Arbitrators and Self Represented Parties

Scott Ellis [1]

Introduction

While there have been litigants in person or self represented parties (SRPs) for as long as there has been litigation, it appears that the increasing number of litigants is placing ever more pressure on the judicial system.[2] This is due to a variety of factors, although undoubtedly increased legal costs and the decline in availability of legal aid are major causes. It may, to some extent, be a result of the extent to which the judicial process has been demystified and information relating to it has become more generally available. Persons who represent themselves are also likely to have an increasingly significant impact on arbitration processes, particularly if arbitral procedures form part of industry based consumer dispute resolution schemes.[3]

The purpose of this article is to examine:

- some of the issues which litigants in person create for the courts;
- the responses of the court system to these issues; and
- whether the same or similar steps should be adopted by arbitrators dealing with unrepresented parties.

It is suggested that, where an arbitral procedure involves a 'traditional' hearing, the approach taken by courts in civil proceedings to assisting litigants in person should be adopted by arbitrators. However, arbitrators have a greater opportunity than courts to adapt procedures to the exigencies of the particular dispute before them and should be proactive to adopt or encourage the parties to adopt procedures that will minimise the disadvantages experienced by some SRPs, while remaining fair and efficient.

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2. See generally, Hon Justice RD Nicholson, 'Australian Experience with Self Represented Litigants' (2003) *ALR* p. 820; Hon Justice RD Nicholson, 'Litigants in Person' (2001) 5 *TJR* p. 181; Hon Justice Dean Mildren, 'Don't Give Me Any LIP – The Problem of the Unrepresented Litigant in Criminal Trials' (1999) 19 *Australian Bar Review* p. 30; *Federal Court Civil Justice System Strategy Paper*, Department of Attorney General, Dec 2003, viewed 10 May 2004, <www.ag.gov.au>; 'Erosion of Legal Representation in the Australian Justice System' February 2004, <www.lawcouncil.asn.au/> ; Western Australian Law Reform Commission, Review of the Criminal and Civil Justice System in Western Australia, Consultation Drafts Volume 1, *Litigants in Person Management Plans Issues for Courts and Tribunals*, Australian Institute of Judicial Administration Issues Paper, viewed 25 May 2004, <www.aija.org.au/onlinepub.htm>; 'The Unrepresented Party', Adversarial Background Paper No. 4, Dec 1996, <www.austlii.edu.au/au/other/alrc/publications>.
3. Such as the dispute resolution schemes required by sections 912A(1) and 1017G of the *Corporations Law* of financial services licensees who provide financial services to retail clients.

Issues for the court system

The paradigm of dispute resolution within which the court system operates is that the judge is impartial and does not participate in the investigation of the circumstances of the dispute. It is for the disputants themselves to investigate the factual and legal circumstances of the dispute and then present material to the court in a partisan fashion using established procedures.[4] It is said in support of this system that 'truth is best discovered by powerful statements on both sides of the question'.[5] Within this context, the ability of the parties, or their representatives, to marshal and present material to the court so as to make a 'powerful statement' is important to their prospects of success in the proceedings.

In general, parties involved in litigation in courts may appear in person or be represented by a legal practitioner.[6] Persons involved in litigation without legal representation are seen as being at a disadvantage compared to persons who are represented by competent legal practitioners.[7] In *Deitrich v R*,[8] Mason CJ and McHugh J said:

> *An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable to dispassionately assess and present his or her case in the same manner as counsel for the Crown.*

Real concerns can arise about the fairness of the court system towards the unrepresented. These concerns were expressed forcefully by Kirby J in *Re Refugee Review Tribunal; ex parte HB*:[9]

> *The applicant does not have counsel or a solicitor or any other advocate or representative. He has for a long time been detained in immigration detention. He is unable to earn funds to pay for a lawyer of his choice. He does not speak the English language. He claims to be a refugee. In such circumstances it would be an affront to justice for me to sit silent and allow him, unaided, to flounder in the mysteries of our court procedures and substantive law until he had adequately demonstrated an incapacity to present relevant evidence and argument. The judicial power of the Commonwealth does not oblige those who exercise it to engage in a charade of justice.*

There is material that suggests that self-represented litigants are less likely to be

