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INTERCULTURAL COMMUNICATION AND TRIBUNAL CRAFT A PANEL DICUSSION

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> *It should never be forgotten that tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfill their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases.*
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> (*Carnwath LJ Senior President of Tribunals [UK], Commonwealth Law Conference 2001 "echoing Leggatt L" (in his report "Tribunals for Users – One System One Service"*)

INTRODUCTION

This paper highlights strategies I have employed, mostly successfully, in sitting as a judicial officer over some fifteen years in jurisdictions where the litigants before me are frequently from a non English speaking background with different cultural norms and expectations to those of an Australian litigant, and who are often unrepresented. I hope some of the strategies I have employed will be of assistance to you. They mostly work because they are based on common sense.

Because of the expertise of my fellow panel members in dealing with indigenous clients or litigants, I have focused my presentation principally on the litigants from culturally diverse and non-English speaking backgrounds (NESB) and self represented litigants (SRL) who appear before courts and tribunals in Australia. I explore some "tribunal craft" I have employed with these special litigants.

In providing a somewhat fuller explanation in this paper than my time as a panel member permits I propose to examine the following:

- right of access to courts and tribunals, right of appearance and SRL;
- reasons for self-representation, the needs of SRL;
- legal principles to be applied when dealing with a SRL, particularly a litigant with a NESB;
- practical issues dealing with SRL and those with a NESB;
  - seating
  - introductions
  - explanation of procedure and identifying issues to be determined
  - procedural fairness

    - what do I call you?
- Interpreters – tricks and traps.
- Body language
- Language
- Repeating and reframing
- Keeping a level playing field
- Expertise of other panel members
- Special challenges with SRL.

I conclude with some suggested further reading on this topic.

RIGHT OF ACCESS TO COURTS AND TRIBUNALS, RIGHT OF APPEARANCE AND SELF-REPRESENTED LITIGANTS.

The right of access to a court or tribunal.

It is important to start with a basic premise. That is, it is a fundamental tenet of our common law system that a citizen has (subject to statutory provisions which may declare a litigant to be vexatious) a right of access to a court or tribunal. (see *Coco v R* (1994) 179 CLR 427 at 446; *Re Attorney-General (Cth); Ex parte Skyring* (1996) 70 ALJR 321 at 323).

Further, the High Court has made it clear that although a SRL's case may not be clearly articulated, it is the duty of the judicial officer to ascertain the true nature of the case of the SRL. This is explained by the High Court in *Neil v Nott* (1994)121 ALR 148 as follows:

> 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.

Mr Neil was a solicitor who had suffered a nervous breakdown and ceased practising. His wife died leaving her estate to the children of the marriage. Mr Neil applied to the Supreme Court by affidavit for an extension of time to make an application under the relevant statute for provision for him out of his late wife's estate. At the time he filed his affidavit he was 4 months out of time. Before the trial Judge Mr Neil argued that the executors of his wife's estate had properly failed to disclose the value of the assets of the estate including the value of the matrimonial home. The trial Judge found Mr Neil was seeking a declaration about the assets and liabilities of the estate and dismissed his claim for an extension of time to seek a provision for himself out of the estate.

The Full Court of the Supreme Court of Victoria refused him leave to appeal. The High Court found, on the evidence, that Mr Neil was, to his wife's knowledge "impoverished, ill, burdened with debt and with poor prospects of

gainful employment". Their Honours went on to note "it seems misconceived advocacy by Mr Neil directed his Honour's attention away from material considerations".

Legal or other representation – the use of a *McKenzie Friend*

I appreciate that there is great diversity in enabling legislation for particular tribunals about legal representation. Suffice it to say in tribunals such as those established under the *Health Practitioner Regulation National Law* (NSW) there is a right for a party to be legally represented by an Australian Legal Practitioner, or with the leave of the Chairperson of the Tribunal, by an *advisor.* This situation may be compared and contrasted with the position under the *Guardianship Act 1997* (NSW) where a party may only be legally represented by an Australian Legal Practitioner if leave is granted to do so.

Often a party who has difficulty with reading documents in English, or is so nervous or intimated by being before a tribunal, will benefit from the assistance of a *McKenzie Friend.* The role and limits on the conduct of litigation involving a *McKenzie Friend* are discussed by the Full Court of the Family Court in *Batey-Elton & Elton* (2010) Fam LR 62. The relevant discussion by the Full Court is found at paragraphs 21 and 22 of the judgment. In those paragraphs the Full Court also deals with the matters which contra-indicate the right of audience before the Court being extended to a lay advocate, which course may also on rare occasions be sanctioned. It is accepted by superior Courts that lay advocates may more readily be granted a right of audience in tribunals than in superior courts. In *Batey-Elton* the Full Court said:

> The role of, and limitations placed on, a person acting as a *McKenzie Friend* are clearly explained by Lindenmayer J in *Watson & Watson* (2002) FLC 93-094. His Honour explored the history of the role emanating from the UK decision of *McKenzie v McKenzie* [1970] 3 All ER 1034 at paragraph 18 of his reasons as follows:
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> > 18. The first point which I think it important to make is that the application here is for the appointment of a "next friend", not for the leave of the Court to employ the services of an assistant of the kind which has become known, throughout the Common Law world, as a "McKenzie friend", following the decision of the English Court of Appeal in *McKenzie v McKenzie* [1970] 3 All ER 1034. That decision was to the effect that a litigant who appears before a Court in person is ordinarily entitled, if he or she so wishes, to have the assistance, in the Court, of a friend or assistant who may sit beside the litigant at the bar table for the purpose of taking notes, handling or cataloguing documents or exhibits, making quiet suggestions to the litigant as to how best to conduct the case, and generally being of assistance to the litigant in presenting his or her case to the Court, provided that that person does not disrupt the proper conduct of the proceedings. However, an important limitation upon the role and functions of a "McKenzie friend" is that he or she may not (except, perhaps, in the most exceptional cases, and with the express leave of the Court) act as an advocate for the litigant in the proceedings. That limitation has been

recognized at least since a statement was made to that effect by Lord Tenterden CJ in *Collier v Hicks* (1831) 2 B & Ad 663 at 669; 109 ER 1290 at 1292, and has recently been reaffirmed by the Full Court of this Court (Kay J, with whom Holden and Mullane JJ agreed) in *KT v KJ and TH* (2000) FLC ¶93-032 at 87,509.

The cases dealing with the issue of a non-practitioner appearing on behalf of a party in other superior courts are comprehensively reviewed by Stein JA (with whom Mason P and Sheller JA agreed) in *Damjanovic v Maley* (2002) 55 NSWLR 149; (2002) 195 ALR 256 and the applicable principles are summarised at paragraphs 69 to 86 of his Honour's reasons. We adopt the principles espoused therein which we now set out:

Principles from the cases

69. A number of themes or principles run through the cases which are relevant to the exercise of the discretion to grant or refuse leave to an unqualified person to appear on behalf of an unrepresented litigant. They may be briefly summarised as follows:

(a) The complexity of the case

70. Whether the case is one of complexity or minor or straightforward has often been seen as a discretionary factor: see for example, *Scotts Head*, per Mahoney A-P (at 4); *Re G J Mannix* (at 311, 314 and 316); *Bay Marine*, per Samuels JA (at 110–11); *Hubbard* (at 343); *Abse* (at 549); and Miles CJ (at 3) in *Commonwealth Bank v Individual Homes*.

71. In the instant case Judge Dent referred to the case as a complex one having regard to the pleadings. This was a relevant factor well open to be concluded by the judge.

(b) Genuine difficulties of the unrepresented party

72. These include matters such as unexpected language difficulties and emergencies. An example of the latter was the absence of legal aid in a criminal appeal (*Schagen* (at 411-412)). Also, in that case, the appellant was deaf and virtually incomprehensible to the court reporters. The court permitted two law students to address the court: see also *Re G J Mannix* (at 314, 316, 317); *Scotts Head* (at 4); *Abse* (at 549); *Galladin* (at 147–8); and *Stergiou* (at 247).

73. The case before the court does not fall into an emergency situation nor one where the appellant experienced *unexpected* language difficulties in conducting his own case. Mr **Damjanovic** was probably always going to need an interpreter. If he gave evidence, as he would need to in order to establish his case, Ms Vukic could not interpret for him. Doing so would obviously conflict with her position as his advocate: see, for example, *Pacific Air Freighters (Qld) Pty Ltd v Toller* (2000) 171 ALR 519 at 521. That the appellant had previously been dissatisfied with interpreting services is beside the point. To be able to present his own case, the appellant would need an accredited interpreter of the Croatian language. That the appellant has poor command of the English language is no reason to grant Ms Vukic leave to appear as his advocate.

(c) The unavailability of disciplinary measures and a duty to the court by lay advocates

74. Almost every case mentioned these matters as protection for a client when a qualified lawyer represented a party but were protections which were not available where an unqualified lay advocate appears: see *Re G J Mannix* (at 311, 316); *Scotts Head* (at 3); *Hubbard* (at 343); *Abse* (at 546, 555); *Bay Marine* (at 110–11); *R v Smith* (at 614); *Tritonia* (at 587); and *Paragon* (at 2371) referring to Woolf MR in *D v S*. *Abse* also emphasised the duty of a legal practitioner of absolute probity.

75. In appropriate cases a legal practitioner may be ordered to pay costs. The position is far from clear in relation to a non-party lay advocate. There may be extreme circumstances where the conduct of a lay advocate could attract an adverse costs order.

