 for a half day hearing¹⁴. Reducing the referee cycle has meant that referees are now required to spend more time with the SCT, leading to an effectual full-time work for referees.

The danger of being drawn towards a full-time employment is obvious. Where referees do not have any full-time engagement other than being a referee, the tendency to delay cases rises. Evidence from one tribunal shows that at least one referee hardly disposes a case in one hearing¹⁵. This raises the number of days a referee has to sit. Such practices, which emerge on account of poor administration of the SCT system, tends to undermine the very essence of the SCT – to provide efficient and inexpensive relief to claimants.

A key aspect of the SCT process is recording of a case hearing. Referees make decisions on the basis of what they have heard and understood of a claimant's case and the respondent's response. Normally there is no written submission by a claimant or a respondent for the referee to consider, other than for any documentary evidence of payment, receipt, etc., submitted by any party. This makes it important for referees to record their understanding of the case before them. Such records become important in cases of appeals.

Case recording is a skilled exercise. The SCT ought to develop a standard template for case recording by all referees. Referees ought to also be trained in utilising this template. The Referee's Manual provides an example of a recording (2006: 33). But this is not in the form of a template that can usefully be utilised by referees. The consequence is that there is a continuing problem of either lack of or incomplete, case records.

3.4 Other Staffing Issues: Bailiffs

A major problem facing the SCT is the delay in serving documents to respondents. This is especially the case with the bailiffs that the SCT utilises to serve documents. Claimants are advised that they could utilise their own bailiffs or pay SCT to allow SCT bailiffs to serve documents. There is evidence that the incidence of non-service where claimants utilise SCT bailiffs is higher than the incidence of non-service where claimants opt to serve the respondents themselves directly or through their bailiffs.

Lack of timely service of documents leads to adjournment of hearings, thereby delays, increased costs, and inefficiencies. It also tends to discourage claimants, leading to cases being closed without hearings. Claims lapse if documents remain unserved for a period of at least 12 months after the date of lodgement (s2, SCT (Amendment Rules), 1997)¹⁶.

14 A full day's hearing contains 5 hearings; the recommended time for each hearing is 1½ hours (Referee's Manual, 2006: 13, 16).

15 Adjournment is allowed under the operating guidelines given to Referees in the Referees Manual. A case should not be adjourned for more than 2 occasions (2006: 13). This flexibility itself provides the leeway to referees to prolong the number of hearings to, as the outer limit, 3 times the number of cases filed.

16 The issue of service of documents needs to be examined from the legal point of view. Under the Magistrate's Court Rules, it is the responsibility of the Registrar to ensure that documents are served on parties to the dispute. The Referee's Manual (2006: 20) lists the methods for serving documents. It, however, does not list any fee to be charged by the SCT for service of documents. The relatively low degree of efficiency of service by SCT bailiffs raises the issue of good governance and transparency within the SCT system, with the continuing suspicion that SCT administration is not doing enough to raise service efficiency.

IV

Use of SCT and Public Perceptions

SCT provisions are now available in Suva, Lautoka and Labasa, the last of this being established in 2007. During the recent years, however, there have been no targeted public educational or awareness campaigns on the utility of SCT. To access the utilisation of SCT facilities, quantitative data from the Suva SCT was utilised, together with a nation wide random sample survey on SCT services.

4.1 The Functioning of the SCT

The SCT maintains operations in Suva, Lautoka, and Labasa. Each of the offices compiles its own annual reports. An analysis of the claims filed in Suva from the commencement date in 1996 to June 2008, shown in Table 3, provides interesting insights into the operations of the SCT.

Year	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	June 2008	Total
T o t a l Claims	858	3006	3015	2861	2810	2399	3440	3954	3187	2625	2643	3771	1696	36265
Total Claims From														Avg: 97-08
Businesses	28%	51%	47%	41%	50%	45%	54%	48%	47%	48%	46%	59%	55%	49%
NGOs*	0%	3%	2%	7%	10%	2%	2%	6%	2%	1%	3%	1%	2%	3%
SE*	45%	8%	7%	6%	3%	3%	9%	5%	2%	5%	13%	8%	2%	6%
State	0%	7%	2%	3%	2%	0%	0%	0%	0%	0%	0%	0%	0%	1%
Individuals	27%	30%	41%	43%	38%	50%	35%	41%	48%	46%	38%	31%	41%	40%
Total Claims Against														
Businesses	8%	11%	12%	13%	15%	17%	9%	9%	11%	12%	15%	13%	12%	12%
NGOs	1%	0%	0%	1%	2%	0%	0%	1%	1%	0%	0%	0%	0%	0%
SE	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
State	0%	0%	1%	1%	1%	0%	0%	1%	0%	0%	1%	0%	1%	1%
Individuals	91%	88%	87%	85%	82%	82%	90%	90%	88%	88%	83%	86%	87%	86%
* NGOs refer to non-government organisations. SE refers to state enterprises or statutory authorities														