4. The classic statement of this paradigm is found in *Jones v National Coal Board* [1957] 2 QB 55 at pp. 63-54.
5. Per Ld Eldon in Ex parte Lloyd (1822) Mont. 70, 72n, cited in *Jones v National Coal Board* [1957] 2 QB 55 at p. 63.
6. See for example, Order 4 Rule 3(1) of the *Rules of the Supreme Court* (WA), and Order 4 Rule 14(1) of the *Federal Court Rules*. Corporations which are parties to litigation are required to be represented by legal practitioners, subject to express permission of the courts: see for example, Order 4 Rule 3(2) of the *Rules of the Supreme Court* (WA), Order 4 Rule 14(2) of the *Federal Court Rules*. The requirement of exclusively legal representation is frequently modified in inferior courts and statutory tribunals. Such bodies may permit non-legal representation and exclude legal representation (or both).
7. This article is primarily concerned with the situation where there is one unrepresented party to proceedings and the other party or parties are represented. This article should not be taken as suggesting that lawyers have a monopoly on competent representation, or that all lawyers are equally competent.
8. (1992) 177 CLR 292 at 302.

successful than litigants who are represented.[9] It is not clear whether this is due to the fact that the party is self-represented, or perhaps a tendency of SRPs to pursue weak cases.

SRPs are generally seen as placing a greater burden on the legal system than parties who are represented by legal practitioners. There is a common assumption that trials which involve SRPs take longer to complete than trials in which all parties are represented, because SRPs are unable to adequately identify the issues and are reluctant to abandon arguments which are weak and likely to lose. The cost of providing court facilities is substantial. The South Australian Courts Administration Authority estimated the daily cost to the public of providing a magistrate's court in a civil matter at $4485 per day[11] Unnecessarily lengthy trials divert judicial resources away from other litigants.

If an SRP does not put adequately researched legal arguments before the court, this will mean that either additional judicial time is devoted to doing this work or the research is not done. The High Court observed, in *Neil v Nott*,[12] that a 'frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of the parties which are obfuscated by their own advocacy'.

Some studies suggest that SRPs are less likely to settle proceedings prior to trial than represented parties, and are less effective negotiators.[13] Naturally, proceedings which go to a full hearing require more time and resources than matters which settle before trail.

Lack of legal training may impact on compliance by SRPs with procedural requirements. An SRP may, for example, make a number of efforts at adequately formulating his or her pleadings before compliance with formal or substantive requirements is achieved. In general, this process will involve repeated application to the court by the other party to the proceedings, at significant expense. Discovery of documents, in particular, is a technical area which requires significant experience and, when carried out by legal practitioners, imposes substantial ethical obligations on them. Mustill and Boyd, in *Commercial Arbitration*,[14] comment that 'an order for discovery will often be useless unless the parties are represented by English solicitors.'

Where parties before a court are not represented, the court is not able to rely on the professional obligations imposed on legal practitioners. These obligations are said to be owed to the court but are in fact owed to the public at large and operate whether the practitioner is appearing in court or before some other tribunal. Duties owed by legal practitioners to the courts include obligations to not 'mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case'.[15] In conducting a case, a legal practitioner must have regard to the 'speedy and efficient

9. (2001) 179 ALR 513 at 516.
10. Australian Law Reform Commission Discussion Paper 62 paras 9.49–9.53, 11.39–11.42, 11.165–11.173, 12.9–12.23, 12.212–12.23, viewed 27 May 2004, <http://www.austlii.edu.au/au/other/alrc/publications/dp/62/>.
11. Referred to in 'Erosion of Legal Representation in the Australian Justice System' [57] February 2004, <www.lawcouncil.asn.au/>.
12. (1994) 121 ALR 148 at 150.
13. Australian Law Reform Commission, *Managing justice: A review of the federal civil justice system* (ALRC 89), [5.119] viewed 25 May 2004, <www.austlii.edu.au/au/other/alrc/publications/reports/89/ALRC89.rtf>.
14. MJ Mustill and SC Boyd, *Commercial Arbitration* (2nd edn, London: Butterworths, 1989) p. 325.

