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**The Honourable Justice Mahla L. Pearlman, AM
Chief Judge of the Land and Environment Court of New South Wales**

**The Honourable Justice Nicola Pain
Judge of the Land and Environment Court of New South Wales**

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Introduction

Recent studies have found that litigants in person are appearing in the courts and tribunals in increasing numbers. This trend has led to much discussion about the reasons for increasing numbers of litigants in person in our court systems, the problems faced by the courts and other parties to the litigation when a litigant appears in person, and the approach that should be taken by the courts and the legal profession when faced with a litigant in person. A number of recent papers suggest that the issue is significant across several jurisdictions and clearly impacts on practitioners and decision makers in courts and tribunals. There are a number of terms used to describe litigants in person such as self-represented litigants, unrepresented litigants and, in the USA, pro se litigants. I will use litigant in person in this paper.

This paper explores the issues and experiences in relation to litigants in person in the Land and Environment Court of New South Wales, focusing on merit hearings. It is divided into three parts. Part 1 looks at the background to litigants in person in merit hearings in the Land and Environment Court. It explores the fundamental right of a litigant to appear in person, the nature of merit hearings and the statistics regarding litigants in person in the NSW Land and Environment Court in comparison to other courts. Part 2 deals with the experiences of the Land and Environment Court Judges and Commissioners with respect to litigants in person. Specifically, it looks at some of the major concerns raised by the Judges and Commissioners including issues in relation to the litigant in person in presenting the evidence and interpreting the applicable law; maintaining impartiality and the role of the judicial officer; and the extent to which a litigant in person should be allowed "free reign" in presenting their case. Part 3 looks at managing litigants in person in the court and tribunal system, including providing guidelines for judges, commissioners and court staff and information and assistance for the litigant in person.

Part 1: Background to litigants in person in merit hearings in the Land and Environment Court

The right to appear in person

It has long been recognised that it is a fundamental right of every litigant to appear in person before the Courts: see, for example, *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389; *Collins (alias Hass) v The Queen* (1975) 133 CLR 120; and *Cachia v Hanes* (1994) 179 CLR 403. In *Harvey*, Kirby P, in recognising that right, stated at 395:

The right of any natural person to advance, in person, a cause and to have access to the courts in that way is a valuable civil right. Advice may be given about the wisdom of securing legal representation. But such representation cannot be required, at least in the ordinary civil case with a party apparently of full legal capacity ...

The right to appear in person has been embodied in s 63 of the *Land and Environment Court Act 1979* (NSW) (the Court Act) which provides:

A person entitled to appear before the Court may appear in person, or by a barrister or solicitor, or (except in proceedings in Class 5, 6 or 7 of the Court's jurisdiction) by an agent authorised by the person in writing.

As can be seen, the Court Act not only provides for a litigant to appear in person, but also, in Class 1, 2, 3 and 4 proceedings, to appear by an agent. This allows a litigant to appear by way of a non-legally qualified person, such as a family member or friend. This paper only discusses the position of the unrepresented person appearing themselves and not by a non-legally qualified agent.

It should be stated from the outset that this paper is in no way meant to criticise or detract from the right of a litigant to appear in person. That right is a fundamental right which should not be taken away. Nor does it intend to suggest that all litigants in person are not able to present their case satisfactorily. What this paper aims to do is to raise the issues that arise for the court and the parties to the litigation when a litigant appears in person.

Thus, it must be recognised, as Mason CJ, Brennan, Deane, Dawson and McHugh JJ stated in a joint judgment in *Cachia v Hanes*, at 415, that:

While the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognize that the presence of litigants in person in increasing numbers is creating a problem for the courts. It would be mere pretence to regard the work done by most litigants in person in the preparation and conduct of their cases as the equivalent of work done by qualified legal representatives. All too frequently, the burden of ensuring that the necessary work of a litigant in person is done falls on the court administration or the court itself. Even so, litigation involving a litigant in person is usually less efficiently conducted and tends to be prolonged. The costs of legal representation for the opposing litigant are increased and the drain upon court resources is considerable. [Footnotes omitted]

Furthermore, as Justice Nicholson, of the Federal Court of Australia, recognised:

The adversarial system is designed to be conducted by persons of the appropriate professional skill. It is inevitable that in that context the appearance of unrepresented litigants can give rise to difficulties: RD Nicholson, "Litigants in person" (2001) 5 *The Judicial Review* 181, at 185.

