Dealing with self-represented parties

Graeme Neate*

In most matters before the ACT Civil and Administrative Tribunal (ACAT), parties represent themselves. Some parties are represented or assisted by family members or friends. Few have legal representation.

Although the rise in the number of self-represented parties has been the source of much comment and some concern in courts (including appellate courts), it has always been the case that most parties before tribunals such as the ACAT have represented themselves.

The explanation for that is, in part, found by reference to the nature of the disputes that ACAT has jurisdiction to hear and resolve — for example, relatively small civil claims and disputes with energy utilities and some licensing authorities; and residential tenancy matters.

Some key provisions of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) (ACAT Act) also provide the context in which self-representation is encouraged.

The objects of the ACAT Act, set out in s 6, include:

> (a) ...
>
> (b) to ensure that access to the tribunal is simple and inexpensive, for all people who need to deal with the tribunal; and
>
> (c) to ensure that applications to the tribunal are resolved as quickly as is consistent with achieving justice; and
>
> (d) to ensure that decisions of the tribunal are fair ...

Section 7 provides:

> In exercising its functions under this Act, the tribunal must —
>
> (a) ensure the procedures of the tribunal are as simple, quick, inexpensive and informal as is consistent with achieving justice; and
>
> (b) observe natural justice and procedural fairness.

Section 8 states:

> To remove any doubt, the tribunal need not comply with the rules of evidence applying in the ACT.

Section 30 deals with the representation of parties who appear before ACAT. It states:

> A person may, in relation to an application before the tribunal, appear in person or be represented by a lawyer or someone else (other than a person prescribed under the rules).
>
> Note The rules may make provision about when the tribunal may stop a person representing another person before the tribunal (see s 25(1)(b)).

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Another significant practical provision is that, generally speaking, the parties bear their own costs. ACAT has very limited discretion to make awards of costs.[1] Consequently, a party who has incurred the costs of legal representation cannot expect to receive these costs if they are successful.

Observations on the experience of some self-represented parties

It seems to me that, despite the best endeavours of ACAT members and staff, and the professional assistance of representatives of other parties, some self-represented parties go through the entire process before ACAT without any real understanding of what is happening or the reason for the outcome.

Their bewilderment and lack of comprehension is evident in many ways. They say that they are confused and that they did not realise that they had to prepare in a particular way for a specific type of hearing. Rather than responding effectively, they proceed to disregard evidence that the other party has provided or a key submission sent to them in advance of the hearing because it does not fit with the case they want to put.[2] The ultimate indication of this confusion is when people seek to appeal from decisions in their favour, including from decisions which have been made with their consent.

For some, it seems, the proceedings in which they are involved sweep them along, making momentary or periodic sense but, overall, lacking any cohesion.

Rather than referring to the writings of Franz Kafka at this point, let me illustrate with a poem that some of you will know but might not have linked to ACAT proceedings:

'Twas brillig, and the slithy toves

Did gyre and gimble in the wabe:

All mimsy were the borogoves,

And the mome raths outgrabe.

'Beware the Jabberwock, my son!

The jaws that bite, the claws that catch!

Beware the Jubjub bird, and shun

The frumious Bandersnatch!'

He took his vorpal sword in hand;

Long time the manxome foe he sought —

So rested he by the Tumtum tree

And stood awhile in thought.

And, as in uffish thought he stood,

The Jabberwock, with eyes of flame,

Came whiffling through the tulgey wood,

1 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48.

2 See, for example, *Gore v QBE Insurance*, AA 10 of 2018, decision delivered orally on 31 July 2018.

And burbled as it came!

One, two! One, two! And through and through

The vorpal blade went snicker-snack!

He left it dead, and with its head

He went galumphing back.

'And hast thou slain the Jabberwock?

Come to my arms, my beamish boy!

O frabjous day! Callooh! Callay!'

He chortled in his joy.