administration of justice'.[16] These duties override the duty of the legal practitioner to his or her client. It has been suggested that these duties are fundamental to the proper functioning of the litigation process.[17]

More specifically, legal practitioners are obliged to advise parties if it is considered that a case is hopeless. In *Kumar v MIMIA*,[18] Mansfield J was considering an application for an order for payment of legal costs personally against an applicant's lawyer. Mansfield J said at [14] to [16]:

> *Of course that does not excuse the solicitor from the obligation to conduct such investigations, and to give such advice, as is appropriate in the circumstances before the institution of the proceedings. It is for the client whether to take that advice. If the client does not do so, it may well be in the public interest for the client to be represented, as the solicitor then has the duty to the Court not to incur costs improperly or without reasonable cause. … The advocate also of course has duties of independence and frankness to the Court … Proceedings, even hopeless proceedings, are likely to be conducted more efficiently by a solicitor for a party than by a litigant in person.*

Some court rules require that a pleading prepared by a legal practitioner contain a certificate that there is a proper basis for each allegation and denial in the pleading.[19] An SRP is not subject to many of the obligations or constraints imposed on legal practitioners either at common law, or under the court rules.

Responses of the court system

The 'hallowed' approach to the 'problem' of the SRP is for the judge to become counsel for the unrepresented litigant, 'extending a "helping hand" to guide the accused throughout the trial so as to ensure that any defence is effectively presented'.[20] However, this approach presents the risk that the court will be too helpful to the represented litigant. The court must not only be fair to the litigant in person, in must be fair to the represented litigant. The dilemma was identified in *Raybos Australia Pty Ltd v Scitec Corporation Pty Ltd*:[21]

> *In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer,*

15. *Giannarelli v Wraith* (1988) 165 CLR 543 at 556, per Mason CJ.
16. *Giannarelli v Wraith* (1988) 165 CLR 543 at 556, per Mason CJ.
17. *Giannarelli v Wraith* (1988) 165 CLR 543 at 556, per Mason CJ.
18. [2004] FCA 18.
19. For example, Order 11 Rule 1B and Form 15B of the *Federal Court Rules*. The certificate is given on the basis of the legal and factual material available to the practitioner.
20. Referred to with disapproval in *Dietrich v R* (1992) 177 CLR 292 at 302. There are, of course, occasions in which self-representation is regarded as appropriate, for example, uncontested divorce application.
21. Unreported NSW CA, 16 June 1986 (BC8601339) per Samuels JA, cited with approval in *Re Morton; ex parte Mitchell Products Pty Ltd* (1996) 21 ACSR 497 at 514, and *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438 at 446.

and to prevent destruction from the traps which our adversary system offers to the unwary and untutored.

The courts have adopted the general principle that the nature and extent of any assistance offered by the court to an unrepresented party depends on all the circumstances of the case including the nature of the litigant, and the extent to which the litigant can understand the case.[22]

More specific guidance has been provided in the context of family court proceedings. In *Re F: Litigants in Person Guidelines*,[23] the Full Court of the Family Court said:

1. *A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;*
2. *A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses;*
3. *A judge should explain to the litigant in person any procedures relevant to the litigation;*
4. *A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation;*
5. *If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;*
6. *A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;*
7. *If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights;*
8. *A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated. (*Neil v Nott *(1994) 121 ALR 148 at 150);*

22. *Minogue v HREOC* (1999) 84 FCR 438; *Abram v Bank of NZ* (1996) ATPR 41 – 507. While the question of judicial intervention arises most acutely where an SRP fails to adequately conduct his or her own case, the issue is an aspect of the larger issue of the extent to which decision makers should intervene in the trial process. See The Hon Mr Justice DA Ipp, 'Judicial Intervention in the Trail Process' (1995) 69 *ALJR* p. 366, where his Honour asserts that the Court may intervene where a party's legal representative is incompetent.

23. (2001) 161 FLR 189 at 226-227; [2001] FamCA 348 at [253]. See also the guidelines formulated by T Smith J in his 'Judges' Dos and Don't in a Civil Trial' (reproduced in Western Australian Law Reform Commission, above note 2, p. 582).