It is the nature of those problems that this paper will address.

Background to merit appeals in the Land and Environment Court

The Court Act divides the jurisdiction of the Court into seven different classes:

- Class 1 – environmental planning and protection appeals (s 17);
- Class 2 – local government and miscellaneous appeals and applications (s 18);
- Class 3 – land tenure, valuation, rating and compensation matters (s 19);
- Class 4 – environmental planning and protection civil enforcement (s 20);
- Class 5 – environmental planning and protection summary enforcement (s 21);
- Class 6 – appeals from convictions relating to environmental offences (s 21A);
- Class 7 – other appeals relating to environmental offences (s 21B).

Classes 1, 2 and 3 comprise the merit jurisdiction of the Court; Class 4 the civil enforcement jurisdiction; and Classes 5, 6 and 7 its criminal jurisdiction, the latter two being appellate jurisdictions. In 2000, merit cases comprised 83% of all matters filed in the Court. They are therefore a substantial part of the Court's workload.

The Court is composed of Judges and Commissioners. Cases in Classes 4, 5, 6 and 7 can only be presided over by a Judge. Cases in Classes 1, 2 and 3 can be presided over by a Judge or a Commissioner. However, Commissioners do not have all of the functions that a Judge can exercise in these proceedings and, in particular, have no power to determine questions of law. The majority of merit cases are, however, heard by Commissioners.

Merit appeals are conducted by way of rehearing, the Court sitting in the shoes of the original decision maker (Court Act, s 39). Section 38 of the Court Act provides:

- (1) Proceedings in Class 1, 2 or 3 of the Court's jurisdiction shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and as the proper consideration of the matters before the Court permit.
- (2) In proceedings in Class 1, 2 or 3 of the Court's jurisdiction, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits.
- (3) Subject to the rules, and without limiting the generality of subsection (2), the Court may, in relation to proceedings in Class 1, 2 or 3 of the Court's jurisdiction, obtain the assistance of any person having professional or other qualifications relevant to any issue arising for determination in the proceedings and may receive in evidence the certificate of any such person.

Thus, by nature merit proceedings are conducted in a less formal legal environment and the Court is not bound by the rules of evidence. Each party pays its own costs, except in exceptional circumstances.

The statistics: litigants in person in the Land and Environment Court

It has been recognised that generally there is a lack of information regarding the number of self-represented litigants and any trends in those figures over the years: see Justice Nicholson, *supra* at 182. Figures regarding litigants in person have only begun to be collected in recent years by the courts. It has been recognised that there is at least a "perception" that litigants in person are becoming an increasing presence in the courts: Australian Law Reform Commission, *Rethinking the Federal Civil Litigation System*, Issue Paper No. 20, AGPS, Canberra,

1997, at [8.4] citing H Powles and V Bruce, *The Litigant in Person*, Discussion Paper, Australian Institute of Judicial Administration, Melbourne, 1993, at 5.

In the Land and Environment Court figures on the numbers of litigants in person have begun to be collected since August 2001. As can be seen from Table 1, the numbers are not complete: no representation was recorded for 498 of 1189 cases for that year as the registry has only recently finalised a system for collecting information from each file, which will hopefully improve the data collected. Table 1 does give a preliminary indication of the number of litigants in person appearing in the Land and Environment Court. Litigants in person appeared in 12% of all cases in Classes 1 - 5 of the Court's jurisdiction. In relation to the merit jurisdiction of the Court, Class 1, 2 and 3, litigants in person appeared in 8%, 10% and 25% of cases respectively. The lowest figures in the merit jurisdiction arises in Class 1 of the Court's jurisdiction, where the majority of merit appeals are heard, and the highest in the Class 3 jurisdiction.

Class	Total no. cases finalised	No. of cases for which representation collected	No. of litigants represented	No. of litigants in person	Percentage of Litigants in person for cases finalised
1	1189	691	636	55	8
2	23	20	18	2	10
3	127	88	66	22	25
4	261	149	118	31	21
5	115	74	66	8	11
TOTAL	1715	1022	904	118	12

Table 1. The figures for the number of litigants represented and appearing in person for cases finalised in Class 1 - 5 matters between August 2001 and June 2002 in the Land and Environment Court of New South Wales. Note that non-legally qualified agents that act for the litigant in person are included in the category of litigants that are represented and not the category of litigants in person.

