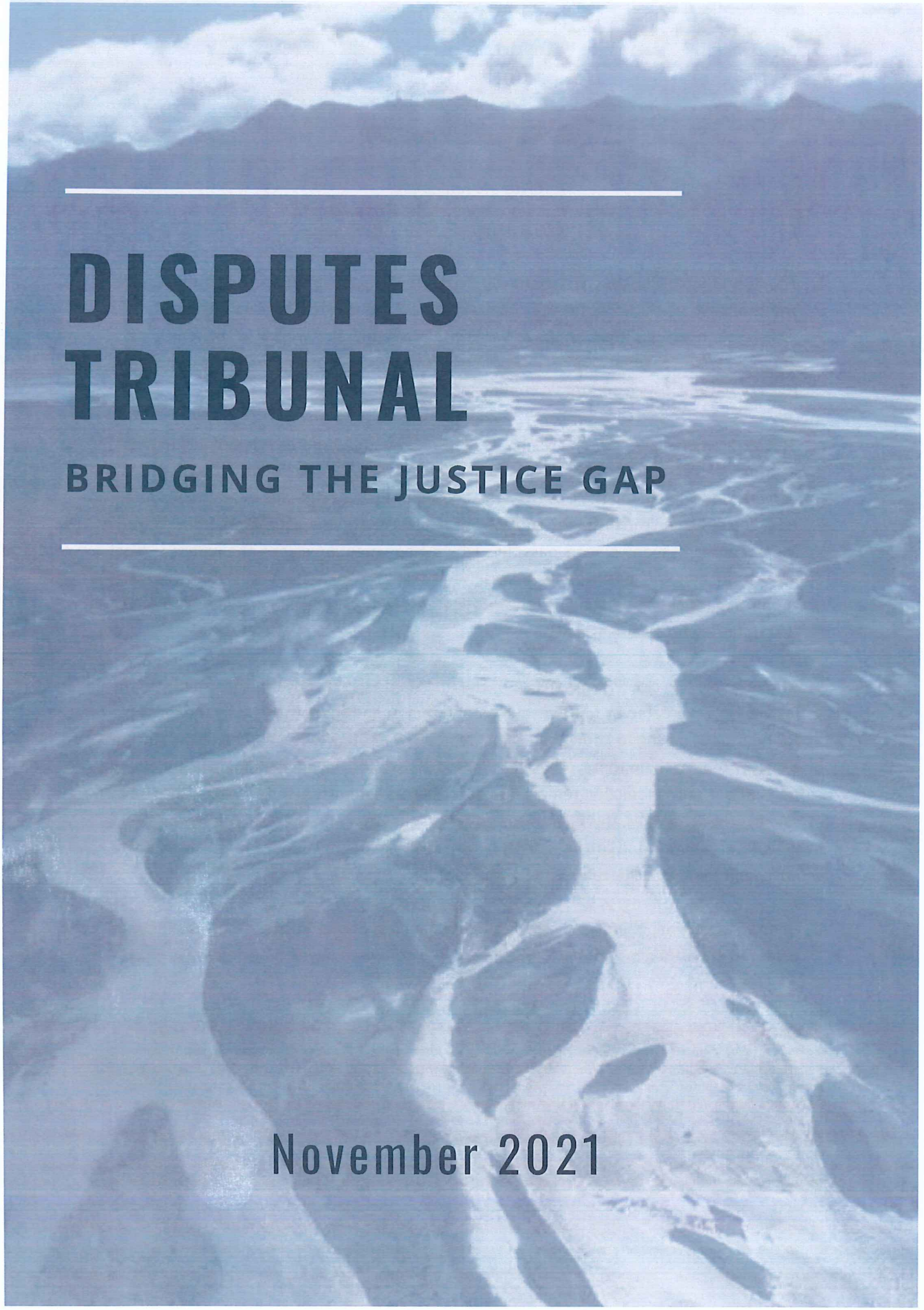

DISPUTES TRIBUNAL

BRIDGING THE JUSTICE GAP

November 2021

Bridging the justice gap

Ibi jus ubi remedium:
"Where there is a right, there is a remedy"
Holt CJ, Ashby v White (1702) 2 Ld Ray 938

1. The Rules Committee project "*Improving Access to Civil Justice*" has revealed a need, and wide-ranging support for, far reaching reforms to the conduct of civil litigation. This conversation echoes that of other jurisdictions around the world, all of which have grappled with designing simple, inexpensive and accessible procedures that uphold the rules of natural justice and retain confidence in the rule of law.[1]

2. An effective, efficient and fair civil justice system is an important element of any modern, just and democratic society.[2] Civil justice preserves rights between individuals, and between individuals and the Government, and is therefore the means to ensure we retain trust and confidence in business, equilibrium in social relations and freedom from tyranny. Moreover, as its many players pass through its many meeting places, the judiciary, legal profession and the participants themselves take part in a form of nation building, submitting, defining, persuading, interpreting, resolving and developing a jurisprudence that defines who we are as a people.