9. *Where the interests of justice and the circumstances of the case require it, a judge may:*
   - *draw attention to the law applied by the Court in determining issues before it;*
   - *question witnesses;*
   - *identify applications or submissions which ought to be put to the Court;*
   - *suggest procedural steps that may be taken by a party;*
   - *clarify the particulars of the orders sought by a litigant in person or the bases for such orders.*

   The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.

The courts appear more likely to sanction intervention, and criticise a failure to assist an unrepresented litigant where technical issues, particularly evidentiary issues, are involved which might trap the untutored. For example, Bryson J, in the Supreme Court of New South Wales, intervened to prevent a document being tendered as a business record when he considered it was not.[24] In a claim for underpayment of salaries,[25] it was held that the claimant ought to have been given a warning by the presiding magistrate that conducting his case on a limited basis would prevent him subsequently pursuing a related argument.[26] It has been suggested that a court should be particularly reluctant to strike out the pleading of an unrepresented party, but should assist in teasing out properly triable issues.[27] Section 132 of the *Evidence Act 1995* of New South Wales and the Commonwealth requires the Court to ensure a witness or a party is aware of any grounds it may have for objecting to the admission of evidence on the grounds of privilege.

The nature of the proceedings is also relevant: a heavier duty is imposed on the court in a criminal trial, particularly one involving the individual's liberty, or the welfare of a child in family court proceedings. In such circumstances, there is a public interest in the outcome of the proceedings that extends beyond the interests of the parties themselves and that requires the court itself to take proactive steps to ensure that all issues have been dealt with adequately. In criminal proceedings, for example, a judge is obliged to ensure that evidence put to the jury is properly admissible and is obliged to hold a *voir dire* as to the admissibility of evidence, whether the issue of admissibility is raised by the unrepresented party or not.[28] Section 132 of the *Evidence Act 1995* of New South Wales and the Commonwealth requires the Court to ensure a witness or a party is aware of any grounds it may have for objecting to the admission of evidence on the grounds of privilege.

The courts have also formulated some limits on the nature and extent of assistance which ought to be provided by a judge to a litigant in person:

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24. *NAB v Rusu* (1999) 47 NSWLR 309.
25. *La Ferla v Bindon Sands* (Supreme Court of the Northern Territory, unreported 21 August 1998, BC9804305).
26. Because of the principle in *Port of Melbourne Authority v Anshun Proprietary Ltd* (1980-1981) 147 CLR 589.
27. *Wentworth v Rogers* (No 5) (1986) 6 NSWLR 534 at 536 to 537, *Morton v Vouris* (1996) 21 ACSR 497 at 513 to 514.
28. (1981) 147 CLR 512. The advice to be given in a criminal matter can be quite extensive: see *Foster v R* (1982) 38 ALR 599 at 606-607.

(a) The courts should not provide 'advice'. In *In the marriage of Johnson*, the Full Court of the Family Court said:

> *It is undesirable for legal advice to be given to the litigant in person, essentially for the following reasons:*
> *(a) it may be unfair or have an appearance of unfairness to the other parties; and*
> *(b) the advice given may not be with full knowledge of the facts.*[29]

A distinction is drawn between providing information about the litigation process and the options which are available to a party (e.g. possibly seeking an adjournment) and advising a party what to do.

(b) The judge must not take over the conduct of the case. Extensive participation by a judge in the examination or cross-examination of a witness is likely to prove problematic, particularly where the judicial interventions take place at an early stage of the proceedings or the evidence of the witness.[30]

(c) There is no requirement that a court assist a litigant in person to formulate a question in admissible form.[31]

(d) In general, there is no obligation on the court to take steps to remedy any inadequacies in the material presented by the unrepresented party.[32] The court is entitled to proceed on the basis of the materials presented.