The following features emerge from the analysis of the data given in Table 3:

- On average from 1997 to 2008, approximately 3,000 cases have been dealt with by the Suva Tribunal annually.
- On average approximately a half of all claims (49%) were claims by businesses.
- On average, claims from private citizens (individuals) comprised 40% of all claims.
- On average, 86% of all claims were against individuals.
- Claims against businesses comprise only 12% of all claims.

Issue: A major issue that emerges from the fact that 49% of all claims are from businesses, of which most are against individuals, concerns the utilisation of the SCT by commercial interests. An examination of the claim records in Suva show that a vast majority of the claims by businesses concern non-payment of money in breach of some form of a contractual agreement. Such claims are nothing but a method of debt collection.

Since a not an insignificant portion of the SCT resources is spent on cases that deal with debt recovery, the issue that arises is whether the SCT was intended to be a debt recovery instrument in the first place.

The SCT Decree provides the scope of the SCT. S15 of the Decree lists the primary function of the SCT: “The primary function of a Tribunal is to attempt to bring the parties to a dispute to an agreed settlement” (underline added). S15(2) states: “If it appears to the Tribunal to be impossible to reach a settlement ... within a reasonable time, the Tribunal shall proceed to determine the dispute.” (underline added).

The operative term is ‘dispute’. A dispute is generally defined as a disagreement or a difference of opinion. In this case, the term would refer to a disagreement of rights or interests or obligations that relate to money.

The issue, then, is whether debt recovery where the parties do not have any dispute on any aspect of the debt, can be treated as a subject of dispute and, thus, be within the ambit of the SCT. Would, for example, a matter like ‘I do not have the money to pay the debt’ be regarded as a dispute? If it were, then the party disputing this statement would have to demonstrate that the party making this claim has the money to pay.

There could be a strong basis to a proposition that the ‘I know I have a debt and I have to pay this, but at this moment I do not have the money to pay’ is not a dispute on the rights or obligations of parties, and as such, they ought not to be matters taken to the SCT. For debt recovery, other legal channels could be resorted to.

The SCT Decree is, however, not entirely clear on this matter. While s15 states specifically the primary function of the Tribunal, the long title of the Decree provides the objective of the decree to ‘provide prompt and inexpensive relief to claimants’.

It may even be imputed that those tasked to administer the SCT Decree were also not certain of the jurisdiction of the SCT. The SCT Referee’s Manual, written in 1996 and revised in 2006 makes no reference to businesses or commercial enterprises specifically. Its introduction, for example, states that the Tribunal will attract a broad ‘range of litigants ... including citizens, consumers, trades people, artisans and others providing goods and services’ (2006: 6). The terms ‘citizens’ and ‘others providing goods and services’ includes business houses. But one would wonder why there is no direct reference to the commercial sector in the manual.

There are at least three probable ways out of this dilemma of interpretation.

One option is for the state to consider amending the SCT Decree to clarify the objective of the SCT and to clearly delineate the functions and perimeters of the SCT.

Another option is to raise the lodgement fee for claims that are in the nature of debt collection/recovery from the current \$5.65 per claim to a cost recovery fee. Even a premium fee (cost + fee) could be considered for claims that are of this nature¹⁷. Revenue from such fees could be used to expand the scope and efficiency of the SCT.

The third approach to resolving this problem is to consider the establishment of a special household consumer claims tribunal with the specific jurisdiction of claims emanating from non-business and non-official entities. Such a tribunal could be established as a special division of the SCT.

Further analysis of the claims lodged in Suva is provided in Tables 4 and 5.