'Twas brillig, and the slithy toves

Did gyre and gimble in the wabe:

All mimsy were the borogoves,

And the mome raths outgrabe.[3]

To me, this poem illustrates what I discern to be some self-represented parties' experience. There is a contest in which they are involved. People are gyring and gimbling around them. The terminology is unfamiliar and, at times, incomprehensible. They are alert to, or imagine, jaws that bite and claws that catch, sometimes attributing them to ACAT. Finally, after periods of uffish thought and the quest for the manxome foe, a person wields a vorpal sword, whatever that is, and snicker-snack there is a result. Someone is defeated, and the other side goes galumphing away to be greeted by family, friends and sometimes lawyers who are pleased that they have slain the Jabberwock.

The issues

There are many challenges facing parties, lawyers and ACAT when one or more of the parties is self-represented.

In this article I will discuss:

- why some parties represent themselves;
- 13 of the practical challenges facing self-represented parties in proceedings before ACAT;
- some of the challenges faced by other parties, particularly when they are represented by lawyers, where a party to the proceedings is self-represented;
- some of the challenges for ACAT when one or more of the parties is self-represented; and
- in what circumstances ACAT might determine that a self-represented party is not capable of conducting the proceedings and a litigation guardian should be appointed.

3 Lewis Carroll, *Jabberwocky*, from Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* (1871).

Various suggestions are made about how ACAT can attempt to overcome, or at least minimise, the difficulties that often arise when one or more of the parties represents themselves (see 'Possible ACAT action' sections in each topic).

Much of the discussion draws on personal experience and observations, as well as decisions of courts and some useful guidelines for barristers and solicitors in New South Wales and Queensland, and the *Equal Treatment Benchbook* of the Supreme Court of Queensland.[4]

Why do people represent themselves?

There are, broadly speaking, two reasons that a party would represent themself rather than have legal representation.

First, the party *cannot* afford legal representation and is unable to obtain legal aid (for example, because the amount in issue is below the threshold for the provision of legal aid). In some instances, people represent themselves without knowing that they are eligible for legal aid.

Second, the person *can* afford legal representation but chooses not to do so because, for example, they consider that the amount in issue does not warrant the expense of a lawyer or their case is so obviously meritorious that it would be a waste of money to engage legal representation. Some people are disillusioned with, or suspicious of, lawyers and do not seek their advice.

In some instances, a party has sought and obtained legal advice but proceeds without legal representation — for example, because they did not accept the advice they obtained (including advice that they cannot win) or the lawyer is unwilling to act for them. Some people might simply think that they can do a better job than a lawyer.

In some instances, a lawyer might be unwilling to act as a result of perceived difficulties with the person's conduct or behaviour, which might be the result of a disability, mental illness or inability to communicate effectively in English.

Possible ACAT action

In the course of a conference or directions hearing, ACAT might encourage a party to seek legal advice and possible representation, having regard to relevant features of the case and, perhaps, the legal resources marshalled by the other party or parties. Where cost is a factor, ACAT might suggest seeking legal services for discrete parts of the matter. For example, a lawyer might assist in settling witness statements or submissions.

ACAT correspondence regularly suggests that a party make enquiries about obtaining legal advice and provides a guide to where information about free legal assistance can be obtained. In any case, parties should be provided with or referred to ACAT's *Guide to Parties* documents on the website.

On occasion, ACAT will 'warm refer' a person to an appropriate organisation for legal advice. ACAT has arrangements in place with the Tenants' Union, Canberra Community Law, the Debt Enforcement Clinic (as part of the Consumer Law Centre of the ACT), and Legal Aid for this purpose.

4 Supreme Court of Queensland, *Equal Treatment Benchbook* (Supreme Court Library Queensland, 2nd ed, 2016).

Possible reforms for other courts and tribunals

In the final report of the Justice Project,[5] the Law Council of Australia recommended, among other things, that, as a minimum standard, every tribunal have the power to allow a party to be represented in proceedings where it is deemed necessary to ensure a fair outcome in the proceedings — for example, in situations where:

- there is a power imbalance between the parties — for example, the other party is evidently a repeat player or a professional advocate;
- a party clearly lacks legal capability;
- a party is particularly vulnerable — such as a potential victim of family violence or elder abuse; and
- the consequences of decision-making are highly significant to individual lives (recommendation 4.2).