The extent of intervention by a judge will depend on all the circumstances of the case. It may be difficult to distinguish between an intervention that assists an unrepresented party and an intervention that simply involves a judge getting to grips with the proceedings. An intervention may have both consequences. *Municipality of Burwood v Harvey*,[33] for example, was a dispute about valuation of land. It was conceded by counsel for the respondent that some assistance would need to be provided by the judge to the unrepresented parties and that 'such assistance would properly involve, in the rather technical area of the law involved in this case, a certain amount of technical advice and guidance to ensure that attention was addressed by the respondent not simply to a vague feeling of the inadequacy of the compensation offered but to the proper application of the relevant statute and of the principles of valuation law, which have accumulated around its sparse words'.[34] One envisages that the judge might list the factors to be taken into account in making his or her decision and direct the unrepresented party's attention to each of them. A similar result might have been obtained by reciting the various arguments put by counsel for the other side and inviting specific responses. Both these course of action would assist a judge in identifying the case of the unrepresented party.

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29. (1997) 139 FLR 384 at 407, see also *Deitrich v R* (1992) 177 CLR 292 at 302, 334-5.
30. *Yuill v Yuill* [1945] P15; *Galea v Galea* (1990) 19 NSWLR 263' *Abram v Bank of New Zealand* (1996) ATPR 41-507; *Municipality of Burwood v Harvey* (1995) 85 LGERA 186.
31. *R v Zorad* (1990) 19 NSWLR 89 at 101. This is not to say that it is improper for a decision-maker to formulate questions for an unrepresented party: *Nagy v Ryan* [2003] SASR 37.
32. *Reisner v Bratt* [2004] NSWCA 22.
33. (1995) 85 LGERA 186.
34. (1995) 86 LGERA 389 at p. 399.

Other steps have been taken to assist self represented litigants:

(a) Many courts have simplified the litigation procedure and have adopted printed forms as the means by which proceedings are initiated.[35]

(b) Many courts have significant programs for the provision of information to SRPs by way of pamphlets or publications, or through court websites. For example, the South Australian Magistrates Court makes available the *Magistrates' Bench Book* through its web site.[36] The information available may include instructions about aspects of the conduct of litigation, such as appearing in court. The Commonwealth Administrative Appeals Tribunal operates an outreach program specifically for unrepresented applicants.

(c) The courts have also responded to the issue of unrepresented parties by ameliorating the limitations on representation in legal proceedings to lawyers. In exceptional cases, a court may permit a litigant in person to be assisted by a 'friend', although the friend is not generally permitted to address the court.[37] The court may also allow the appearance of *amicus curiae* to assist the court in relation to matters of public interest.[38] The Federal Court and the Federal Magistrates Court are empowered to refer unrepresented litigants to *pro-bono* schemes. The legislature has also sought, in certain circumstances, to redress the imbalance arising from differential legal representation by limiting or excluding legal representation or expanding the scope of non-legal representation.

Arbitration

There is little systematic information about the number of arbitrations conducted in Australia. There is even less information about the percentage of those arbitrations which involve unrepresented participants. Given the private nature of arbitrations, it is unlikely that this information will become available. It is clear, however, that arbitrations occur in which one party self-represents. What then, should be done in such circumstances?

The nature and extent of the duties of an arbitrator to unrepresented parties do not appear to have been considered at length. There do not appear to have been any decisions where an SRP has complained about a lack of assistance from an arbitrator.[39] Comments dealing with the duty of a judicial officer towards an unrepresented party were made by Donaldson MR in *Chiltern v Saga Holdings plc*.[40] He said, at p. 844:

35. See for example, the forms for commencement of proceedings for contravention of the *Human Rights and Equal Opportunity Act 1986* in the Federal Court (Form 167 of the *Federal Court Rules*).
36. Viewed 13 May 2004, <www.courts.sa.gov.au/lawyers>.
37. *McKenzie v McKenzie* [1971] P 33; *Schagen v R* (1993) 8 WAR 410; *Galladin Pty Ltd v Ainworth Pty Ltd* (1990) 60 SASR 145.
38. See for example, *Minogue v HREOC* (1999) 84 FCR 438.
39. In *Fox v Wellfair* [1981] 2 Lloyd's Rep 514 at 522, the arbitrator had assisted a party, who was not only unrepresented but failed to attend the hearing, by making findings based on the arbitrator's private knowledge without putting those assertions to the represented party. The arbitrator's conduct was a breach of natural justice towards the represented party.
40. [1986] 1 All ER 841.