As shown in Table 4, of all claims by individuals between 1996 and June 2008, 59% were by ethnic Indians and 35% by ethnic Fijians. A gender decomposition shows that 74% of all claims were by males. This table also shows that a relatively greater proportion of female claimants were from the ethnic Fijian community compared to the ethnic Indian community.

Male	Female	Total
47%	12%	59%
23%	12%	35%
4%	2%	6%
74%	26%	

An analysis of individual respondents, given in Table 5, shows that 38% of the claims were against ethnic Indians and 58% of the claims were against ethnic Fijians. 84% of all claims were against male respondents and 16% against females. About 8% of all claims against ethnic Indians were against ethnic Indian females, while 21% of all claims against ethnic Fijians were against ethnic Fijian females.

Table 5: Individual Respondents

	Male	Female	Total
Indians	35%	3%	38%
Fijians	46%	12%	58%
Others	3%	1%	4%
	84%	16%	
* Respondents to claims from all types of claimants (business, individuals, etc)			

4.2 Awareness, Reach and Perceptions of SCT: Results from a Nation-wide Survey

To establish the views of the people on the SCT, a random sample survey was conducted. A decision to interview heads of households of 1,000 residents in Fiji through a random sample survey on the main islands was taken. The primary reason for this number and geographical scope was funding.

After the usual processes of questionnaire design, piloting and sampling, 1,062 questionnaires were returned. Of this, 1029 were selected as acceptable for analysis. Table 6 provides the details of the sample.

	National	Urban	of which:	Rural	of which:			
	Total	Total	I	F	O	Total	I	F
Ba	300	16.1%	8.1%	7.6%	0.5%	13.0%	8.9%	4.1%
Bua	10	0.0%	0.0%	0.0%	0.0%	1.0%	0.8%	0.2%
Cakaudrove	22	1.0%	0.7%	0.3%	0.0%	1.2%	0.3%	0.9%
Macuata	121	6.7%	3.5%	3.1%	0.1%	5.1%	4.0%	1.1%
Nadroga	60	0.0%	0.0%	0.0%	0.0%	5.8%	2.9%	2.9%
Naitasiri	214	18.8%	5.1%	13.1%	0.6%	2.0%	0.0%	2.0%
Namosi	40	1.7%	1.7%	0.0%	0.0%	2.1%	0.2%	1.9%
Ra	45	1.5%	0.9%	0.6%	0.0%	2.9%	1.2%	1.7%
Rewa	177	16.2%	8.1%	8.2%	0.0%	1.0%	0.0%	1.0%
Tailevu	40	2.5%	1.2%	1.4%	0.0%	1.4%	0.3%	1.1%
	1029	64.5%	29.2%	34.2%	1.2%	35.5%	18.6%	16.9%

65% of the sample coverage was urban. For the urban population, which 5% point more ethnic Fijians appeared in the sample than ethnic Indians. Of the 35% of households in rural areas, 2% more ethnic Indians were included in the sample. In terms of provincial distribution, Ba, Naitasiri, Rewa and Macuata predominated. These characteristics correspond approximately to the national population distribution.

4.3 Awareness

Overall 55% of the households are aware that there exists an institution called Small Claims Tribunal. This is in sharp contrast to the expected universal awareness of the existence of other courts in the country. Table 7 provides the provincial breakdown of awareness of the existence of SCTs. An interesting feature is that even in areas that are not in close proximity to the SCT offices, there is some awareness of SCT. The least aware province was Ra. Of those who were not aware of SCT, a vast majority (67%) relied on the police to resolve their disputes involving money. This was followed by relying on chiefs, village leaders or religious leaders (20%), and lawyers (8%). 2% relied on other courts, while 1% each relied on bailiffs, thugs and witchdoctors. However, only 48% of all these had any overall success in their disputes.

	Aware	Not Aware
Ba	60.0%	40.0%
Bua	80.0%	20.0%
Cakaudrove	59.1%	40.9%
Macuata	48.8%	51.2%
Nadroga	45.0%	55.0%
Naitasiri	47.7%	52.3%
Namosi	55.0%	45.0%
Ra	17.8%	82.2%
Rewa	68.9%	31.1%
Tailevu	60.0%	40.0%
Average	54.9%	45.1%

Respondents who were not aware of the existence of SCT, were provided brief explanations on what a SCT was. The following information was given to them:

SCT is like a small court where you take any claim upto a value of \$5,000. There is no need for you to go to a lawyer or a police. You can go straight to the SCT office, get some forms and fill these to give the details of the claim and lodge the form. You will then be given a date, on which you can go and represent your case to a person appointed by the government. This person, called the Tribunal, will see if your claim is fair and just. It does not take much time or money to get justice this way.