It was also recommended that guidelines be developed to assist tribunals to exercise this power consistently with the minimum standard.

There is a recommendation that guidelines regarding the applicability and use of fee exemptions and waivers be made clearer and, as much as possible, publicly known to court participants. Exemption categories and court discretion to grant exemptions should also be reviewed and broadened in certain jurisdictions. Transcript fee waivers should be generally available to clients of legal assistance services and pro bono services (recommendation 4.3).

There are already fee exemptions and waivers that assist many of the people who make applications to ACAT. Transcript fee waivers also apply to such people.

Challenges for self-represented parties

People who are unfamiliar with legal processes but who are seeking justice in relation to their own particular circumstances have a number of hurdles to overcome, particularly when matters go to a hearing.

The difficulties they face will vary depending on factors such as the person's capabilities, the nature and complexity of the proceedings, the type of party they are (for example, applicant, respondent, party joined or appellant) and the extent of assistance available to them.

Let me make it clear that I am not speaking particularly about vexatious or querulous litigants, although there are plenty of those. They are a subset of people who, for whatever reason, choose or are forced to represent themselves in an unfamiliar legal setting. They also provide particular challenges for ACAT members and registry staff. Some of those challenges and how to deal with them have been discussed in other presentations — for example, in Dr Grant Lester's presentation, 'The Unreasonable, Querulant and Vexatious as Self Represented Litigants'.[6]

Also, I will not be dealing with the difficulties faced by people for whom English is not their first language; or people with disabilities that affect their capacity to engage readily with ACAT. That subset of people requires additional assistance to participate fully in a hearing, and ACAT needs to make appropriate arrangements for them on a case-by-case basis.

5 Law Council of Australia, *The Justice Project Final Report: Overarching Themes* (Law Council of Australia, 2018).

6 Dr Grant Lester, 'The Unreasonable, Querulant and Vexatious as Self Represented Litigants' (Presentation to ACAT members, 21 August 2018).

Rather, this article deals with 13 issues that self-represented parties generally confront and which ACAT members and registry staff, as well as other parties and their representatives, try to ameliorate or accommodate.

Putting to one side those particular types and needs of parties, it should be recognised that self-represented parties do not form a homogeneous class in terms of their needs and attitudes. Indeed, as the Victorian Court of Appeal noted recently:

> Their needs, and their attitudes towards the court, vary across a wide spectrum. At one end of the spectrum, the litigant may be inarticulate, or anxious, or distressed, and in need of considerable assistance in order simply to understand the process in which he/she is involved. At the other end, there are litigants who are variously articulate, strong-minded, stubborn, dismissive of legal advice and, very often, unwilling to accept judicial authority.[7]

Understanding and coping with the personal effects of conducting litigation

Apparently, most research indicates that self-represented litigants experience stress, frustration, desperation, heightened emotions and feelings of intimidation and fear. They can also feel disadvantaged, angry, anxious and bitter.[8]

A lack of familiarity with procedures inside and outside ACAT might lead to a sense of frustration at the perceived rigidity of the legal system and the length of time proceedings take to finalise.

Also, whatever the reason for representing themselves, parties who have a strong sense of their stake in the proceedings and even a sense of entitlement to a particular outcome often feel fear, frustration, bewilderment and disadvantage, particularly when they appear against a represented party. This might lead to inappropriate behaviour such as aggression toward, or interruption of, the other party.

Although self-represented parties bring a range of emotions and attitudes to a hearing, the Western Australian Court of Appeal has observed that:

> Being unrepresented is not a free pass to misbehave, flout the legal or procedural rules, ignore the law of evidence or treat the trial judge and witnesses with disrespect or contempt. Where an unrepresented [person] acts or attempts to act in any of these ways, a trial judge must fairly and, if necessary, firmly deal with such behaviour.[9]

With appropriate adjustment for the different role of courts and tribunals, those observations are apposite to people appearing before ACAT.