> *The problem which arises where you have one represented party and one unrepresented party is very well known to all judges and in particular to judges who deal with small claims in the county court. It becomes the duty of the judge so far as he can, without entering the arena to a point where he is no longer able to act judicially, to make good any deficiencies in the advantages available to the unrepresented party. We have all done it; we know that it can be done and that it can be done effectively. That is the proper course to be adopted. The informality which is stressed by the rule and the requirement that the arbitrator may adopt any method of procedure which he considers to be convenient (it would have been better perhaps if it had said "just and convenient") covers the situation where, as so often happens, a litigant in person is quite incapable in the time available for cross-examination of putting his own case. The judge or the registrar then picks up the unrepresented party's complaints and puts them to the other side.*[41]

However, this case concerned the failure of the registrar to allow a represented party to cross-examine on evidence given by an unrepresented party. The court held that the conduct of the registrar was a denial of natural justice to the represented party.

Mustill and Boyd[42] deal with the topic as follows:

> *Where only one party is legally represented, it is the professional duty of the advocate for the other party to ensure that he does not take an unfair advantage of his greater skill and knowledge, and it is the function of the arbitrator to ensure that this duty is observed. Most litigants in person are able to explain their case, but many find it more difficult to expose the weaknesses of their opponents case. Cross-examination in particular, does not come easily to the unpractised. This does not mean, however, that the arbitrator should try to redress the balance by disallowing cross-examination by the professional advocate. Instead he should pick up the unrepresented parties' points and put them to the witness himself.*[43]

The question is also adverted to in *Russell on Arbitration*,[44] where the authors suggest that 'there is no positive obligation for a tribunal to make a party's case for him, even where that party is not legally represented.' While this statement is in accordance with the Australian authorities, as far as it goes, it does not deal with the arbitrator's obligations short of taking over the conduct of the hearing for the unrepresented party. Sutton and Gill further state that 'there was some authority under the old law that if a tribunal has in mind certain findings of

41. Slade and Lloyd LJJ agreed with Donaldson MR.

42. MJ Mustill and SC Boyd, *The Law and Practice of Commercial Arbitration*, (2nd edn, London: Butterworths,1989) p. 349.

43. While it is accepted that the passages from *Chiltern v Saga Holdings* and Mustill and Boyd are not intended to be comprehensive statements of the approach to assisting the unrepresented, the passages suggest a greater involvement by judges in cross-examination than is favoured by the Australian authorities cited at paragraph 19(b) above. T Smith J, in his Judges' Dos and Don't in a Civil Trial', above note 23, p. 582, suggests that a judge participating in proceedings involving an unrepresented party should 'engage in genuine questioning to elucidate the facts', rather than 'cross-examination' and, where there are disputes as to facts, both parties' version of the facts should be put to the witness. As to the duties of legal practitioners towards SRPs in Australia see 'Litigants in Person – Procedural and Ethical Issues for Barristers' (2000) 19 *Aust Bar Rev* p. 41.

44. D St J Sutton and J Gill, *Russell on Arbitration* (22nd edn, London: Sweet and Maxwell, 2003) at paras 5-058.

fact arising out of the evidence given which would establish a defence to a claim, and it requires that defence to be formulated in the pleadings, it should spell this out to the party concerned and failure to do so could render the award susceptible for "procedural mishap".' The case of *Indian Oil Corporation v Coastal (Bermuda) Ltd*[45] is cited in this context. It concerned an arbitration conducted before a panel of three Queen's Counsel in which pleadings were exchanged. Both parties were legally represented. The claimant alleged an express oral abandonment of past claims for demurrage. The arbitrators formed the view that there might have been an implied abandonment, but that it was not open to the arbitrators to make this finding on the pleadings. The arbitrators invited counsel for the claimant to amend the claimant's pleading, but no amendment was forthcoming. The claim was dismissed. The court held that the arbitrators did not need to go further in helping the claimant. There was, however, no suggestion that the level of assistance the arbitrators had provided to the claimant was inappropriate.