On this basis, 96% of those who were not aware of SCT stated that they would take any of their case involving money dispute to the SCT.

In terms of the sources that were the primary basis of respondents' awareness of the existence and functioning of the SCT, as Table 8 shows, approximately a fifth stated these to be their friends and relatives. This was followed by Radio (15%), TV and School (both 14%), and newspapers (13%). A quarter of the respondents learnt of the SCT through other sources; these included the military, colleagues and workmates, community police, and SCT itself through the claimants when respondents were taken to the SCT for claims.

Newspapers	13%
TV	14%
School	14%
Radio	15%
Friends/Relatives	19%
Others	25%
Total	100%

4.4 Use of the SCT

Of those who were aware of SCT, as Table 9 shows, 16% had utilised SCT. There was a relatively greater utilisation of SCT by urban residents than rural residents.

	Yes	No
Rural	12.5%	87.5%
Urban	17.1%	82.9%
TOTAL	15.8%	84.2%

By province, as Table 10 shows, the largest proportion of those who were aware of SCT and who used the services of SCT were from Rewa, Tailevu and Ba. Ra is an outlier as 2 out of the 8 households who resided in Ra had utilised the services of the SCT. As expected, however, Bua and Cakaudrove had no household utilising SCT. The surprising result, however, is from Naitasiri as a relatively smaller proportion than other provinces utilised SCT services.

	YES	NO	No of Households
Ra	25.0%	75.0%	8
Rewa	24.8%	75.2%	125
Tailevu	24.0%	76.0%	25
Ba	16.8%	83.2%	179
Nadroga	14.8%	85.2%	27
Macuata	11.1%	88.9%	63
Namosi	9.5%	90.5%	21
Naitasiri	7.3%	92.7%	96
Cakaudrove	0.0%	100.0%	12
Bua	0.0%	100.0%	9
	15.8%	84.2%	565

From the random sample survey, it is estimated that 3.7% of all residents in Fiji had cases filed against them sometime during 1996-2008.

While a large majority of those surveyed had not themselves utilised the SCT for their redress, 44% knew of someone who had done so. Approximately a third also knew of someone who was taken to SCT as a respondent. A quarter knew of someone who had given evidence on behalf of either of the parties before the SCT.

4.5 Redress

Of those who sought redress through the SCT, 58% succeeded in getting a positive outcome. Of those who did not succeed, 34% indicated that they had either appealed the decision, or were going to appeal (if the decision was more recent).

Table 11 provides further details on those who sought redress through the SCT.

	Yes	No
Were any lawyers involved in your dispute?	15%	85%
Did your opponent take the Tribunal seriously?	91%	9%
Were proceedings easily understandable?	96%	4%
Any need to followup on payment	19%	81%

The results show that people take the SCT seriously, and that language is not a barrier to seeking redress through the SCT. 15% stated that lawyers were involved with the matter. Details of such involvement could not be ascertained. However, it is probable that the claimants would have consulted lawyers prior to seeking the avenue of SCT.

An underlying philosophy behind the establishment of the SCT was that the SCT would provide a comfort zone for people with monetary disputes to air their claims and counter-claims, compared to the highly legalistic court system. The 2006 revision of the SCT Referees Manual states:

Referees observe that parties are allowed to air their grievances in a relaxed forum, say what is important to them even if of no strict legal significance, talk directly to their opponents and hear the other point of view, and receive quick decisions which they are in a position to understand and therefore accept (2006: 6).

This observation is confirmed by the respondents in this survey. The SCT provides a non-intimidationist environment in which claimants and respondents can interact to resolve their monetary disputes¹⁸.

¹⁸The objective of providing a non-intimidating environment is strengthened by the personal qualities that the judicial department lists as those required in a Referee: ability to listen, ability to relate to and communicate with a wide variety of people, ability to respond positively and appropriately to cultural differences, ability to assess information, fair mindedness and impartiality, commonsense and practical judgments, self awareness, and ability to express herself/himself clearly (SCT Referees Manual, 2006: 14-15).