76. In my opinion, the overall duty of a barrister or solicitor to the court is an important consideration. It is a duty of candour and a practitioner must not knowingly mislead the court. The court is entitled to place reliance on that duty and expect it to be met. The disciplinary codes of the legal profession back up the overriding duty of a practitioner to the court. (See D A Ipp, "Lawyers' Duties to the Court" (1998) 114 *Law Quarterly Review* 63).

77. Training, qualifications and experience are also important. This is not to say that there are not incompetent lawyers, including some who seek to practise advocacy. For the most part, the market and the disciplinary codes account for them. But with unqualified and uninsured lay advocates, the court loses the benefit of the overriding duty and clients are at a distinct disadvantage. Apart from endeavouring to ensure that a lay person granted leave to appear obeys the rules, there is little a court can do except, in an appropriate case, withdraw the leave to appear.

78. All of the above is not to say that Ms Vukic has not obeyed the rules of court when she has been granted leave to appear. In the court's experience she has been unfailingly courteous and polite. However, the absence of a disciplinary code and duty to the court underlines the inappropriateness of permitting unqualified persons to appear apart from an exceptional case.

(d) Protection of the client and the opponent

79. Lay advocates are unqualified, unaccredited and uninsured. This places a client at considerable risk. The point was made in *Scotts Head* that an unqualified advocate may cause loss to a party (at 3). A lay advocate does not owe the same duty to his client as does a lawyer. See also *Abse* (at 546) highlighting the duty owed by a lawyer to assist the court in ensuring the end of the proper administration of justice. On the same issue see also *Paragon* and *D v S*.

80. One should also not lose sight of a lawyer's duty to his/her opponent, *Scotts Head* (at 3). None of these protections for the system of justice exist with an unqualified lay advocate. In this case, Mr **Damjanovic** has none of the protections although he can afford a lawyer. As I have said, it is difficult to accept that he cannot find a competent and trustworthy Croatian or non-Croatian lawyer.

(e) Lay advocates in inferior courts and tribunals

81. There are indications in some of the cases that Local Courts, given their jurisdiction and large numbers of unrepresented litigants, may be more likely to grant leave to unqualified persons. This is, one assumes, in straightforward uncomplicated matters where the party is under some disability in presenting his/her own case. This may also be the case with some specialist jurisdictions and tribunals.

82. The authorities however suggest that higher courts should be very chary at giving leave. See *Re G J Mannix* (at 314); *Hubbard* (at 343), *Bay Marine* (at 111); *Scotts Head* (at 3–4); and *D v S* (see *Paragon* (at 2369)).

(f) The interests of justice

83. What runs through all of the authorities as the guiding principle in the exercise of the discretion is the public interest in the attainment of the ends of justice. The public has an interest in the effective, efficient and expeditious disposal of litigation in the courts. As a general rule this can best be achieved by parties employing qualified lawyers.

84. The reason for this was explained by Gleeson CJ in a speech given to the Supreme Court of Japan in January 2000 (Current Issues for the Australian Judiciary). The Chief Justice said that: "The adversary system assumes, in the interests of both justice and efficiency, that cases will be presented to courts by skilled professionals. To the extent to which that assumption breaks down, so does the system".

85. Representation by legal practitioners will not always be possible because of the high cost of legal services and restrictions on legal aid. There is therefore room for the discretion to be exercised in an appropriate case, as indeed the authorities make plain and in circumstances where the achievement of justice cannot be otherwise secured.

86. Nonetheless, the foundation for the general principle and limited room for the discretion to be exercised is, as Mahoney AP said in *Scotts Head*, the proper administration of justice and the protection of the parties. It is not a rule devised to protect a lawyer's privilege or monopoly. Access to justice is a difficult issue in an ever more complex society with constraints on public resources. It will therefore be understandable and appropriate that judges will from time to time be prepared to grant leave to an unqualified person. Advocacy before courts is however a difficult skill to acquire without formal qualifications, training and practice. Ultimately perhaps governments may take up some of the recommendations of the *Access to Justice Report* referred to earlier.

We think in this case the matters espoused in paragraphs 74-77 are of particular importance, as are those set out in the following two paragraphs 79 and 80. We would also emphasise the importance of the matters referred to in paragraphs 83-86. (See also *Melaleuca of Australia & New Zealand Pty Ltd v Duck* [2005] FCA 1481 per Bennett J where her Honour discussed both the right of audience before a Federal Court and the role of a *McKenzie Friend*).

REASON FOR SELF REPRESNTATON AND THE NEEDS OF THE SELF REPRESENTED LITIGANT

What do we know about self represented litigants?