Possible ACAT actions

Assuming that most self-represented parties experience at least some of those feelings before and during ACAT proceedings, ACAT needs to be alert to what it can do to create a calm, orderly environment in which matters can proceed at an appropriate pace. That might involve giving clear guidance to the parties about how the conference or hearing will be conducted (a matter dealt with in more detail later in this article).

The presiding member should not assume that their calm and reassuring presence will necessarily be appreciated by the self-represented party. Apparently self-represented parties are often suspicious of the independence of judicial officers and lawyers and are

7 *Doughty-Cowell v Kyriazis* [2018] VSCA 216 [1].
8 See New South Wales Bar Association, *Guidelines for Barristers on Dealing With Self-represented Litigants* (New South Wales Bar Association, 2001) [12].
9 *O'Connell v The State of Western Australia* [2012] WASCA 96 [109] (Mazza JA; Martin CJ and Buss JA agreeing).

resentful that they are unable to receive help from legal aid, the legal profession or the court or tribunal (which is sometimes perceived as a publicly funded body which should be there to provide such assistance).

Understanding ACAT's procedures

The challenges can include:

- understanding the nature and features of ACAT's proceedings on a particular occasion — a conference, a directions hearing, an application for interim or other relief, a substantive hearing, or an appeal. Confusion about the nature and purpose of a particular type of proceeding can lead to a party being unprepared and, consequently, to potential delay at the hearing or an application for an adjournment;
- understanding that ACAT offers alternative dispute resolution procedures for resolving the dispute without the need for a hearing;
- understanding and complying with any directions made previously in relation to the hearing of their case (for example, the production and exchange of witness statements and submissions);
- knowing how to address the presiding member or members;
- knowing whether to stand or sit when the party speaks;
- knowing when to speak (and when not to speak) — even understanding that there is some structure to the proceedings and it is not just a free-flowing conversation where participants speak at will; and
- understanding the respective roles of the persons present in the hearing and that the presiding member decides who speaks and when.

Possible ACAT action

ACAT can attempt to minimise these problems by:

- providing useful information on our website and registry counter;
- giving procedural advice in correspondence and in conversations by telephone or in person;
- offering or directing mediation or other alternative dispute resolution as appropriate; and
- making clear directions; and explaining the reasons for the directions and the consequences of not complying with them.

Performing roles that more than one person would perform if the party was legally represented

This observation is best illustrated by a comparison with proceedings where a party is represented by counsel and an instructing solicitor and might have other people (such as clerks or departmental officers) involved. One sometimes observes from the bench that, in the course of the proceedings, notes are written and a person excuses themself from the hearing. It later becomes apparent that something has been mentioned in evidence and a person has departed the hearing to seek instructions or obtain evidence in reply, which is then introduced at a later stage in the proceedings. There is no interruption to the flow

of the proceedings because one or more people can deal with that issue outside the room while counsel proceeds to examine or cross-examine witnesses or make submissions.

By contrast, a self-represented party is, at the one time, the equivalent of the advocate, instructing solicitor, client and witness. While it might be difficult enough for one person to readily distinguish between those roles, it is impossible to perform them all concurrently. Consequently, a self-represented party often has to use lunch and other breaks to follow up the requests from other parties or an ACAT member or search for documents identified in the proceedings, as well as obtaining sustenance and refreshment and perhaps gaining some relief from the stress of the proceedings.

Possible ACAT action

The presiding member can encourage the party to make a note of what they need to do, ask them how and when they might be able to do those tasks, allow sufficient time for that to occur, and at the relevant break remind them of what they need to do.

Understanding what is relevant or not relevant to their case and that more material is not necessarily better for that case

As noted earlier, ACAT need not comply with the rules of evidence applying in the ACT. But ACAT has to make decisions based on evidence that is both relevant and probative.[10] That means that a party needs to provide the other party (or parties) and ACAT with the evidence on which that party relies.