It is useful recall that an arbitrator is under an obligation to provide a level of explanation or assistance even to represented parties:

(a) An arbitrator must ensure that the parties understand the nature of the proceedings that are to take place, particularly if there is to be any variation from the 'ordinary' course of events.[46]

(b) An arbitrator may not decide a case on the basis of a point that was not raised by the parties, and must raise the issue with the parties so they might comment on it.[47]

It appears, therefore, that there will be occasions on which an arbitrator may provide assistance to an unrepresented party. The principles in relation to intervention by an arbitrator will most closely resemble the principles applied by courts where the procedure adopted for the arbitration substantially mirrors that of the judicial system ie where there are pleadings and an oral hearing with examination and cross-examination.

There are, however, a number of significant differences between arbitrations and proceedings in court, which may impact on the nature and extent of intervention by arbitrators:

(a) Arbitration proceedings are private disputes between parties.

While there is a public interest that a fair process be followed by arbitrators, there is not, in relation to arbitration proceedings, a general public interest in the outcome of an arbitration, in the way that there is a public interest in, say, the outcome of family law disputes involving children. The fundamental obligation of the arbitrator is to give the parties the opportunity to present their cases, not to ensure that they take best advantage of that opportunity.[48] Given that the cases involving SRPs in

45. [1990] 2 Lloyds Rep 407. An appeal from this decision was settled before judgment, see *King v Thomas McKenna Ltd* [1991] 1 All ER 653 at 655.

46. *Bunge and Co v Ross T Smith and Co Ltd* (1926) 24 Lloyd's Rep 30.

47. *Interbulk Ltd v Aiden Shipping Co Ltd* (1984) 2 Lloyds Rep 66 at per Goff LJ at p. 75 and Ackner LJ at p. 76.

48, *Sullivan v Dept of Transport* (1978) 20 ALR 323 at 343.

arbitrations involve excessive assistance by the arbitrator, it is worth repeating the warning sounded by Deane J in *Sullivan v Department of Transport*:[49]

Ordinarily, however, in the absence of a request for assistance or guidance by a party who is appearing in person, a tribunal under a duty to act judicially should be conscious of the fact that undue interference in the manner in which a party conducts his case may, no matter how well intentioned, be counter-productive and, indeed, even overawe and distract a party appearing in person to the extent that it leads to a failure to extend to him an adequate opportunity of presenting his case.

(b) The rules in relation to representation in arbitrations are significantly different from the rules in relation to representation in court proceedings.

An arbitrator has a discretion to allow representation in an arbitration by a person who is not a legal practitioner, where this is likely to shorten the proceedings or reduce costs, or where the party would be unfairly disadvantaged if leave were not granted.[50] The choice for a party to arbitration is not simply between representation by a lawyer and self-representation. Further, corporations which are parties to litigation are required to be represented by legal practitioners, subject to express permission of the courts.[51] A corporation is entitled to be represented in an arbitration by a person who is not a legal practitioner. These rules and the prior practices in relation to representation in arbitration have lead to the development of 'non-lawyer' advocates. Corporations which have substantial involvement in arbitration may employ 'in-house' advocates to conduct or assist in the conduct or arbitrations. The differing rules relating to representation in arbitrations do not require a fundamental shift in the approach to the SRP. An arbitrator should not intervene to assist an SRP unless it is apparent that the party is disadvantaged or unable to adequately deal with the arbitration. Particularly, where the SRP is a corporation utilising in house representation, it is not appropriate to assume that an SRP is at any particular disadvantages. It may, however, be appropriate for an arbitrator to take steps to impose on the parties obligations equivalent to those imposed on legally qualified representatives. This might be done by specific directions requiring parties to provide a certificate as to the factual and legal basis for the claims.

(c) A further difference between arbitrations and court proceedings is that an arbitrator is not obliged to apply the rules of evidence, unless the parties agree to the contrary in writing.[52]

It seems unlikely that an SRP would agree that the rules of evidence apply. Not applying the technical rules of evidence would eliminate some of the more esoteric issues about which an SRP lacks knowledge. There remain some evidentiary issues

49. (1978) 20 ALR 323 at 343.

50. S 20 of the *Commercial Arbitration* legislation.

51. See for example, Order 4 Rule 3(2) of the *Rules of the Supreme Court* (WA), Order 4 Rule 14(2) of the *Federal Court Rules*.