An excellent overview of some of the Australian and overseas research about SRL is found in a report prepared by Dewar, Smith and Banks for the Family Court of Australia. The findings in the report, while focusing on litigants in the Family Court, have general application. In conducting their research the authors did not limit their task to the Family Court but looked at overseas research and to other jurisdictions.

The authors suggest that the increase in the number of litigants in person may be attributed to restrictions on legal aid, increased costs of private representation and court fees, and the complexity of legislation. They conclude that the majority of SRL are *forced* to represent themselves for financial reasons. (I have found that if the relevant legislation does not permit legal representation without leave, this sometimes provides a perception that a SRL is forced to appear unrepresented, and raises concerns, particularly among lawyers, that the proceedings may not provide procedural fairness to the litigant).

The authors also explain that some SRL *chose* to represent themselves because they believe a lawyer could not adequately represent them, or they do not need a lawyer because the matter is relatively simple, or they do not want to spend money on legal fees, because they have a 'personal stake' in the litigation, or finally, for strategic reasons, believing their plight will evoke sympathy or make them appear more credible.

The authors also refer to the fact that a lack of legal representation may be because of the SRL's mental illness, or the fact the SRL cannot find a lawyer willing to represent him or her.

THE REASONS FOR SELF REPRESENTATION, THE NEEDS OF THE SELF REPRESENTED LITIGANT AND THE DISADVANTAGES OF SELF-REPRESENTATION

Reasons

The literature reporting on research on this topic is extensive, but in summary, generally reflects the matters referred to in the Dewar research set out above. I recommend, if you are interested in this topic, the literature review conducted for the Australian Centre for Court and Justice System Innovation, Monash University referenced at the end of this paper.

Needs of self-represented litigant

The Dewar paper also deals with the *needs* of a SRL and summarises the criteria from the seminal UK report of Lord Woolf on the civil justice system, as follows:

- a system which is understandable and responsive to their needs
- information and advice on different ways of resolving problems
- information and advice on how to make a claim and how to respond to a claim, as a defendant/respondent; and
- advice and assistance on preparing their case.

Dewar goes on to note the ALRC has suggested the areas in which the SRL needs help are:

- understanding the procedure during the hearing
- presenting and closing their case
- testing by cross-examination the evidence of an opponent and
- preparing for and presenting an appeal.

I would add to the matters identified by Dewar and the ALRC the need of assistance to a SRL in drafting a statement of evidence, or an affidavit, setting out relevant admissible material, and in the case of the NESB access to an interpreter prior to the hearing to complete any relevant forms or documents, and at the hearing itself.

The disadvantages of self representation.

The Dewar reports notes the disadvantages suffered by SRL including dealing with complex substantive law, complex pre-trial procedures, ignorance of trial proceedings, hostility from the court, vulnerability to unfair or oppressive tactics by opposing counsel, and the impact of financial ruin because of the imposition of a costs order. The authors note other disadvantages identified in the literature include the inability of a SRL to identify the issues in dispute, inability of the SRL to objectively assess the merits of his/her claim, and a failure to see litigation as but one avenue of settling a dispute.

WHAT ARE THE SUBSTATIVE LEGAL PRINCIPLES THAT GOVERN A TRIBUNAL'S DEALINGS WITH A PERSON OF NON-ENGLISH SPEAKING BACKGROUND AND/OR A SELF REPRESENTED LITIGANT?

Natural justice and procedural fairness

It is a core principle of the law that a citizen should have access to an impartial tribunal to resolve disputes, and that the citizen should have the right to be

heard. Natural justice requires that a citizen, who may be subject of an order which will deprive him or her of a right, knows the case to be made against him or her. The principles of natural justice also require that a court or a tribunal act in a procedurally fair manner. In the case of administrative law this duty to act fairly is only abrogated if a relevant statute manifests a clear contrary intention (see *Kioa v West* (1985) CLR 550 per Mason J at paras 28-31).

While we are all familiar with the concepts embodied in the principles of natural justice, it is useful to remind ourselves of a number of important statements on this topic enunciated by the High Court. A number of those statements were usefully garnered by Coleman J exercising the appellate jurisdiction of the Family Court in *KPR & MRS* [2007] FamCA 1334 at paragraphs 60 -62 as follows:

> 60. In *National Companies and Securities Commission Ltd v News Corporation Ltd* (1984) 156 CLR 296 at 312 Gibbs CJ said:-
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> > The authorities show that natural justice does not require the inflexible application of a fixed body of rules; it requires fairness in all the circumstances, which include the nature of the jurisdiction or power exercised and the statutory provisions governing its exercise.
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> 61. In *Kioa v West* (1985) 159 CLR 550 at 612 Brennan J said that:-
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> > The principles of natural justice have a flexible quality which, chameleon-like, evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power.
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> 62. In *Allesch v Maunz* (2000) 203 CLR 172 at 184 – 185 Kirby J said:-
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> > [35] It is a principle of justice that a decision-maker, at least one exercising public power, must ordinarily afford a person whose interests may be adversely affected by a decision an opportunity to present material information and submissions relevant to such a decision before it is made. The principle lies deep in the common law. It has long been expressed as one of the maxims which the common law observes as "an indispensable requirement of justice". It is a rule of natural justice or "procedural fairness". It will usually be imputed into statutes creating courts and adjudicative tribunals. Indeed, it long preceded the common and statute law. Even the Almighty reportedly afforded Adam such an opportunity before his banishment from Eden.
> >
> > [36] The rule is also implicit in international principles of human rights. It is inherent in the proper conduct of judicial proceedings in a court of law. It may even be an implied attribute of the judicature established under, and envisaged by, the Constitution. So deeply ingrained is the principle that more recent times have seen its extension, with certain exceptions, to administrative tribunals and other decision-makers. The principle governed the Family Court of Australia in determining the rights of the present parties. (footnotes omitted)

Bias

A number of the papers exploring issues arising with self-representation discuss the difficulties encountered by a judicial officer in dealing with a SRL in attempting either to create a "level playing field", or because the judicial officer is perceived as proceeding in a manner that an unsophisticated SRL sees as prejudicial to him or her. One of the most frequent complaints raised on appeal in cases involving a SRL is that the trial Judge was biased.

The principles to be applied in a case of disqualification for apprehended or actual bias are clear and uncontroversial. They are conveniently found in several significant decisions of the High Court (*Johnson v Johnson* (2000) 201 CLR 488*; Re JRL; Ex Parte CJL* (1986) 161 CLR 342; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *British American Tobacco v Laurie [2011] HCA 2*). In *Johnson* the plurality (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) explained at 492-493:

> … It has been established by a series of decisions of this Court that the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias (which, in the present case, was said to take the form of prejudgment) is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.
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> That test has been adopted, in preference to a differently expressed test that has been applied in England, for the reason that it gives due recognition to the fundamental principle that justice must both be done, and be seen to be done. It is based upon the need for public confidence in the administration of justice. "If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision". The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is "a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial".
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> Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. In *Vakauta v Kelly* Brennan, Deane and Gaudron JJ, referring both to trial and appellate proceedings, spoke of "the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case". Judges, at trial or appellate level,

> who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them. (footnotes omitted)

The test to be applied was further expanded by the High Court in *Ebner* where the plurality (Gleeson CJ, McHugh, Gummow and Hayne JJ) said at 348:

> *The principle to be applied*
>
> > Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.
> >
> > This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.
> >
> > It is not possible to state in a categorical form the circumstances in which a judge, although personally convinced that he or she is not disqualified, may properly decline to sit. Circumstances vary, and may include such factors as the stage at which an objection is raised, the practical possibility of arranging for another judge to hear the case, and the public or constitutional role of the court before which the proceedings are being conducted. These problems usually arise in a context in which a judge has no particular personal desire to hear a case. If a judge were anxious to sit in a particular case, and took pains to arrange that he or she would do so, questions of actual bias may arise.
> >
> > The particular principle or principles which determine the grounds upon which a judge will be disqualified from hearing a case follow from a consideration of the fundamental principle that court cases, civil or criminal, must be decided by an independent and impartial tribunal.
> >
> > Bias, **whether** actual or apprehended, connotes the absence of impartiality. It may not be an adequate term to cover all cases of the absence of independence. (emphasis added)

In *Strahan & Strahan (Disqualification)* (2009) FLC 93-414 the Full Court of the Family Court (May, Boland and Thackray JJ) at paragraph 5 of their reasons referred to these two decisions as follows:

> It will be noted that the plurality in *Johnson* considered it unnecessary to undertake a detailed analysis of the principles relating to apprehended bias, preferring to rely on the test of "whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide." The plurality in *Ebner* articulated a two step process to be used in applying that test in individual cases. The first step is the identification of the matters said to give rise to the apprehended bias. The second step requires consideration of the "logical connection" between the matters identified and the possibility, real not remote, of a deviation from the course of deciding the case on its merits.

Their Honours in *Strahan* went on, at paragraph 6, to refer to the decision of Mason J (as he then was) in *Re JRL; Ex Parte CJL* (1986) 161 CLR 342 where his Honour said at 352:

> It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as *Watson* and *Livesey* has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established": *Reg. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group*; *Watson*; *Re Lusink; Ex parte Shaw*. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour. (footnotes omitted)

The test to be applied in respect of actual bias is set out by their Honours Gleeson CJ and Gummow J in *Re Minister for Immigration and Multicultural Affairs; Ex Parte Jia* (2001) 205 CLR 507 at paragraphs 72 and 102.