That evidence needs to be relevant to the case before ACAT. If it is not relevant, ACAT should not accept it and have it clutter the file and add to the material to be considered then set aside when making a decision. I recognise, however, that it is sometimes easier and more time-effective to receive material to which no weight will be given rather than explain in detail why you will accept some material but not other material. In those circumstances, ACAT should make clear the basis on which the material is received and not create an expectation in the mind of the party providing it that the material might influence the outcome.

If the material is relevant but of little probative value, ACAT might accept it as evidence but give it relatively little weight.

The practical issue for each party is identifying, from the range of material which they have or could obtain, the material that is relevant to their case. That might not be an easy task, particularly in those instances where the self-represented party is the applicant or appellant, and the application or appeal document filed in the Tribunal does not clearly set out the reasons for bringing the proceedings or what outcome is being sought. If the outcome sought and reasons for it are not clear, the task of identifying relevant evidence becomes more difficult.

Some self-represented parties seem to consider that by providing numerous documents their case will be bolstered. Having numerous documents does not, of itself, enhance the prospects of success, particularly if:

(a) the documents do not address the matter in issue; or

(b) the other side concedes the point and hence the documentation does not advance the resolution of what remains in dispute.

10 That is, the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Parties should be encouraged to focus on what they need to prove their case and not attempt to swamp ACAT and the other party or parties in the hope that the weight of paper will ensure victory.

Possible ACAT action

ACAT might assist, in a conference or directions hearing, to clarify what the issues are (and are not) so that the self-represented party can focus on obtaining relevant evidence.

If the legal issues are clear and the applicable law is straightforward, it can be useful for ACAT to set out the principles and what the party must show to make their case. If the law is not clear, it might be useful to set out what is unclear and why.

Knowing what evidence to adduce and the best forms the evidence should take

Even where a party has a clear understanding of the issue or issues in their case, they might not appreciate the nature and extent of the evidence that should be provided to ACAT.

What might seem obvious to an experienced ACAT member might not occur to the party.

Some people seem to think that, if they tell their story to ACAT, that will be sufficient. The other party (whether they be a landlord, used car salesman, disgruntled employee or estranged partner) is clearly at fault. That should be enough to resolve the case.

Some parties fail to recognise, or perhaps even contemplate, that there might be another side to the story — or even a plausible alternative — and that, faced with conflicting assertions, ACAT will need more than each party's account of the sequence of events to make a reasoned decision. Parties take a real risk if, in the absence of documentation or corroboration from witnesses, the decision in the case depends entirely on each party's credibility as a witness.[11]

It is important that self-represented parties understand that ACAT proceeds only on the basis of the evidence before it. If there is no evidence in relation to a fact then no finding can be made.

That proposition might seem obvious to people involved regularly in court or tribunal proceedings. However, it is not unusual for a person who is extremely familiar with their own case to fail to identify one or more material facts and hence not call evidence in relation to that fact or those facts. Indeed, there have been instances of appeals being lodged alleging errors of fact on the basis that the original Tribunal did not take into account a particular fact or facts and for a search of the record before the original Tribunal to disclose that the existence of that fact was not raised at the original hearing and no evidence was called in relation to it.

The evidence might take the form of documents (for example, a residential tenancy agreement, a condition report, a set of accounts or bank statements, invoices, a published advertisement, emails, text messages, photographs or plans) and corroborating oral evidence from a witness or witnesses, a written summary of which should be provided to ACAT and the other party or parties. Each witness should be available at the hearing, preferably in person but otherwise by telephone.

11 See *Sarbandi v Sharif* [2017] ACAT 57.

Possible ACAT action

ACAT could discuss with each party the form the relevant evidence might take (for example, photographs attached to a witness statement) and should encourage each party:

(a) depending on the type of case, either to:

    (i) prepare a timeline of events and note which document or documents can be provided in respect of each event in the sequence (a useful means of getting a party's story in order and a useful resource for ACAT when assessing the case and preparing reasons for decision); or

    (ii) prepare a written outline of their case and the submissions they intend to make to ACAT and prepare a list of what evidence they might need to provide in order to prove each point that they intend to make;

(b) try to locate or obtain relevant documents and contact potential witnesses to ascertain whether they are willing to give evidence of what they saw, heard or did; and

(c) if those people are willing to give evidence, obtain a witness statement from each of them and confirm their availability to attend the hearing.