3. At this point, two clouds cross the sun. The first shadow is cast by the constraints on the justice system created by finite resources, and the second shadow is cast by the entry fee to the user of having to know their rights, find their meeting place, and be able to afford a lawyer to take them there. These challenges play to the advantage of a few, and many parts of our civil jurisdiction remain difficult to access for most people.[3] As has also been said in other countries, this dilemma requires the judiciary and the legal profession to act with determination and conviction,[4] and to find ways to provide a system with an inclusive entry point and an achievable end point.

4. At the same time, there is a growing understanding of the legal system as a service provided in partnership with iwi. Much work has gone into developing new ways of

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[1] *United Kingdom*: Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London 1995); *Canada*: *Civil Justice Reform Project: Summary of Findings & Recommendations* (Report) (Ontario 2007); *Effective and Affordable Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (British Columbia 2006); *Hong Kong*: *Civil Justice Reform: Final Report* (Chief Justice's Working Party on Civil Justice Reform, (2004); Victorian Law Reform Commission, *Civil Justice Review Report* (Melbourne 2008); Scottish Executive, *Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland* (Edinburgh 2007)

[2] Chief Justice Helen Winkelmann Ethel Benjamin Address: "*Access to Justice – Who needs Lawyers*?" 7 November 2014, n

[3] Dr Bridgette Troy-Cronin, "*Power in Civil Litigation*: Policy Quarterly Vol 17 No. 2 (2021) Special issue; Vested Interests

[4] Anthony Clarke: "*Civil Justice: The Importance of the Rule of Law*", The International Lawyer, Vol 43, No 1 (Spring 2009) pp 39-44

5. delivering court services[5] and to open a discourse about the values and development of the common law alongside those of tikanga Māori.[6] There is a meaningful intersection between the agendas of improving access to civil justice generally and ensuring that the way in which civil justice is delivered meets the Crown's obligations to Māori.

6. The Rules Committee and submitters have identified that the Disputes Tribunal can be part of the solution. The Disputes Tribunal supports the tenor of proposals made to date. Its members wish to provide further information to better inform the Committee in evaluating the submissions made, and to present further options for change.

7. This paper is in four parts:
    - Part I: The history of the Tribunal
    - Part II: The work of the Tribunal today
    - Part III: Te Ao Mārama
    - Part IV: Ways to bridge the justice gap

Part I: The history of the Tribunal

8. The Small Claims Tribunal was created in 1976 in response to the consumer justice movement, and the increasing understanding of the need for, and benefits of, alternatives to formal court processes to resolve small disputes.[7] The jurisdiction was capped at $500.00. Members were appointed from the community and were generally not legally trained. They made their decisions without a written order, and according to the "substantial merits and justice" of the case.

9. The early years proved a success, and in 1985, the jurisdiction was increased to $1,000.00. The Department of Justice then established a Working Party, which recommended an update to the framework, enacted as the Disputes Tribunal Act 1988. Much of the original Small Claims framework remained, but changes were made to the appointment of Referees, their powers, and their jurisdiction. The jurisdiction limit was raised to $3,000.00, and $5,000.00 by consent.

10. In 1996, following a further positive review of the Tribunal's performance from a consumer standpoint, the jurisdiction of the Tribunal was increased to $7,500.00 (and $12,000.00 by consent). Further increases occurred in 2014 to $15,000.00 (and $20,000.00 by consent) and in 2019 (to $30,000.00).

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[5] Chief Judge Heemi Taumaunu, Norris Ward McKinnon Annual Lecture 2020, "*Mai to pō ki to ao mārama... the transition from night to the enlightened world, Calls for tranformative change and the District Court response*",
[6] Justice Joe Williams, Harkness Lecture: "*Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law*" (2013) 21 Waikato Law Review 1
[7] Judge Peter Spiller: "*The Disputes Tribunals of New Zealand*", 2nd Ed, Thomson Brookers (2003)

11. As the table below shows, early increases did little other than keep pace with inflation. However, from the 1996 increase onwards, the increases heralded a meaningful shift in concept for the type of cases for which the Tribunal was considered appropriate. In real terms, the jurisdiction of the Tribunal is about seven-fold from its starting point.