Statistics collected in other courts indicate higher numbers of litigants in person than in the Land and Environment Court. For example, figures of 41% have been estimated for the Family Court, 18% for the Federal Court with recent figures suggesting this could be increasing up to 40% due to the large number of litigants in person in migration matters, and 35% for the Administrative Appeals Tribunal: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No. 89, AGPS, Canberra, 2000. While numbers of litigants in person in the LEC are evidently lower than other courts and tribunals (at least on preliminary figures), they are an evident presence in the Court. Tribunals such as the Victorian Civil and Administrative Tribunal and the Resource Management and Planning Appeals Tribunal, Tasmania, have litigants in person appearing in well over fifty percent of matters.

Reasons for increase

The reasons for the increasing trend of litigants appearing in person is largely unknown due to the lack of information collected, though a number of reasons have been suggested. Reasons proposed include the cost of legal representation; the unavailability of legal aid to the litigant; disillusionment with legal representatives and the legal system; and the litigant may "think that they know it all": SA Strickland, *Litigation Rules: whose interests do they serve?*, paper presented at the 8th National Family Law Conference: The Challenge of Change, Hobart, 24-28 October 1998, at 5. It has been stated that there is no common reason for litigants being unrepresented; different reasons are found in different courts: Australian Institute of Judicial Administration, *Litigants in Person Management Plans; Issues for Courts and Tribunals*, AIJA, 2001, at 1.

Information has not been collected on why litigants appear in person in the Land and Environment Court, though cost would obviously be a relevant factor. It may perhaps be thought that in merit cases, as compared to the more "traditional" legal Class 4 civil enforcement and criminal matters, the number of litigants in person would be higher. The assumption may be that such cases, being merit appeals, would be easier cases for the litigant in

person to run. Interestingly, the preliminary figures for merit appeals, at least in class 1 and 2, are not consistent with this assumption (see Table 1 above). As will be discussed further below, even the merit jurisdiction of the Court can involve technical evidence and points of law which may be beyond the ability of the litigant in person to deal with effectively.

Part 2: Litigants in person: issues for the Land and Environment Court

The nature of merit hearings

As has been outlined above, merit hearings are heard with as little formality and technicality as possible and the Court is not bound by the rules of evidence. The environment of a merit hearing is therefore, by nature, somewhat different from other legal proceedings in the Court. As was just discussed, it may perhaps be thought that a merit hearing, being technically less legalistic in character, would be an easier proceeding for a litigant in person to run. It is evident however, that there are still a number of legal “matters” that the litigant in person will need to deal with. These include presenting evidence and interpretation of the various statutes, regulations and rules applicable to their case.

The pre-hearing stage

Although Part 2 focuses on the issues that arise in the hearing of the case, it should be recognised that a lot of the problems that arise during the hearing stem from the pre-hearing stage. For example, failure to properly define issues, poor preparation in gathering the evidence, failing to put evidence into a useful or acceptable form, or filing evidence out of time all impact on the nature and quality of the evidence that is, and can be, presented at the hearing.

One advantage for litigants in person in Class 1 and 2 matters is that the local government authority, who is generally legally represented, is required to identify the merit issues at the pre-hearing stage of the case by filing a statement of issues. This means that all parties and the Court should be aware of the issues from the outset. For the unrepresented party, it is clearly critical that the legal and factual issues have been outlined at the beginning of the case, as it allows them to focus on the issues that have been raised and therefore gives them some guidance in the matters that they need to address in presenting their case.

The hearing: issues for the litigant

Presenting the evidence

In merit appeals it is still necessary for litigants to bring evidence in support of their case. In many circumstances, such as appeals relating to the refusal of a development by a local council or appeals in relation to land valuation and rating, it will often be necessary to present expert evidence to the Court. Often this evidence can be very technical in nature.

One of the major issues that has arisen for the Court in cases involving litigants in person is their ability to deal with the evidence. This issue can be divided into two major themes. Firstly, the evidence presented by the litigant in person and secondly, their ability to deal with the evidence presented by the other party.