52. See for example, s 19(3) of the *Commercial Arbitration Act 1985* (WA).

upon which the legally untutored might need assistance, such as the lower weight which might be given to hearsay evidence, and the rules in *Browne v Dunn*,[53] and *Jones v Dunkel*.[54]

(d) More fundamentally, arbitrations often do not operate within the adversarial paradigm mentioned at paragraph 4 above.
Quality arbitrations in the commodity trades involve an 'inquisitorial' procedure in which the arbitrator may not have a 'hearing' or accept any submissions from the parties. In such circumstances, the role of and need for legal representation is more limited than otherwise.[55] Although the arbitrator is expected to be neutral and unbiased, the arbitrator takes on responsibility for investigating factual matters, frequently without substantive input from the parties. While it may be necessary, or course, for the arbitrator to give the parties the opportunity to comment on or controvert material resulting from those investigations, an inquisitorial procedure in which an arbitrator makes his or her own inquiries may be fair without requiring either party to possess particular forensic skills.

(e) Arbitrators have a greater role in procedural matters than many judges.[56]
This provides an opportunity for arbitrators to mould the procedure of the arbitration so that the disadvantages of the SRP are minimised, while remaining fair to the represented parties. It is suggested that the following procedural approaches may be suitable in cases where one party represents itself:

(1) Active participation in the identification of the real issues of the case may be appropriate. This might occur through discussion in conference rather than through formal 'pleadings', which are often confusing to non-lawyers. (The issues so identified should, of course, be reduced to writing and clearly agreed by the parties.)

(2) The discovery process may be modified. In particular, the scope of discovery may be defined by reference to particular categories of documents, rather than by reference to 'relevance' to the issues, as is usual in many courts.

(3) It may also be productive for an arbitrator to be more actively involved in obtaining expert reports where an SRP is involved, than in cases where both parties are legally represented.

(4) The principal disadvantage under which the legally untutored are seen as labouring relates to the conduct of oral hearings. The Court of Appeal, in

53. (1894) 6 R 67.

54. (1959) 101 CLR 298.

55. In *FE Hookway & Co v Alfred Isaacs & Sons* [1954] 1 Lloyds Rep 491, Devlin J described a longstanding policy of a trade association to exclude lawyers from quality arbitrations as 'sensible' (at 507).

56. There are a number of courts where procedural matters are generally dealt with by specialised court officers, for example, the Supreme Court of Western Australia.

Chiltern v Saga Holdings plc,[57] identified cross-examination as an area of particular difficulty for persons who are not professionally trained. Where issues in an arbitration do not involve disputes of oral evidence, an oral hearing may not be necessary. Written witness statements ought to reduce the disadvantage suffered by an SRP since written witness statements provide a greater opportunity for persons who are not skilled in cross-examination to prepare for the task and reduce the prospect of surprises. Against the advantages of written witness statements must be weighed the possibility that the SRP will produce prolix and confusing documents.

(5) Procedural directions may need to be more fulsome than would ordinarily be the case with legally represented parties. For example, the rules of court generally require that affidavits deal with different matters in each paragraph and that the paragraphs be numbered. It may be appropriate for these requirements to be set out in directions where an unrepresented party has shown a tendency towards prolixity. The consequences of failure to comply with procedural directions should be spelled out.

(6) It may be appropriate for the arbitrator to be more explicit in relation to the mechanics associated with the hearing, such as securing witnesses, than would ordinarily be the case, to reduce the risk of an application for an adjournment based on a lack of preparation for hearing.[58]

(7) An arbitrator should actively encourage compromise between the parties and may suggest conciliation or mediation to them.

These are steps that ought to operate to overcome some of the barriers which might impede effective participation by an SRP. It may well be that some of these steps could be taken to more effectively conduct arbitrations involving represented parties as well.[59] The promise of arbitration, in general terms, is a less legalistic approach that the courts and a more active involvement by the arbitrator in the process. This promise, if fulfilled, should make arbitration a procedure in which persons can adequately represent themselves.

57. [1986] 1 All ER 842.

58. Cf *Titan v Babic* (1994) 126 ALR 455 at 464.

59. See for example Ian D Nosworthy, 'Incorporating ADR into Contracts' (2004) 23 (2) *The Arbitrator & Mediator*, p. 13 at 21.