Table showing increase in jurisdiction in real terms

Year	Jurisdiction	Actual increase	Real value of increase (at the time)	Real value of jurisdiction limit (in 2021)	Increase in real value (since 1976)
1976	$500.00			$4,529.88	
1985	$1,000.00	$500.00	$501.87	$3,016.17	decrease
1988	$3,000.00	$2,000.00	$2,912.44	$6,213.70	x 1.37
1996	$7,500.00	$4,500.00	$5,738.54	$12,181.51	x 2.68
2014	$15,000.00	$7,500.00	$11,089.60	$16,476.94	x 3.64
2019	$30,000.00	$15,000.00	$15,828.97	$31,228.07	x 6.89

12. Despite this substantial increase in jurisdiction, there have been few changes to the model. The Disputes Tribunal Act 1988 still retains many of the original features of the Small Claims model from where it grew. These features include:

    (a) The exclusion of lawyers in all cases, and other representatives in most cases;

    (b) The exclusion of the public from hearings;

    (c) A lack of prescribed rules of procedure;

    (d) A neutral Referee who adopts an evaluative approach (referred to often as an "inquisitorial" approach). The hearing begins with the Referee as a "naïve enquirer", but once both parties have been heard, the Referee takes an active role in defining the issues in dispute, and identifying the process and evidence necessary to resolve those issues;

    (e) A requirement to first consider whether the matter can be resolved by agreement, and an ability to approve appropriate settlements;

    (f) If the matter is not resolved by agreement, the power to determine the case according to the "substantial merits and justice of the case".

    (g) A limited right of appeal on procedural issues only.

13. This context is not out of step with civil and administrative Tribunals in Australia, which also now have various jurisdictions for small contract and consumer claims ranging from $25,000 to $50,000. Beyond $50,000.00, Victoria has a Tribunal with unlimited

jurisdiction, and Tasmania invites unlimited claims over $50,000 where both parties agree[8].

14. The most significant changes to the Disputes Tribunal as its jurisdiction has progressed have related to:

    (a) the qualifications of referees;[9]

    (b) The provision of written decisions;

    (c) A determination of the merits based on identified legal principles, except in unusual circumstances that warrant a departure from this;

    (d) the requirement to record hearings, and the development of best practice guidelines setting out defined hearing procedures that are designed to promote ethical and fair procedures and comply with principles of natural justice.

15. In short, as has been the case in other jurisdictions, the Tribunal model has translated well over the last 20 years to an increasing range of cases. The Disputes Tribunal started out as a body whose decision makers tended not to have legal backgrounds, dealt only with minor claims and had regard to the law but often departed from a strict view of the law. Today, its members must meet defined qualifications and criteria, are bound by the rules of natural justice, preside over a hearing that is structured and recorded, provide a written judgment with legally reasoned conclusions, and have competencies in both dispute resolution and decision-making applicable to disputes where far more is at stake.

Part II: The work of the Tribunal today

16. The Disputes Tribunal hears claims arising from contract, quasi-contract, tort claims involving physical damage to property and specified statutes such as the Consumer Guarantees Act 1993, the Fencing Act 1978 and the Fair Trading Act 1986. Employment and most family related cases are excluded because of exclusive jurisdiction rules under other legislation. The Disputes Tribunal Act also excludes specialist matters such as disputes about wills, defamation, intellectual property and statutory fees.

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[8] *QCAT*, Queensland Civil and Administrative Tribunal, ($25,000), *NCAT*, NSW Civil and Administrative Tribunal ($40,000), *Magistrates Court of Tasmania* (50,000, or >50,000 by agreement), *VCAT*, Victoria Civil and Administrative Tribunal (unlimited)

[9] By the end of 2021, there will be 4 Referees that are not legally qualified. The Act has been amended to provide: s7(2) "A person is qualified to be appointed as a Referee only if that person (a) holds a relevant qualification (for example, a qualification in law, mediation, or arbitration) or has had relevant training; and (b) has the personal attributes, knowledge, and experience so as to be capable of performing the functions of a Referee; and (c) has been recommended for appointment under section 8".

17. The Registrar may reject claims where there is inadequate evidence of a dispute (section 11(1)). However, in practice, a dispute often reveals itself at the hearing, and only applications from finance companies or large corporates recovering unpaid accounts would be rejected on those grounds. It is common for those claims to be transferred to the Tribunal from the District Court where a Statement of Defence is lodged. Consideration could be given to enabling the Tribunal to take over the default procedure or accept a wider range of claims for what were historically considered debts if this would materially save civil judicial resources.

18. The Tribunal mainly hears claims relating to contract and consumer disputes, with a smaller portion dealing with tort claims (most commonly car accidents) and neighbour disputes (most commonly fencing matters). The chart in Appendix A, created from CMS data in April 2021, shows the spread of claims.

19. Much of the work of the Tribunal remains "smaller" claims. The chart in Appendix B shows that of the $3,700,000 million in dispute in April 2021, 60% of those cases were for sums less than $5,000.00, and only 11% of Tribunal business was for cases at the higher end of the jurisdiction. Whilst this proportion is growing, the Tribunal still remains focussed on the needs of small claims participants.