PRACTICAL ISSUES

Explaining procedure

Lawyers who preside on tribunals, or experienced tribunal professional and community members, can easily forget how frightening, or at least confusing, a tribunal can be for any person, but particularly a person from a NESB and/or SRL.

Seating arrangements

In my tribunal experience I have presided in "purpose built" tribunal rooms, in very old Court Houses, and in conference rooms and similar venues. Each type of venue provides its own unique challenges.

It is important *prior to* commencing a hearing to consider where the parties will sit, where you can ask an interpreter to sit, to check the facilities for a hearing impaired or an otherwise disabled litigant, and to consider an appropriate emergency exist.

Introductions

At the beginning of the hearing I introduce the tribunal members. It is trite to say that a good lawyer will know his or her bench (and their idiosyncrasies), but an NESB litigant or SRL may not even know the names of the members of a panel or their expertise. It is reassuring to a litigant to be told you can refer to me as "Chairperson" or "Ms Boland", to the professional member as Member or Ms Smith etc.

At this stage of a hearing, after noting each party's appearance, I then explain the proceedings are legal proceedings and that are being recorded. I also identify and confirm the nature of the proceedings with the litigant.

> "Today the tribunal is hearing your appeal. We understand you have lodged this appeal because you were refused registration as a nurse. We also understand that the Australian Health Regulation Agency says your overseas degree does not meet the Australian requirements for registration. You dispute that decision"; or
>
> "Today we are hearing an application by you Mrs Liew to be made your sister's guardian. We understand you say your sister is mentally unwell, and needs someone to make decisions for her. Your sister has told Tribunal staff she does not need someone to make decisions for her".

The order of proceedings

If the litigant comes from a Commonwealth country where they play cricket I often explain procedure in terms of a cricket match in which the tribunal is the umpire. "You, [the litigant] have a team, (you and your witnesses) and the other party [the respondent] has a team'. I then explain which team "goes

first", (the first innings) and how that team will be asked questions, and then the second team is "in" and gives evidence (or tells us about their side of the case). I adopt a different example for litigants from non-cricket playing backgrounds!

What do I call you?

Before I adopted the practice of introducing tribunal members I had the experience of litigants saying, "What do I call you". A litigant will feel much more comfortable if he or she knows how to address you. It is also important to confirm you have correctly pronounced the litigant's name. This can be important with Chinese litigants. I have frequently found confusion between given names and surnames of these litigants, often because application forms are not correctly completed.

Do you have your papers?

Many appeals succeed because of lack of procedural fairness. This is particularly so in the case of NESB and SRL. It is important, although it may be time-consuming, to see that you and the litigant are "singing off the same hymn sheet". It is my experience that litigants frequently turn up with *no* documents at all. So it is necessary to check what he or she has, and if necessary, provide access to documents.

It is also important to check when a document was served and if the litigant is disadvantaged by late service. It is also necessary to ensure a document has been translated or read over to the litigant. These matters may require the tribunal to raise with the litigant the question of whether he or she needs to seek an adjournment (see *Minister for Immigration v Li [2013] HCA 18*).

Check that the litigant has a pen and paper to write on. This enables you to explain to the SRL how it is important not to interrupt the other party, but if he/she thinks of something important they can jot it down and raise it with the tribunal later in the proceedings.

Inevitably the vast majority of NESB and SRL litigants will not have looked at the law that you will be applying to their claim. Have photocopies of the relevant sections of the legislation available to hand out. It is useful to point out that the litigant will need to refer to how his or her evidence fits with the legislation when making his or her closing remarks.

Can we identify the issues the tribunal has to decide?

This is often a daunting task for a NESB litigant and/or a SRL. Often he or she will not have thought about the issues to be determined, but rather will be focused on perceived unfairness of an administrative decision. They will tell

you they are before the court or tribunal because what has occurred "is not fair". The time you spend at the beginning of the hearing with the NESB and or SRL identifying issues is always time well spent.

As a SRL is frequently unable to articulate what is in issue, I read the papers, identify what I discern to be the issues, discuss my conclusions with my fellow panel members *prior* to commencing the hearing, and then confirm my understanding with the parties. This process also provides an opportunity to confirm facts which are not in dispute.

During the hearing, if a SRL raises irrelevant matters, you can to refer him or her back to the issues identified at the beginning of the hearing.

Interpreters – tricks and traps

First check the interpreter employed speaks the appropriate language dialect – for example - Sicilian dialect, not just Italian. If you have the opportunity of a directions hearing make sure relevant information about the language of the interpreter needed for the final hearing is noted.

It is frequently necessary with a person from a NESB to use an interpreter. Remember to speak in small "sound bites" – short sentences, one question at a time to be translated, and answer given.