One Commissioner commented that self-represented litigants rarely provide expert evidence to the Court. Where expert evidence is provided to the Court by the other party on an issue, it is very difficult for the Court to rule in favour of the litigant in person on the assertion from the bar table by the litigant in person that the issue “will not be a problem”. Indeed, where the litigant in person bears an onus of proof, but has not presented any evidence to the Court, there is little hope for them to succeed. As Justice Nicholson, *supra* at 193, noted:

Where there is no apparent evidence to support the relief claimed, there will be no denial of natural justice in terminating (or not providing by way of adjournment) the opportunity to be heard [*Gamestor Pty Ltd v Lockhart* (1993) 67 ALJR 547 at 549]. Where the opportunity is not taken, a judge is not bound to set out on a search for evidence to support a claim which the party has failed to articulate intelligibly [*ibid*].

When evidence is presented by a litigant in person it can at times be largely unfocused and difficult to follow, there being no logical sequence of presentation of the evidence. In some cases the sheer volume of evidence that has been presented, at times involving extracts from a large number of documents without identification of the original source, places a significant burden on the Judge and the other party to sift through the evidence and determine what is relevant.

At times it is evident that the litigant in person does not fully appreciate the concept of evidence. They often try to give opinions from the bar table as to their version of events and consequences without offering any form of proof or corroboration. It has been recognised that the submission of evidence from the bar table by a litigant in person is not to be permitted by the court and the court should explain to the litigant in person the proper methods of giving evidence: *Randwick City Council v Fuller* (1996) 90 LGERA 380.

Evidence is often not in a properly acceptable format, such as affidavits not being properly sworn, or is filed out of time and the other party quite properly has a right to object to it being tendered. However, when the Court questions the form in which the litigant in person is attempting to give evidence or the relevance of what they are being told, they are often accused by the litigant in person of not giving them “a fair go”.

Another problem that arises for the Court in relation to evidence is the reliability of evidence presented to the Court by the litigant in person. In relation to valuation appeals, one Commissioner commented that a number of applicant litigants in person have relied on sales information from local newspapers as valuation evidence. They could not understand why a registered valuer's report tendered by the other party would be preferred by the Court over such evidence. Furthermore, in such cases the problem arose that "the applicant also wanted to take on the role of an expert because they thought they knew the most appropriate value for the property, despite this not following conventional valuation practice."

A further issue that arises is the ability of the litigant in person to deal with the evidence of the other party. The art of cross-examination is a difficult process, even for the most experienced lawyer. For litigants in person, the difficulty is evident and the process is, at times, not very effective, the litigant asking inappropriate questions or not putting their questions in a form that is readily understandable by the witness or the Court and often results in long delays to the litigation. The most difficult task arises for the litigant in person where they themselves have not provided any evidence to the Court and they must therefore seek to find errors in the other party's evidence through cross examination of the other party's expert witnesses; once again, a process that can be extremely difficult to achieve even for the most experienced lawyer. Indeed as one Commissioner commented, it is "a very difficult task for a lay person to gain any concessions from an expert particularly on very specialist areas such as noise measurements etc".

Interpreting the applicable law

It has been noted that one of the main issues for litigants in person arises from the increasing complexity of planning legislation. In merit proceedings, questions of law can still arise and can be dealt with as preliminary points of law before the actual merit hearing is heard. Thus, the litigant in person in a merit hearing may still find themselves embroiled in technical legal arguments as to the proper meaning of the legislation in question. Difficulties for the Court arise where only one side enters into legal argument and the Court is presented with no legal arguments suggesting a contrary interpretation. This creates a difficulty for the Court, as it does not have a properly informed argument before it. It therefore places a greater burden on the Court to ensure that all sides of the issues have been covered.

Furthermore, even where no question of law arises, the litigant in person will be faced with understanding planning legislation that has become increasingly complex. Planning legislation, at least in NSW, is comprised of a number of different pieces of legislation and overlapping planning instruments. For example, in an appeal from a refusal of a development application the litigant in person may be faced with determining the interaction between the *Environmental Planning and Assessment Act 1979* (NSW) and any relevant State Environmental Planning Policies, Regional Environmental Plans and Local Environmental Plans.

The hearing: issues for the Court

Maintaining impartiality

One of the major issues for the Court is maintaining impartiality when a litigant in person appears before the Court. It is recognised that it is appropriate for the court to provide some limited assistance to the litigant in person, but the issue is how far the court can go without losing the appearance of impartiality or denying procedural fairness to the other party to the litigation. One Judge described the issue as follows:

Providing too much assistance to the unrepresented litigant is probably the greatest concern. It is a true paradox for the umpire to become involved in the tactics of the game, irrespective of the competitors levels of competence. After all, very often the stakes are as high, if not higher, for the represented party or some third party interest. Even making that assessment impinges on the neutral position that is imperative for an adjudicator to take.