20. The Tribunal adopts a flexible, but defined, hearing process. The beauty of the process lies in its directness, efficiency and dual functionality. A Referee is able to build trust and rapport by displaying neutrality, even-handedness, respect and engagement with the parties. By identifying the issues, a Referee narrows the areas of disagreement to those that are critical to the resolution of the dispute, and then considers the evidence relevant to those issues. The Referee then evaluates the positions of the parties with reference to the applicable law and evidence presented, foreshadowing strengths and weaknesses, and grey areas, but without disclosing the determination of all matters (which may or may not be known). At that point, the Referee usually facilitates a settlement discussion. The personal attributes of the Referee can at that point make a difference to how the parties relate to one another. Some settlements are purely functional, but others have the potential to be transformative, and regardless of how the matter is resolved, a level of understanding is reached that supports an enduring and genuine end to the dispute.

21. The benefits of this process over a trial in which lawyers present a case include:

    (a) The speed and efficiency of one decision maker who has the skills to recognise the best version of each position and distil for the parties what the dispute is about;

    (b) The removal of incentives to escalate the dispute or engage in conduct that delays outcomes and increases costs;

(c) The opportunity for resolution that is maximised by the personal characteristics and skill set of the Referee; and

(d) The ability to be pragmatic about process and evidence, enabling a common-sense approach that is appropriate for the interests of justice in each case.

22. The competencies developed in the Tribunal's methodology for small claims has translated well to the more complicated disputes. In considering an increase in jurisdiction, members have expressed their reluctance to see any "creeping tide"[10] of more formal procedures that would undermine the advantages of the exercise.

23. The Tribunal has a set format for decisions that follows the issues-based analysis of the hearings. To date, the work of the Tribunal has not been easily viewable. The Tribunal is mindful of the need to increase the visibility of its work. From 2021, the Tribunal has begun publication of decisions through the resources available in the Ministry Judicial Libraries team (https://www.disputestribunal.govt.nz/disputes-decision-finder/). There are approximately 300 decisions of interest currently online, but the Judicial Libraries team has recently had its resources expanded to publish 600 decisions per year. In addition, a library of other decisions will be retained and made available for internal, judicial and research purposes.

Part III: Te Ao Mārama

24. The Disputes Tribunal is a division of the District Court and is currently developing a draft protocol in support of the Chief District Court Judge's vision for Te Ao Mārama. This includes proposals to make the filing processes and the hearings themselves inclusive and culturally responsive, create video resources on the Ministry website to give confidence to participants, undertake a community engagement pilot in South Auckland, increase the publication of decisions, promote manaakitanga, and be more aware of cultural expectations in relation to support people, representatives and dispute resolution practices in general.

25. The protocol will have significant benefits for access to justice, as the ideas for better engagement with the public will raise the profile of the Tribunal in the community generally and will also encourage a wider uptake of the services from Māori and Pasifika. Many thousands of New Zealanders from all walks of life come through the doors of a Tribunal every year, and the way in which that conversation takes place has influence on how we relate to one another after the process ends. A Tribunal, with its closeness to the conversation, presents an opportunity to pass its wisdom into, and take its wisdom from, the collective common sense of our people: *He awa whiria e tapotu ki te moana*: A

[10] Rt Hon Baroness Hale of Richmond DBE Keynote Address, Conference of Council of Australasian Tribunals (COAT) 2021

braided river that reaches the sea.

26. Anecdotal evidence supports the Rules Committee's suggestion of a name change for the Tribunal. It is thought that the name "Disputes Tribunal" has not in fact expressed the wairua of the process in a way that encourages participation, and the Tribunal supports a reconsideration of our name, both in English and Te Reo, to reflect our role as a community or small claims court, with a focus on resolution rather than conflict.

Part IV: Ways to bridge the justice gap

27. Tribunal members are fully supportive of an increase in jurisdiction to $50,000.00 as proposed but are predominantly of the view that the current model starts to be stretched, in terms of its proportionality, at an amount beyond this. All Referees have indicated their preparedness to hear cases up to $100,000.00, but unless this was by consent of the parties under the existing framework, aspects of the model beyond $50,000.00 would need to change to reflect the increased amounts at stake.

28. The Tribunal can and should continue to expand its reach, and in doing so, will be able to play an increasingly significant role in the delivery of civil justice. However, this must occur in a way that does not undermine the existing model and by evidence-based exposure of the reason for and extent of its areas of special advantage. The following sets out three options, all of which could be adopted if considered useful, to bridge the justice gap.

Option 1: Increase jurisdiction to $50,000.00

29. The simplest option for ensuring a safe progression that preserves the benefits and values of the Tribunal process, would be to leave the model as it currently operates, and extend the jurisdiction to $50,000.00. The work being undertaken this year to create the online and offline library, and to be available and open for research and review will provide a meaningful base for assessment and build confidence in the work we do.

30. There are also two further ways to expand on that safe progression, both of which would enable a greater ability to test scope, and maximise the advantage of our current competencies without compromising quality.