4.6 Processes

Respondents were asked to recall the time it took for them to complete the various processes to get a redress at the SCT.

A clear majority (73%) stated that the redress was provided in less than 6 months. For 93% of the claimants the process was completed within a year.

In terms of the actual time to hear a case, for 83% of the claimants, the actual hearing and decision took less than an hour.

One major problem, however, was in relation to getting payments if the decisions went for the aggrieved. Table 12 shows the lag between the decision and the full payments. While over a half (55%) of the claimants received the payment as decided within one month of the decision, approximately 30% did not receive the payment decided on despite winning their claims.

Payment within 2 Weeks of Decision	27%
Payment Between 2 wks & 1 month	28%
Payment between 1 Month & 1 Year	13%
Payment over 1 year	3%
No payment	29%

A majority of those who did not receive the necessary payments stated that they followed up with the SCT office on the lack of payments, but lost hope given the delays and the costs of chasing up on payments. The frustrations of those who did not receive the payments as per payment orders, was generally captured in their comment that they felt it was a waste of time to take the matter to the SCT. Suggestions were made that decisions ought to include mandatory payment through a respondent's provident funds.

4.7 User Rating

Overall, two-thirds of the SCT users stated that the services of the SCT were satisfactory. 9% stated that the services were excellent. 23% rated SCT services between unsatisfactory and extremely poor. The detailed breakdown of the ratings by various services of the SCT are given in Table 13.

	V. Poor	Unsatisfactory	Satisfactory	Excellent
Customer Service/Registry Staff	5	17	70	5
Professionalism/Competency of Referee/Tribunal	5	19	66	10
Independence of Referee/Tribunal	3	18	64	14
Summons Delivery Service	3	15	74	8
Speed & Efficiency	7	33	53	7
Cost Effectiveness	5	17	68	10
Overall Experience in Using Customer Service	6	14	68	13
Your Overall Confidence in SCT	7	13	67	13
Ease of Access to Tribunal	0	12	74	15

While there was an overall satisfaction with the services provided by the SCT, about 40% of those who had utilised the services of the SCT claimed lack of satisfaction with the speed with which SCT resolved their cases. A quarter of the respondents utilising SCT services also expressed unhappiness with the professional competence of the referees.

4.8 Overall Perception

The overall perception of those who had heard of the SCT was overwhelmingly positive. As Table 14 shows, 92% perceive the SCT as overall worthwhile. 87% perceive the SCT as efficient in delivering redress to complainants seeking financial redress. 89% viewed the SCT as delivering good results.

	Strongly Agree	Agree	Disagree	Strongly Disagree	Agree + Strongly Agree
Efficient	10%	77%	11%	3%	87%
Timely	9%	56%	30%	5%	66%
Delivers good results?	11%	78%	8%	3%	89%
Fair/Just	13%	78%	7%	2%	91%
Professional & Reliable	11%	76%	11%	1%	87%
Corrupt	3%	16%	63%	18%	19%
Another of govt's stupid schemes	1%	26%	56%	17%	27%
Overall worthwhile	14%	78%	7%	1%	92%

A total of 124 general comments on SCT were received. Of these, 16% praised the establishment of the SCT. The rest of the comments suggested various areas of improvements. Over a third (36%) of the comments contained expressions of concern at the efficiency of the SCT. Included in these were calls for greater professionalism of staff manning the SCT offices, need for more staff, and better bailiff services. 22% called for greater publicity of the SCT. 15% commented on poor quality of referees, even to the extent of suggesting that there was a need to improve the education levels and quality of referees hired by the SCT. Claims of bias of some referees were also made. 7% of the comments were specifically related to the need for SCT to ensure that payments are made promptly after a decision is handed down. 6% of the comments called for the establishment of SCT in other areas in Fiji.