Ensuring that the evidence has been provided before the hearing and that evidence (including a witness or witnesses) is available at the hearing

It is sometimes surprising that, despite directions having been given and other procedural advice provided to a party, the party appears at a hearing without relevant documents (even of the most basic kind) or witnesses.

On one occasion, a woman who had commenced proceedings against a tenant for unpaid rent appeared at hearing without any documentary evidence of the specific amounts unpaid and the dates on which they fell due. When asked by the ACAT member for documentary evidence, the woman (who said she had been letting premises in the ACT for about 30 years) said that no one had told her that she had to bring that material to the hearing.

Possible ACAT action

The risk of parties arriving without relevant documentary evidence or witnesses might be reduced if clear directions are given at directions hearings or at conferences to assist people in preparing their case by identifying what they have to prove, and how best to prove it by what forms of evidence, and reminding them that everything needs to be prepared well in advance of the hearing and provided to the other side. Parties could be provided with a copy of ACAT's *Guide to Parties: What to Expect at Hearing* and/or encouraged to access such information on ACAT's website.

They should be encouraged to follow practical steps outlined earlier, such as putting documents in chronological order and clearly identifying and possibly paginating them. ACAT does not proceed on a 'trial by ambush' basis, nor will it readily grant adjournments if people arrive ill-prepared despite ACAT having given appropriate directions and provided guidance to a party or parties.

Self-represented parties are sometimes ignorant of, ignore or are contemptuous of directions (for example, directions for the exchange of evidence before a hearing) made by ACAT as part of its case management. It is not for parties to pick and choose which directions they will obey or when they might comply with them. If they choose to ignore or only partially comply with directions, they take the risk that the hearing will proceed and no

adjournment or other accommodation will be made for them. Evidence provided late might not be considered. For that reason, the relevant ACAT member or registry staff should take reasonable steps to explain what the directions mean and the importance of complying with them, while not giving legal advice (including how a person should prepare and run their case).

ACAT will be concerned to ensure that self-represented parties are given every opportunity to assert the rights which they might appear to have. However, a request for an adjournment prior to or during proceedings in circumstances where the reason for the adjournment is very much the fault of the self-represented party is unlikely to be treated favourably by ACAT. In such circumstances, it can be useful for the presiding ACAT member to check the file before a hearing and, in particular, trace previous directions and other applications made by the self-represented party to get a sense of the history of the matter and how a party has conducted themself.

Knowing how to ask questions when examining or cross-examining witnesses

There are at least three traps into which self-represented parties often fall when asking questions of witnesses.

First, when asking questions of their own witnesses, they give the answer to the question in the course of asking a question. In other words, they lead the witness. All the witness needs to do is to answer 'yes' to the questions. Strictly speaking, little weight should be given to such evidence. Yet many self-represented parties do not know how (or why) to ask a non-leading question.

Second, some people ask more than one question at a time so that when they pause it is not clear to the witness, or ACAT, what the witness is being asked or how best to answer.

Third, sometimes questions are preceded by long explanations or statements which (apart from potentially leading the witness to a particular answer) can sometimes leave the witness wondering whether they have been asked a question and, if so, what was the question.

Possible ACAT action

Although leading questions can enable non-contentious matters to be covered relatively quickly, the Tribunal might intervene to ask questions around contested matters or simply ask the witness questions like 'What happened next?'

ACAT might assist a party to break down long, multi-barrel questions into a series of shorter single questions so that the witness knows exactly what they are being asked and the Tribunal has a clear idea of their evidence.

On occasion, it might be in the interests of moving proceedings along for the Tribunal to put the questions to a witness, at least to the extent of establishing relatively uncontroversial factual circumstances which lay the foundation for other questions to be put by the self-represented party.