Option 2: Increase jurisdiction to $100,000.00 by consent

31. Parties may wish to avoid the time and cost associated with a trial, despite their claim being of a value greater than $50,000.00. Given the established track record of the Tribunal and the willingness of Referees to take on claims to this value, it is considered a safe option to enable parties to make that choice. In the past, split jurisdictional caps

(higher amounts by agreement which existed at $7,500 (for $12,000) and $15,000 (for $20,000)) were hardly ever used, as the alternate sum was not high enough to change the incentives on the respondent to agree. However, the availability of a sum of such higher quantum would make this a more attractive option. Consideration would need to be given to whether any part of the model was amended for those cases.

32. It is considered that expanded appeal rights for any sum over $50,000.00 would uphold confidence and justice, without compromising access to justice. Referees are thoroughly trained in a set of procedures designed to minimise processing errors, confirmation biases and attributions. Low rates of complaints, rehearings and appeals suggest such errors do not often prejudice outcomes. Nonetheless, each Referee is an independent judicial officer, and much of the atmosphere, analysis and outcome of the hearing depends on the particular attributes and aptitude of the Referee. In addition, the combination of the function of settlement and decision making contains with it risks to the overall justice of the matter. The statutory function of the Referee, with the dual power to both investigate a settlement, and decide the case, is based on a "med-arb" model of dispute resolution. Whilst it contains efficiencies, it also relies for its integrity on the ability of the Referee to demarcate appropriate stages of the hearing, avoid becoming involved in the dispute, and to be able to understand potential injustice that can arise in the settlement phase from the power that sits with their role as decision maker.[11] At lower sums, it is easier to write off errors made in a case as rough justice. However, there is too much at stake at higher sums to assume that in every case, a Referee has applied the correct law, appropriately processed and weighed the evidence, and managed the discussion without incident.

33. On the other hand, most Referees have expressed the view that legal representation should continue to be excluded at any higher jurisdictional sum. Parties in higher value claims generally bring legal submissions, which provides them with confidence that the correct issues are being identified. Beyond that, the inclusion of lawyers erodes the level playing field, and increases costs, which defeats accessibility objectives. Tribunal processes are designed to assist each party to put forward their best case, and Referees are trained on how to do this without compromising their adjudicative function. The parties can still choose to be represented if they elect to remain in the District Court.

34. Referees have also expressed a preference to see Tribunal hearings remain closed to the public. It is acknowledged that the Law Commission concluded there were benefits to

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[11] Richard Fullerton, "*Med-Arb and its variants: Ethical Issues for Parties and Neutrals*", Disputes Resolution Journal, May-October 2010, American Bar Association; Richard P. Flake: "*Med/Arb – A Viable ADR Vehicle? Nuances of Med/Arb – A neutral's perspective*", Arbitration Handbook, 2016 Edition, Juris Publishing; Med-Arb/Arb-Med: A More Efficient ADR Process or an Invitation to a Potential Ethical Disaster? Donna Ross; Hon David Saxe, "*Med-Arb: Is it the Wave of the Future*?", National Arbitration and Mediation, New York Law Journal Alternative Dispute Resolution Special Report, 30 November 2020.

open proceedings in its 2008 Report on Tribunal Reform.[12] It has also been pointed out by a participant in recent times that closed proceedings are a breach of Article 10 of the UN Universal Declaration of Human Rights. That Article entitles everyone to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations.[13] There is also a public interest in openness, including greater knowledge of the process of a hearing, allowing independent research, enabling others to exercise their right to know what is going on and encouraging confidence in Tribunal processes and the rule of law.

35. However, despite the increases in jurisdiction to date, it is considered that some of the original reasons for a closed court still hold true. In particular:

    (a) It takes a not inconsiderable amount of courage to file a claim and attend a hearing. Leaving aside the emotions involved in facing an adversary, there is the stress of having to participate in a process at a court and tell a stranger what can sometimes be quite a personal series of events, and financial circumstances. The matters in issue are rarely of public importance, being only of interest to the Referee and the parties. Parties may think twice about filing a claim if they were to imagine a public gallery or the press in attendance. Encouraging and providing access to justice remains one of the core purposes of the Tribunal setting.

    (b) In addition, part of the proceedings is set aside for determining whether the matter can be resolved by agreement. There are public policy reasons for statements made during this time to be without prejudice, and confidential. People sometimes choose to step away from their story, and their rights, to express other interests and values in a settlement process. A private setting encourages a free and frank exchange without loss of face or other external pressures.