Indeed the limited role that the court should take in assisting the litigant in person has been described in a number of cases in other NSW courts. In *Rajski v Scitec Corporation Pty Ltd* (NSWCCA, 16 June 1986, unreported)

Samuels JA, at 14, described the role of the court in assisting a litigant in person as limited to:

diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored.

His Honour furthermore noted that it should be remembered that:

an unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient to the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions.

In the same case Mahoney JA stated at 27:

Where a party appears in person, he will ordinarily be at a disadvantage. That does not mean that the court will give to the other party less than he is entitled to. Nor will it confer upon the party in person less than he is entitled to. Nor will it confer upon the party in person advantages which, if he were represented, he would not have. But the court will, I think, be careful to examine what is put to it by a party to ensure that he has not, because of the lack of legal skill, failed to claim rights or put forward arguments which otherwise he might have done.

As Mahoney JA recognised, one of the fundamental things that must always be remembered when dealing with a litigant in person is that there are *two* parties to the litigation and the represented party should not be put at a disadvantage simply because the other party appears in person.

In *Harvey*, an appeal from the Land and Environment Court, the New South Wales Court of Appeal discussed the role of a judge in cases involving litigants in person. The Appellant in that case essentially argued that by the nature and extent of the intervention in the proceedings by the trial judge the Appellant had been denied procedural fairness. Kirby P, at 395-8, set out a number of principles relating to the role of a judge in the conduct of proceedings and the extent of judicial intervention that is permissible. These may be summarised as follows:

1. "A judicial officer enjoys a wide discretion in the conduct of court proceedings". It is accepted that different judges have different personalities, such that some may be "more inclined to intervene in proceedings than others." "Monochrome uniformity" in the approach taken to the conduct of proceedings by judges is therefore not required (at 395).
2. There are a number of reasons that now require a judge to take an increasing role in proceedings including: ensuring that cases are conducted efficiently; the number of litigants in person is increasing, either due to the unavailability of legal aid for that person or due to choice; "[t]he creation of expert tribunals with specialised judges and other members, novel standing rights and modified procedures aimed to facilitate if not actually encourage, persons to pursue, or defend, their legal rights without the necessity of securing qualified legal practitioners to represent them"; and "the requirements of fair procedure" (at 395-6).
3. However, despite the more active role required of judicial officers in recent times, they do have certain constraints imposed on them regarding the part that they can play in the conduct of the case (at 396):

Advocacy is for the bar table. The judicial officer sits on an elevated bench, not to promote a sense of self-importance, but to symbolise his or her removal from the fray. Such removal is designed to promote both the appearance and actuality of neutrality and independence of the parties which are the hallmarks of judicial office

There will therefore be limits on the proper basis that a judge can intervene to ask questions, including clarification of a point made by a witness or an advocate: at 396 citing *Jones v National Coal Board* [1957] 2 QB 55 at 64 per Denning LJ (see also Mahoney JA in *Harvey* at 409).

4. The requirement of neutrality and limited intervention is imposed to ensure that the court maintains "the confidence of litigants and their acceptance that the judicial officer has approached the controversy presented to the court with detachment and equal attention to the arguments of each party" (at 397).
5. If the interventions of the judicial officer are so excessive that the fairness of trial has been undermined, then the law will regard the trial as "no trial at all"(at 398):

That point may be expressed in terms of apparent bias; departure from due process and procedural fairness; or invalid conduct of the trial. But the essential point will be the same. The parties are then held not to have had a trial at all, as our system of law guarantees them.

(See also Mahoney JA at 410.)

6. Where an appellant court finds that a judicial officer has excessively intervened in the proceedings the court will not grant relief if either (at 398):
 - (a) ... the interventions, although excessive, did not prevent a fair trial from being had or cause a reasonable apprehension of bias to arise. ...
 - (b) ... the party complaining waived an objection to the manner of the conduct of the proceedings at trial or is estopped by its conduct from later complaining about the suggested irregularity of the trial.