Distinguishing evidence from submissions

A recurring issue is the failure to distinguish between evidence on which a case is based and submissions to convince ACAT that a particular conclusion should be drawn from that evidence.

Most self-represented parties do not understand the distinction. Consequently, some oral and written statements are not really evidence at all but in the nature of argument. On the other hand, some submissions refer to evidence which has not been given previously in the proceedings. It is sometimes difficult to separate evidence and submissions in the flow of the proceedings. Indeed, sometimes when asked what evidence supports their final submissions, a party will produce material which has not previously been provided to the other party or ACAT. Such last-minute production can occur even when the Tribunal has earlier asked the party whether all their material is in evidence and there is nothing extra on which they seek to rely.

Possible ACAT action

ACAT should take the opportunity to point out the difference between evidence and submissions in order to assist one or more of the parties to provide first the factual information (and, where appropriate, expert opinion evidence) on which the case can be made. ACAT should point out that the parties will have the opportunity later in the proceedings to make arguments to about what that evidence means and the extent of its reliability.

Although ACAT proceedings are often conducted in an informal fashion, it is preferable not to allow a party in person to say what they want to say by way of evidence from the bar table without making an oath or affirmation. Rather, each party should give their evidence under oath or affirmation. ACAT should advise the party that potentially the person will be subject to questioning by the other party or parties to test whatever the self-represented party has said by way of evidence. A relevant statement or ruling to that effect might need to be made early in the proceedings, rather than after the person has, in effect, given evidence in relation to the case from the bar table.

I recognise that such an approach is preferable but may not be practicable in very busy lists, such as the Termination and Possession list and the Assessment list, where there is rarely time for such a process and it is most efficient simply to hear each party's story.

Knowing when, how and why to object to some evidence

Sometimes a party will want to object to evidence that is adduced by another party, either orally or in writing. Sometimes the objection is made simply because the evidence is contrary to the party's case.

Given that ACAT is not bound by the rules of evidence, the guiding principle must be whether the evidence sought to be tendered is relevant to the matter in dispute and has some probative value.

There is a risk that a lack of experience and confidence might result in a self-represented party being bluffed by another party. An important procedural point is whether a party should be invited or encouraged to object to evidence that is irrelevant or of little weight.

Possible ACAT action

Depending on whether any side is legally represented, it might fall to ACAT to either reject the tender of material or advise the parties that the material will be accepted but little weight will be given to it unless the party tendering it can convince ACAT that the evidence is significant.

There are judgments to the effect that:

(a) a judge is entitled to object to evidence on behalf of a self-represented litigant rather than simply advising the self-represented litigant of the right to object;[12] and

(b) a judge may provide general advice to a self-represented litigant that the person has the right to object to inadmissible evidence, and to enquire whether the person so objects, but is not obliged to provide advice on each occasion that particular questions or documents arise.[13]

Given that ACAT is not bound by the rules of evidence, Tribunal members might have fewer occasions on which to make such rulings or provide indications to self-represented parties. However, it seems that a presiding ACAT member has to be alert to the possibility of objectionable material being admitted into evidence unless ACAT identifies that it might be objectionable and provides at least an opportunity for the self-represented party to make some objection to it. ACAT's power to control its own proceedings,[14] adverted to earlier, might also allow it proactively to question the relevance of material submitted without objection by the other party.

Not relying on irrelevant or distinguishable extracts from judgments or ACAT decisions and understanding the significance of the other party's authorities

Some parties will find and rely on statements in decisions of courts or tribunals to support their case without reference to the context in which the statement is made and, in some instances, without realising that the decision is entirely distinguishable from the subject proceedings (for example, because it involved different circumstances or legal issues).

On the other hand, a party might receive and read the authorities provided by the other side and consider them completely irrelevant because the self-represented party is not able to discern the legal principle being relied on. In one case recently, a self-represented party declared that all the other side's judicial authorities were irrelevant. Having read the decisions carefully, I found not only that they were relevant but also that they supported the self-represented party's case rather than the case put by the party who proffered the authorities.[15]

Possible ACAT action

In such cases, it falls to the ACAT member to read the authorities cited in order to determine which, if any, of them are relevant to the matter in dispute. To the extent that it is necessary or appropriate to do so, those authorities should be referred to in the decision. If the authorities are largely irrelevant, that can be pointed out politely to the party or parties.