Be attentive if the litigant gives a long answer, but the interpreter only translates a brief reply, ask for the answer to be repeated and re-translated.

Don't let the interpreter become an advocate for the party. I just ask firmly but politely that the interpreter interpret *exactly* what I have said, and to *exactly* translate the reply.

Don't discharge the interpreter too soon. You may regret your action. Be prepared to allow a litigant to converse in English if he/she expresses a desire to do so but to consult with an interpreter about nuances in language.

Make sure when any party or witness is giving evidence, or you or another tribunal member asks a question, that you ensure the interpreter has sufficient time, and is in sufficient proximity to the NESB person, to interpret that evidence or question. Remember the NESB party needs to know everything said at the hearing.

I don't hesitate to acknowledge and thank an interpreter who has provided excellent service. I think this encourages good practice for future matters.

Body language

I cannot stress too much the need to *observe* the NESB and/or SRL. You will often learn more from observation than oral evidence. First, look for signs the litigant cannot read or understand relevant documents. Many older and some younger migrants and indigenous litigants are illiterate. They are embarrassed by their illiteracy and generally do not volunteer information about this disability. If you find a litigant cannot read, or has poor literacy skills and needs a document translated, stand down and have the interpreter read over the document to the person.

If a SRL without interpreter is before your tribunal see if you can enlist the help of a lawyer to act as *amicus curia* and read over the document. I have never been knocked back when I have asked a lawyer to act in this limited role, and more often than not a lawyer has volunteered from the back of my court as assist a litigant in difficulty. Otherwise, read the document aloud to the client yourself.

Observation of body language will also assist you in identifying the resentful, rude, aggrieved, difficult litigant. Be ready with polite but firm control strategies. "Mr. X would you please not gesture in that manner or I will have to adjourn the proceedings".

Observation is equally important to gauge when a litigant is overwhelmed and needs a breaks in the proceedings.

Observation does not cease to be relevant because the party before you is represented. Often you will observe a lawyer make a submission to you, and the litigant sitting behind him or her strenuously shaking his or her head! Raise this behavior with counsel. Remember while you can make findings about a witnesses' credibility when giving sworn/affirmed evidence in the witness box, it is impermissible to make findings about behavior in the tribunal room unless that behavior is brought to the notice of the party, and an opportunity to respond to your observations is afforded to that party.

Language

This in my view is one of the hardest skills to learn. Lawyers rejoice in "Lawyer speak". We frequently use long and convoluted sentences. We use technical terms –" the appellant, "the respondent", " interlocutory", "cross examination" "re-examination", and terms such as "the apparatus" rather than "the vacuum cleaner", "motor vehicle" rather than "car".

When dealing with a litigant from an NESB it is important not to generalise about a litigant's language ability. The litigant may be very well educated, fluent in more than one language, and used to sophisticated language. But conversely, another NESB litigant may be uneducated or poorly educated, and

simply pretend to understand what, is or has, been said. Frequent checking by you about the litigant's level of understanding can alleviate this problem.

Regardless of the litigant's language expertise consciously try to shorten your sentences. Use plain English. Make one point at a time. Allow time for a response. Don't interject unless behavior warrants interjection.

A salient lesson to improve your skills in this area is to take time to either listen to a transcript of a hearing at which you have presided, or critically evaluate your performance by reading a transcript of the hearing!

Repeating and Reframing

Often a litigant will endeavor to make a submission about either the evidence or the law in a garbled or convoluted manner. Listen, pick up the key point and reframe in words relevant to the issue in dispute.

For example, in dealing with a guardianship application where the issue is can a family member be properly appointed: "I heard you say 'John thinks he runs the show and rude to me' am I right in thinking you mean he is unable to talk to you in a civil way about your mother's needs ".

This mediation technique is often an excellent way of offering practical assistance, but not legal advice to the litigant.

Keeping a level playing field

I have been known to describe the way I feel during a trial where one party is represented by competent counsel, and the other is not, as being like a split computer screen. One side of the screen needs to be engaged in frequent explanations of procedure, assisting in framing questions, and constantly checking the SRL's understanding of what is occurring. You must ensure the SRL does not perceive that your manner is over friendly towards the counsel or solicitor appearing for the other party. The other side of the screen is keeping a barrister and his client calm, and not giving, or appearing to give, the unrepresented party favourable treatment.

Very often the parties will be unevenly matched particularly if one party is represented and the other is not. Strategies I have adopted include speaking to the non represented party first regardless of who is applicant or respondent and seeking to identify issues in dispute with that party thus empowering him/or her at the commencement of a hearing. It is also useful, at times, to explain, by reference to authority, to the represented party, that a judicial officer has duties and obligations which he or she must fulfill when one party is unrepresented (see *Re F Litigants in Person* (2001) FLC 93-072) and that failure to do so can lead to a successful appeal.