    (c) The UN Universal Declaration of Human Rights remains subject to overriding public interest issues that arise in local jurisdictions. There are a number of Tribunals and Courts in New Zealand that function in a closed manner to protect the privacy of individuals in appropriate circumstances. In addressing this issue, Judge Spiller has stated that: "Privacy is seen to make for a more accessible Tribunal, encourages free, open and frank exchange, allows the parties to take part in negotiation more readily, and gives the parties a safe environment in which to sort the matter out without loss of face".[14]

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[12] Te Aka Matua o te Ture, Law Commission, "*Tribunal Reform*", 28 December 2008

[13] UN Universal Declaration of Human Rights (1948)

[14] Judge Peter Spiller: "*The Small Claims System: A comparison of the South African Small Claims Court and the New Zealand Disputes Tribunal*" [1997] Waikato Law Review 3

(d) In reality, whilst there are good reasons to support open courts, experience in the Tenancy Tribunal, which is open to the public, would suggest that there is no appetite from the public to attend. The Disputes Tribunal Act 1988 includes a provision entitling attendance from any person with a legitimate interest. There is already room for inclusion of researchers or others for whom there is a public interest in attendance.

(e) It is considered that there can more thorough oversight than is currently the case through publication of decisions, and openness to research and review, the processes for which are underway.

Option 3: Use existing powers to transfer cases from the District Court for settlement only

36. There is a third and significant way in which the Tribunal can engage in a safe progression of its place in civil justice. It is considered that whilst there are real gains to be made by increasing the Tribunal's jurisdiction, consideration should be given to the way the Tribunal can bridge the justice gap for matters *beyond* its decision-making jurisdiction.

37. There are two ways in which the Disputes Tribunal can assist.

38. The Disputes Tribunal has a cap on its jurisdiction for making a decision, which currently sits at $30,000.00. However, it currently has *no* cap on its jurisdiction for resolving matters by agreement (s18(4)). In the past, this has only been used where the claim has expanded after filing. However, there is another use for this power. Judges could transfer suitable claims to us, using existing transfer machinery, purely to take advantage of Disputes Tribunal settlement process. If the matter is not resolved, it would be transferred back for a decision.

39. This option would require little legislative change. Appendix D sets out the current provisions in the Disputes Tribunal Act 1988 that currently enable the transfer of claims. The transfer of a case could be at the request of the parties, or on the direction of a Judge. A case that has been transferred could be resolved by an order of the Tribunal if settled (already provided for by s18(4)) or transferred back if not (using existing processes)).

40. It is important to note that the Tribunal is not a negotiation or mediation process. It is an inquisitorial process, that identifies issues, weighs evidence, and facilitates settlement through evaluative and supportive dialogue. This concept would enable the parties to take the benefit of the Referee's experience and abilities in unpacking the dispute and bringing people out of their corners. Cases that do not settle would return back to the District Court.

41. This proposal would avoid the ethical allegations that can arise from mixing settlement and adjudicative functions, which may be more difficult to avoid when the stakes are higher. It would also be an advancement of the "PAP" procedures that have been adopted in the UK and Australia, where certain civil processes require confirmation of pre-application protocols, such as dispute resolution engagement.[15] Criticisms of these processes include the front loading of costs, non-compliance, irregular enforcement of sanctions and the risk of satellite litigation arising from these that derails the resolution of the original dispute. The use of the Disputes Tribunal for this process would provide a prescribed channel that would avoid these pitfalls. This proposal could also replace the concept, considered in the Rules Committee project, of having a court appointed "assessor" to assist the parties early in the process. This assessment would take place where that expertise already resides.

42. In this way, the Disputes Tribunal, renamed in a manner to better reflect the spirit and purpose of the process, can become an inclusive and efficient entry point and provide a service that can be seen as the restorative arm of civil justice. It is possible to envisage in the future offering the parties the choice, at the conclusion of the Tribunal process, whether they agreed to have the Referee decide the case if it did not settle, regardless of the sum involved.

43. The Courts Strategic Partnership Group is currently supporting a review of Tribunals, and as part of that Review, the Disputes Tribunal has advocated for closer ties conceptually between those Tribunals that deal with inter-party civil matters and the civil judiciary. The recent establishment of Tribunals Aotearoa, being a collaboration of all interested Tribunals in New Zealand, is the beginnings of that strategic direction. The proposal for the Disputes Tribunal and the District Court to work in a more connected way could be another expression of that strategic direction.

Conclusion

44. The Tribunal can be a source of multiple solutions in bridging the justice gap.

45. It has grown from its modest roots because the processes that have developed work efficiently across a greater range of cases than was envisaged at the start. However, other than proposing broader rights of appeal, the Tribunal sees benefits in retaining its current parameters if its jurisdiction is increased. It remains the natural home for small claims, and a constructive and approachable place where people can come and seek help, without the cost of representation.