IV

Evaluation

5.1 Tribunal's accomplishments and failings

This study shows that the major accomplishments of the SCT are:

- The SCT is a major avenue for redress on disputes involving small sums of money. Until 2007, this limit was \$2,000; from 2007, the limit was raised to \$5,000.
- Approximately 5,000 claims are lodged in the SCT annually. Of this, about 3,000 cases are lodged annually in the Suva SCT alone. This is a large number of cases, which otherwise would have either remained unresolved or would have found their way to the Magistrate's court, thereby further clogging the already crowded Magistrate's Court system.
- The access to judiciary has increased significantly with the SCT.

The major potential risk of the SCT is that the SCT has been used by the commercial sector as a debt collection agency. The risk of SCT losing focus has increased with the increase in claim jurisdiction to \$5,000. This risk can be countered by a premium for all claims from the commercial sector. The fee could generate sufficient revenues, that could be targeted to improving the efficiency and geographical coverage of the SCT. The premium could be established as a proportion of the sum claimed by businesses. For efficiency in the functioning of this, the present SCT, together with the current fee regime, could be bundled as the Household/Consumer Claims Tribunal, and a separate division created to handle small commercial claims (Small Commercial Claims Tribunal), with a commercial fee for service being levied.

5.2 Tribunal's Strengths and Weaknesses

The SCT's major strengths are:

- The SCT is an inexpensive redress for claims involving small sums of money.
- For the government, the average cost is less than \$100 per claim. As such, it is significantly cheaper than the Magistrate's Court for redress,
- The SCT is significantly less 'legalistic' in its dealings. The objective of attaining a just resolution as against a legalistic resolution determined by precedents, provides a less adversarial environment for dealing with claims. This is an important factor in ensuring social harmony in a small society like Fiji.
- The SCT provides a greater access to redress. Claimants find a higher degree of comfort in the SCT than in courts. Courts, with the presence of 'strangely

dressed' (wiggled) persons, speaking 'strange tongues' are seen as too 'threatening' by ordinary citizens.

- The SCT is more efficient than other mechanisms that claimants can utilise.

The Tribunal's major weaknesses are:

- For long, the SCT operations were limited to Suva and Lautoka. A SCT was established in Labasa during 2008. This leaves claimants from other areas great distances to travel in order for them to utilize these services, or to go without them. A mobile SCT service could be a possible way out of this dilemma. A mobile SCT would enable a wider spread of the SCT mechanism in Fiji. While a mobile SCT system would incur costs, the overall advantages of enabling monetary claims upto \$5,000 be resolved in the SCT system rather than through the Magistrate's court, would continue to hold for spreading the SCT system widely in Fiji.
- The relatively limited funding of the SCT, and the inefficient administration (for example by not appointing a full complement of referees as allowed for under the budgetary provisions), caps the potential of the SCT.
- The difficulties that those who feel genuinely aggrieved by the SCT decisions have in taking their grievances to higher courts through appeals, tends to reduce public confidence in the SCT. While there are credible basis for limiting appeals to Magistrate's courts from SCT decisions, the option of creating an appeals mechanism within the SCT framework needs to be considered¹⁹. The technical/legal and financial feasibility of the establishment of a Small Claims Appeals Tribunal would show the viability of such a tribunal.
- Training of referees is relatively limited, with progressively lower profiled persons being appointed as referees. A greater scrutiny of potential referees at the time of appointment, coupled with screening examinations, would alleviate a perception of incompetence of referees that exists with some people who have utilized the services of the SCT. Former referee, Ikbal Jannif suggests that routine peer reviews, and possible random reviews by the Magistrate's Court of the determinations by the SCT would also strengthen the perception of independence and professionalism in the SCT. This would require all SCT decisions to be adequately recorded²⁰.
- Awareness of the SCT, and/or its potential is relatively limited in Fiji, vis-à-vis the awareness of Magistrate's courts. Awareness campaigns on the SCT, including its scope, procedures, and limitations, would significantly raise the profile and the utility of the SCT.

¹⁹ The possibility of this mechanism emerged from discussions between the author of the report and former referee Ikbal Jannif.

²⁰ Currently there is no formal record of decisions other than records in the individual case files. Judgments, as they are recorded in other divisions of the court system, are not available for the SCT. The issue of whether such judgments are to be filed is a matter of public policy. Any formal recording of judgments and/or making them public will have resource pressure, which the current funding levels of the SCT would not be able to sustain. In addition, any requirement of formal recording needs to be balanced by the negative consequences of any temptation for the referees to act like magistrates and judges.



Notes



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