Kirby P accepted that litigants in person are entitled to a degree of assistance by the judicial officer and that in such cases a judicial officer will be entitled to ask more questions of witnesses and the other party's representative in order to "bring out the evidence" than would otherwise be permitted (at 399). However, the judicial officer must be careful to ensure that their questions are limited to clarification and that they do not cross the line and assume the role of an advocate, for example, by intensive cross examination or challenging the credibility of a witness (at 399-403). Later in his judgment Kirby P further explained the reason behind the restraint on judicial questioning (at 405):

so strong is our convention and expectation of judicial neutrality, that combative questioning by a judicial officer can intimidate a witness and affect his or her willingness to adhere to fact or opinion, as otherwise the witness might. This is one of the recognised reasons for judicial restraint in questioning. It is a reason why questions, when asked, should ordinarily be put in a manner designed to elicit information, not to score a point.

Mahoney JA recognised a fundamental point in relation to ensuring that a judicial officer does not excessively intervene: excessive intervention takes the conduct of the proceedings out of the parties' hands. It is the right of a party to conduct the proceedings as they see fit. There are therefore proper limits that must be placed on intervention by the judicial officer (at 410).

Kirby P specifically noted the terms of s 38 of the Court Act (set out above) and stated that although that section allowed some "measure of flexibility in the conduct of proceedings" the judicial officer must still conform to the "procedures normal to a superior court of record in this country". The provisions in s 38 still require the court to conform to the principles of procedural fairness (at 404).

Although it is a difficult task to attempt to define the role or appropriate response of a judicial officer when faced with every particular situation, there are a number of general standards that a judicial officer should bear in mind. The courts have therefore recognised high standards in maintaining the appearance and actuality of impartiality and affording procedural fairness to all litigants. Indeed as Kirby P stated in *Harvey* in concluding that the trial had miscarried: "I am convinced that his Honour was endeavouring to reach a conclusion which was both legally accurate and just. Nonetheless, the procedures adopted to achieve those ends were not acceptable by the high standards of our law" (at 406).

In *Johnson v Johnson* (1997) 139 FLR 384, the Full Court of the Family Court considered the responsibilities of judges in the Family Court in relation to litigants in person. They set out the obligations for Family Court judges to be as follows (at 407):

1. To inform the litigant in person of the manner in which the trial is to proceed, the order of the calling of witnesses and the right which he or she has to cross-examine the witnesses;
2. To explain to the litigant in person any procedures relevant to the litigation;
3. To generally assist him or her by taking basic information from witnesses called, such as name, address and occupation;

4. If a change in the normal procedure is requested by the other parties, such as the calling of the witnesses out of turn, to 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;
5. If evidence is sought to be tendered which is or may be inadmissible, to advise him or her of the right to object to inadmissible material, and to inquire whether he or she so objects;
6. 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;
7. To ensure as far as possible that a level playing field is maintained at all times;
8. To attempt to clarify the substance of submissions of unrepresented parties, 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) 68 ALJR 509 at 510.

In relation to the duty to maintain the appearance of impartiality, the New South Wales Bar Association in “Guidelines for barristers on dealing with self-represented litigants”, October 2001, at 15, noted that the litigant in person should not be given legal advice by the judicial officer nor give advice as to what decisions they should make in relation to the proceedings. In relation to the restraint on giving legal advice the Bar Association noted: “[t]his is because such an approach may not only give the appearance of unfairness to other parties but also it may be given without full knowledge of the facts”.

Letting the litigant in person present their case

Maintaining control of proceedings

Another issue that has arisen for the Court is how far the judicial officer should let the litigant in person go in having a “free rein” in presenting their case. At times litigants in person try to present arguments that have no merit, put forward legal arguments that are fundamentally wrong, or try to tender evidence that is irrelevant. When the litigant in person is told that the Court can only accept evidence that is relevant, such restrictions can be “viewed with great displeasure” or the Court is accused of not giving the litigant in person a “fair go” – “the other side gave their version and their evidence, why can’t I give mine?” As one Judge noted, “ultimately the Court had to take control even though it disappointed the litigant”. As was noted above, litigants in person are still subject to the same rules as every other litigant.

Providing assistance

Linked to maintaining impartiality is the issue of how much assistance to provide to litigants in person. One Judge described the issue as follows:

The dilemma in dealing with the unrepresented litigant is whether to indulge them in one of two ways:

1. Provide gentle assistance to ensure they do not miss the vital point in their case; and
2. Allow them full rein to present the case as they see it.