Use of the expertise of other tribunal members

One of the great strength of a tribunal is the collective expertise and wisdom of the panel members. Don't hesitate to use other panel members' expertise and experience. Often those members' specialist knowledge will be invaluable in making the NESB or SRL feel listened to, and that they have had a fair hearing.

Even if you don't have an indigenous member on your panel, learn from that member when you have had the benefit of sitting with him or her on other occasions. If you do not have the requisite expertise on your panel, explore prior to the hearing at a directions hearing, if you are able to have one, the availability of relevant expert evidence which may fill such a gap.

Special challenges with some self represented appellants

The rude, disruptive, SRL or the "Querulous Litigant" can present a serious challenge to the effective hearing of a case. Understanding their underlying behaviours can assist a judicial officer to deal with such SRL (see for example *Vexatious Litigants and Unusually Persistent Complainants and Petitioners: from Querulous Paranoia to Querulous Behaviour*, Mullen and Lester, Behav.Sci. Law 24: 333-349).

Some strategies I have used include:

- Setting firm rules at the beginning of the hearing (non interruption) assuring the querulous litigant he/she will get an uninterrupted time to speak, and he/she must afford he same courtesy to the other party;

- setting fixed time limits for asking questions ("You may ask any proper questions you like, and use the time in any way you chose but you and [the other party] have one hour each to do so") and keep to the allocated time!;

- requiring the litigant to identify the issue in dispute in respect of which questions are being asked;

- taking "time out" when language behavior is unacceptable. "Mr X we cannot proceed while you are shouting and swearing. I am going to adjourn now for 10 minutes so that you have a chance to think about whether the tribunal can continue to hear this matter with you present"; (or so I can take a deep breath, get a cup of tea and continue to preside in a calm and dignified manner);

- arranging for security in the court or tribunal room if the litigant has been identified by a party or tribunal staff prior to the hearing as

likely to present problems, and telling the difficult litigant, if appropriate, of that arrangement; and

- knowing where your duress button is located, or have worked out an appropriate exit strategy from the hearing room.

Further reading on the topic

I think it is fair to say that the phenomenon of the SRL is worthy of a Ph.D candidate's attention. In my research for this paper I have found the following many papers on this topic to be useful. The publications listed below contain detailed references to overseas publications on the topic which you may care to explore further.

I draw specific attention to the publication of the Judicial Commission of NSW – *Equality before the Law Bench Book.* This bench book, which was published in 2005, is, in my view, a very practical tool for Chairpersons of Tribunals. It highlights the further complexities involved in a case with a SRL if such a litigant comes from a culturally diverse or indigenous background and may require the assistance of an interpreter. I particularly like the tips at 10.3.2 which direct attention to explaining to the SRL who is in the court (or tribunal) that they can take notes but not record the proceedings, the conventional order of proceedings, and *exploring the purpose of the proceedings.*

Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (London HMSO) 1995 Chapter 17. Lord Woolf. ("the Woolf report").

Litigants in person – A report to the Attorney-General prepared by the Family Law Council, August 2000.

Review of the Criminal and Civil Justice System in Western Australia Consultation Drafts Volume 1, Project 92 The Law Reform Commission of Western Australia.

Judicial Intervention in the Trial Process (1992) 69 ALJR at 384, Justice D A Ipp.

Review of the Federal Civil Justice System: Discussion Paper No. 62 Australian Legal Reform Commission.

Litigants in Person, Family Court of Australia, Queenscliff Conference, April 1998 Justice G Mullane.

The Civil Pro Se Litigant v. The Legal System (1989) 20 Loyola University Law Journal 999 Rubin, HM.

Self Represented Litigants – Literature Review Monash University, Richardson, T Sourdin and N Wallace 2012.

Access to Justice for Litigants in Person (or self represented litigants) Civil Justice Council; A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice. November 2011.

A New Day for Judges and the Self-Represented Towards Best Practices in Complex Self-Represented Cases. Winter 2012 Judges' Journal Vol 51 No. 1 at p36.

Self-representing Litigants: A Queensland Perspective Professor John Dewar, Bronwyn Jerrard and Fiona Bowd.

Showing Procedural Fairness to the self-represented litigant, Kai Wu and Claire Cantrall, 66 Law Society Journal September 2010.

Equality before the Law Bench Book Judicial Commission of NSW.

One VCAT: President's Review of the Victoria Civil and Administrative Tribunal, The Hon Justice Kevin Bell.

Conclusion

While some tribunals do have the benefit of parties appearing with legal representation, it is unfair and inappropriate to disregard regard those who, for whatever reason, do not have such a benefit. I conclude with some salient words of Lord Woolf:

> Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of justice exists. The true problem is the court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people.