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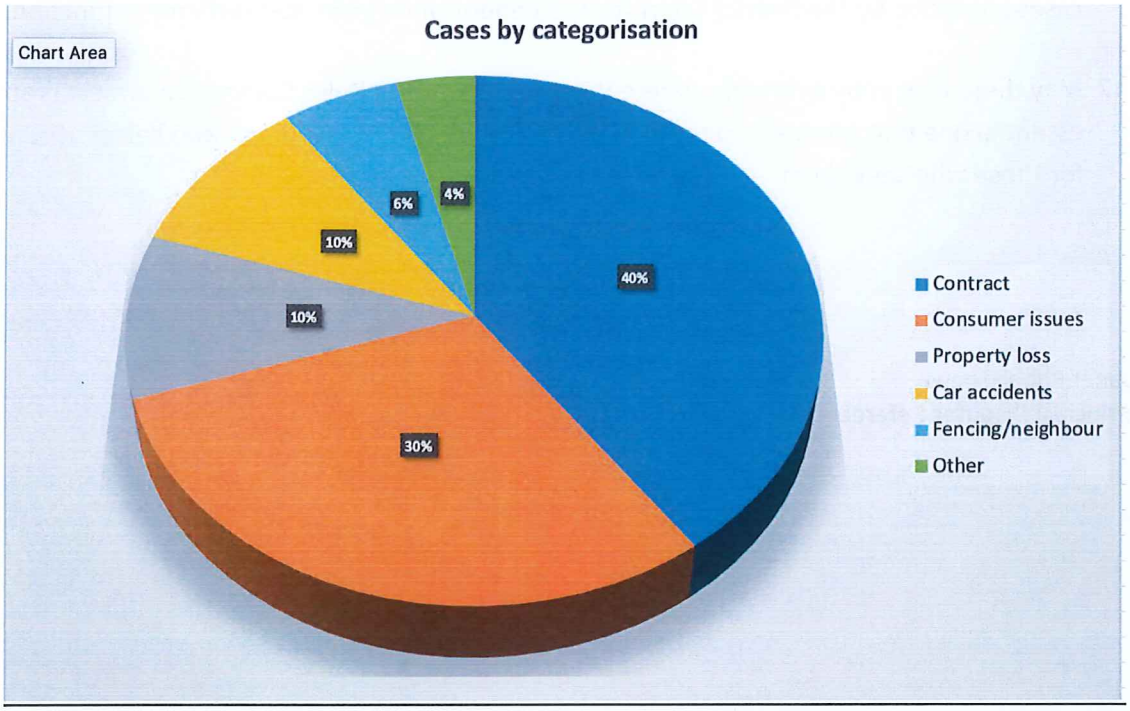
[15] Shelley Greer, "*Should Pre-Action Protocols be Adopted by the New Zealand Civil Justice System*?" [2014] Waikato Law Review 1

46. The Tribunal is ready to hear and determine more cases by an increase in its jurisdiction to $50,000.00. It would welcome further safe progression, which could begin with an extension to $100,000.00 by agreement, and by the transfer of any other appropriate cases identified by the District Court for the benefit of its unlimited settlement function.

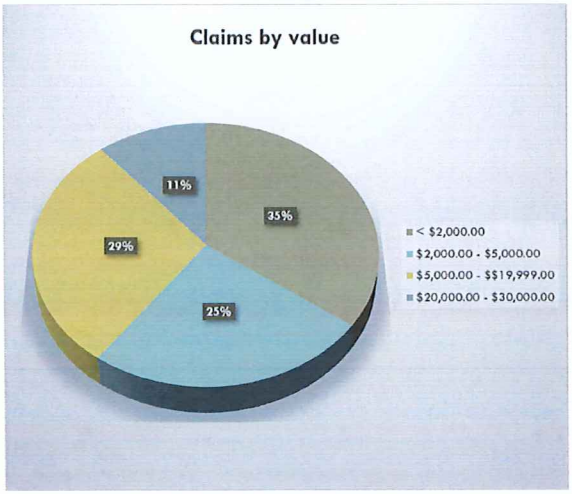
47. May there always be a remedy, where there is a right. The Rules Committee project is an essential one that promises to result in better use of judicial resources, and better access for those who seek them.

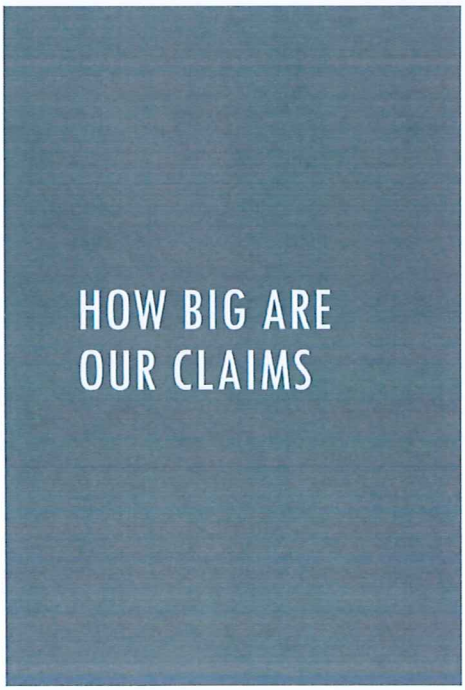
Janet Robertshawe
Principal Disputes Referee

Appendix A



Appendix B





Appendix C:

Jurisdiction proposal for settlement function:

Current mechanisms in Act

The DT has jurisdiction up to $30,000 for a decision (s19(4), but unlimited jurisdiction in approving a settlement (see s18(4)).