The first option runs the risk of creating a prejudice against the other party. The second has the almost inevitable disadvantage of prolonging the case and very often with little benefit to the unrepresented litigant.

As has just been discussed above, the judicial officer must be very careful in the extent of the assistance that they give to a party. However, the courts have recognised that some assistance from the court may be appropriate to prevent a party appearing in person from being deprived of their claim: *Wentworth v Rodgers (No 5)* (1986) 6 NSWLR 534. In that case Kirby P stated, in relation to an application to have a proceeding struck out, that if with “a little assistance from the court” the pleadings could be amended so as to be in proper form, the court can do that (at 537).

At times litigants in person are simply not aware of the legal or evidentiary burden that they have to meet or the elements that they have to prove. Even though the other party may clearly have raised the relevant issues early on in the proceedings there may simply be a lack of understanding on the part of the litigant in person. Submissions from the litigant in person often focus on fairness or hardship. It is evident that emotional attachment to their case can often prevent them from seeing the real issues. One Judge stated that:

Where it gets to the point that I perceive the unrepresented person is about to suffer irreparable or unreasonable harm I have on occasions enquired whether, if granted a short adjournment, they would be prepared to take advice from a pro bono lawyer, provided one can be made available forthwith within the precincts of the court. ... Following the subsequent appearance of a pro bono lawyer who, at the least, is able to say that some guidance has been provided to the litigant, without being specific, I have often found that the litigant becomes more pragmatic. I certainly feel more confident to let the matter take its normal course after that.

Delay

One of the major concerns that has been raised is the delay in proceedings caused by litigants in person. Often when the litigant is trying to present their case the proceedings become delayed due to the judicial officer having to stop to explain the role of the Court or the proper process to be followed. Again, trying to steer the litigant onto the right course is often met with frustration by the litigant, because they feel they are not allowed to present their case as they see it. One Judge commented that the issue of how far an applicant should be allowed to go in presenting their case as they see fit “highlights the dilemma created between the principle that a party should have his day in Court and the administration of efficient justice”.

Part 3: Managing litigants in person; issues for the future

As this paper has recognised, the number of litigants in person appears to be increasing in courts and tribunals. Though figures of litigants in person in the Land and Environment Court are at the moment preliminary, and are perhaps lower than in other courts, it is evident that litigants in person are an issue for the Court. Judges and Commissioners of the Court are faced with issues of the best way to manage litigants in person and the conduct of the proceedings in which they appear.

Commissioners of the Court, who do not have the full powers of judges and most of whom have no legal qualifications or training in running legal proceedings, can face substantial challenges. Commissioners have raised issues such as “When the proceedings become so unruly that it is difficult to maintain control over the litigant in person or the proceedings themselves what should I do?” or “The represented party made a submission that was unreasonable, but because the litigant in person knew nothing about planning law they were unable to counter it. Should I raise the obvious solution to the problem?” Obviously, because issues of procedural fairness may arise for both parties, judicial officers may feel much safer and would be assisted if there is some guidance on how to deal with litigants in person in relation to the general conduct of proceedings. Providing such guidance is much easier said than done.

Furthermore, it is recognised that litigants in person “increas[e] demands on court administrators and staff”: The Law Society of New South Wales, *Self Represented Litigants: The Law Society’s Role*, 14 November 2001, at 23. Experiences from this Court show that Court staff are often required to give litigants in person procedural advice and spend more time dealing with the litigant in person than other litigants. Also, registry staff are often asked for legal advice by the litigant in person. However, legal advice cannot be given, as it is not the role of the registry to give legal advice. Similar experiences are evident throughout the court system. The Law Society of New South Wales stated (*supra*, at 25):

The relationship between court staff and self represented litigants is not an easy one. There is a perception that self represented litigants take up a considerable amount of time and energy from the court staff. Tension is created when a court staff member is unable to provide the substantive advice that a self represented litigant is seeking. Court staff may only provide procedural advice.

There is a definite need for proper court management in relation to the litigant in person. The Law Society of New South Wales summarised the position of the then Chief Justice Nicholson of the Family Court as follows: “virtually all jurisdictions are experiencing high proportions of litigants in person and, unless the phenomenon is carefully managed, access to justice will be hindered and court case management systems can be negatively impacted”:

The Law Society of New South Wales, *supra*, at 7. Parker stated that:

All courts should have a litigants in person Plan that deals with every stage in the process, from filing through to enforcement, or the equivalent in criminal matters. This is recommended so that systematic attention is given to the issues. As part of the litigants in person Plan guidelines should be prepared by judicial officers so that best practice is identified and shared between them as to

how to conduct a hearing where one or more of the parties are unrepresented: S Parker, *Courts and the Public*, Australian Institute of Judicial Administration, 1998, at 166.

There are several aspects to consider in developing a litigants in person plan. Firstly, guidance for the judicial officers and court staff in dealing with litigants in person can be included. It has been recommended that each court maintain a manual specific to both the registry staff and judges in relation to dealing with litigants in person: Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia: Final Report*, State Law Publisher, Perth, 1999, as cited by Justice Nicholson, *supra*, at 201. The Land and Environment Court does not, at the moment, have formal guidelines. The Land and Environment Court is proposing to discuss how feasible it is to prepare formal guidelines within the next few months.

Secondly, it is necessary for the court to have a management system that focuses on aiding the litigant in person, without of course, overstepping the bounds of the court's role. Perhaps the most fundamental aspect in this respect is firstly, the need to collect data in relation to the litigants in person: how many are appearing, why are they appearing and what matters are they appearing in? (see AIJA, *supra*). As has already been discussed, there is little information on litigants in person and data has only recently begun to be collected in most courts, including the Land and Environment Court.

The next aspect is getting information to the litigant in person. For many years the Land and Environment Court had a guide on the Court that was available to litigants. The New South Wales Young Lawyers Environmental Law Committee has produced "A Practitioner's Guide – the Land and Environment of New South Wales", May 2001. This useful guide is now available to litigants appearing in the Land and Environment Court. The Court also provides practical assistance on its web site, such as information on how to serve a document. The Court's forms and procedural information, such as governing statutes, rules and practice directions, are all available on the Court's web site in a readily accessible manner. The Court's Registrar commented that in situations where she had been asked for advice by litigants in person she directed them to the Court's website. Only one litigant in person to whom she had made such a suggestion did not actually have the Internet. They were, however, able to access the Internet through a family member. A number of other different strategies have been suggested such as instructional videos, written procedural instructions and access to information including libraries and a court supplied computer providing access to the internet: AIJA, *supra*, at 15.

From a judicial officer's perspective there is definitely a need to provide the litigant in person with information regarding the running of the actual hearing in court, including for merit appeals, and not just the procedural aspects leading up to the hearing. It may be that this can be done by providing a standardised guide to court hearing procedure, as has occurred in some courts.

The Land and Environment Court is currently preparing a litigants in person plan, which includes an information package for litigants in person. It is expected this will be available by the end of the year. It is expected the plan will include detailed information for litigants in person relating to pre-hearing and hearing procedures in several of the Court's classes of jurisdiction, notably Classes 1, 2, 3 and 4.

Other strategies that can be incorporated into the litigant in person plan are duty advice schemes and pro bono schemes. These have been operating in some courts (see AJA, *supra*). This would allow the litigant in person to be provided, at the minimum, with some guidance as to the proper running of their case. As was discussed above, one Judge in the Land and Environment Court has, on occasion, adjourned a case in order for the litigant in person to be offered pro bono advice. The Judge stated that they found the litigant in person was generally better focused after receiving such advice. To date, there has been no organised pro bono advice scheme run from the Land and Environment Court. Many litigants in person have been referred to the Environmental Defenders Office, a non-profit community legal centre specialising in public interest environmental law. While the EDO can provide some preliminary assistance to callers on a non-profit basis, its resources do not allow it to provide a level of advice which many litigants in person consider they need. It may be that a more dedicated pro bono scheme could be arranged through the Court if the need was considered great enough.

Conclusion

The right of a litigant to appear in person is a fundamental right. Recent studies and anecdotal evidence suggests that the number of litigants in person is increasing in many courts in Australia. Preliminary data from the Land and Environment Court shows that the number of litigants in person in the Land and Environment Court is lower than in some other courts, but is noticeable in all classes of the Court's jurisdiction, including merit appeals. The Land and Environment Court of NSW is actively considering how to assist litigants in person through development of its litigants in person plan, with results due by the end of 2002.

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