18 Functions of Tribunal

(1) The Tribunal shall, as regards every claim within its jurisdiction, assess whether, in all the circumstances, it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement in relation to the claim.

(2) Without limiting the generality of subsection (1), in making an assessment under that subsection, the Tribunal shall have regard to any factors that, in the Tribunal's opinion, are likely to impair the ability of either or both of the parties to negotiate an agreed settlement.

(3) Where the parties reach an agreed settlement, the Tribunal may approve the settlement, and the settlement shall then take effect as if it were an order of the Tribunal made under subsection (8), and shall be enforceable in accordance with section 47.

(4) In approving an agreed settlement pursuant to subsection (3), the Tribunal is not bound by the monetary restrictions in section 19(4) to (6).

The monetary restrictions in section 19(4) to (6) that apply to decisions, but do not apply to settlements are:

19 Orders of Tribunal

(4) Subject to section 20, the Tribunal shall not make an order under this Act that exceeds any of the monetary restrictions specified in subsection (5), and any order that exceeds any such restriction shall be entirely of no effect.

(5) The monetary restrictions that apply for the purposes of subsection (4) are as follows:

(a) an order under subsection (1)(a) or under section 47(3)(b) shall not require payment of money exceeding $30,000:

(b) a declaration under subsection (1)(b) shall not relate to a claim or demand exceeding $30,000:

(c) an order under subsection (1)(c) shall not relate to any property exceeding $30,000 in value:

(d) the work to be done or matters to be attended to under a work order shall not exceed $30,000 in value:

(e) an order under paragraph (e) or paragraph (f) of subsection (1) shall not be made in respect of an agreement if the total amount in respect of which an order of the Tribunal is sought exceeds $30,000.

(6) Except as provided in subsection (3), the Tribunal shall not, in respect of a claim, make more than 1 of the orders authorised by paragraphs (a) to (d) of subsection (1), or by any other enactment, if the aggregate amount or value of those orders exceeds $30,000, and every order so made contrary to this subsection shall be entirely of no effect.

The machinery of transfer

The District Court Rules themselves contain no express machinery for transfer. It is noted that those Rules do require a Judge in case management to make orders to promote the just, speedy and inexpensive determination.

Rule 7.1 Proceedings subject of case management

(1) Case management in accordance with this subpart will be applied to proceedings in order to promote their just, speedy, and inexpensive determination.

(2) The purpose of a case management conference is to enable the Judge to assist the parties—

(a) to identify, define, and refine the issues requiring judicial resolution; and

(b) to determine what steps need to be taken in order to prepare the proceeding for hearing or trial; and

(c) to decide how best to facilitate the conduct of the hearing or trial; and

(d) to ensure that the costs of the proceeding are proportionate to the subject matter of the proceeding.

The empowering legislation for transfer to and from the DC is in the Disputes Tribunal Act 1988 itself. This was not written with the concept in mind of transfer to the DT only for settlement, but this technically provides an avenue, if the settlement function is considered within our jurisdiction. Given this technical interpretation was not originally envisaged, it would be considered appropriate to provide a simple amendment to clarify this ability if a decision is made to use our settlement functionality more widely.

37 Transfer of proceedings from District Court, etc

(1) Where proceedings within the jurisdiction of the Tribunal have been commenced in the District Court before a claim in respect of the same issues between the same parties has been lodged in the Tribunal, or transferred to the Tribunal under this section, a District Court Judge or Registrar may, on the application of either party or of that Judge's or that Registrar's own motion, order that the proceedings be transferred to the Tribunal.

(2) Where proceedings within the jurisdiction of the Tribunal have been commenced in the High Court before a claim in respect of the same issues between the same parties has been lodged in the Tribunal, or transferred to the Tribunal under this section, that court or a Judge of that court may, on the application of either party or of its or that Judge's own motion, order that the proceedings be transferred to the Tribunal.

(3) The Tribunal to which proceedings are transferred under subsection (1) or subsection (2) may have regard to any notes of evidence transmitted to it and it shall not be necessary for that evidence to be given again in the Tribunal unless the Tribunal so requires.

36 Transfer of proceedings to District Court, etc

(1) Where any proceedings have been commenced in, or transferred under section 24(3) or (4) or section 37 to, the Tribunal, and the Tribunal has no jurisdiction to hear and determine those proceedings, the Tribunal may, instead of striking out the proceedings, order that they be transferred to the District Court in its ordinary civil jurisdiction.