Understanding the role of lawyers in the conduct of a hearing

Sometimes the other party is legally represented and the lawyer objects to the admissibility of some evidence (for example, on the basis of relevance) or cross-examines witnesses by putting propositions to them that contradict their evidence but give them an opportunity to respond to evidence that will be given by the other party's witnesses. Even if the lawyer is acting appropriately, including in the context of ACAT not being bound by the rules of evidence, a self-represented party might misunderstand, and hence misconstrue, what

12 *National Australia Bank v Rusu* (1999) 47 NSWLR 309, 311.
13 *Re F: Litigants in Person Guidelines* (2001) 27 Fam LR 544, 551.
14 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 23.
15 See, for example, *Hedgecoe v Abdel-Massih* (AA 41 of 2017, 4 May 2018).

the lawyer is doing. That can delay the proceeding and might ultimately lead to an appeal against ACAT's decision.

Those concerns are illustrated in *Kuenstner v Workers' Compensation Regulator*[16] — a decision of the Queensland Industrial Relations Commission. In that case the appellant was represented by his father, who was not a lawyer. The Regulator was represented by experienced counsel. The following extracts from the reasons for decision illustrate some of the issues:

> [54] The Respondent is meant to behave as a model litigant in proceedings such as these. Counsel for the Respondent … took appropriate objections to questions (and to the tender of some documents) but otherwise provided a level of assistance in relation to the procedures before the Commission consistent with his client's model litigant role.
>
> [55] It is appropriate to make that observation because the written submissions made on behalf of the Appellant contained numerous and sometimes vitriolic criticisms of Counsel for the Respondent and his instructing officer in relation to aspects of their conduct during the course of the hearing. A careful analysis of those criticisms indicates that many of them arise from a misunderstanding of the role of Counsel …
>
> [56] The Appellant's written submissions contended, for example, that Counsel for the Respondent put words in people's mouths and manipulated facts. It was clear, however, that in the course of cross-examination, counsel was testing the evidence of witnesses and putting propositions to them that reflected evidence called by the Respondent. That was in accordance with the rule that counsel are obliged when cross-examining to provide the witness with the opportunity to deny the evidence of that Counsel's own witnesses. A failure to cross-examine a witness on the evidence of that other witness may be taken as an admission of the truth of that evidence.[17] In that context, I reject the Appellant's contentions in this case that counsel was putting words into the mouths of witnesses or manipulating facts.
>
> [57] The Appellant (or at least Mr Kuenstner Snr) appeared to allege that a witness (or witnesses) called by the Respondent was 'coached' by Counsel for the Respondent in relation to the evidence they would give to the Commission. In apparently equating a barrister having a conference with a witness as them coaching the witness, the Appellant misunderstood the process of preparing for a hearing and made unsubstantiated allegations against Counsel for the Respondent.[18]

Experienced counsel should be able to meet their obligations to test evidence while also adapting their style and manner to the more informal nature of ACAT proceedings, particularly as ACAT tends to adopt a more inquisitorial approach to hearing disputes.

Other issues arise when a self-represented party who is unsuccessful appeals the decision on the basis that they were not represented by a lawyer. I dealt with such an appeal recently.[19] In his application for appeal lodged with the ACAT registry, the appellant gave the following reasons for appealing:

> I wish to appeal the decision as I was at a disadvantage as I had no legal representation with me at the time of both hearings. I was not aware that I could apply for legal representation at Legal Aid and I am not in a financial situation to obtain private legal aid. Now that I have been informed that I am able to receive help through legal aid I would like the opportunity to put my case before you this time with Legal representation.

That ground of appeal was dismissed for three reasons.

16 *Kuenstner v Workers' Compensation Regulator* [2016] QIRC 083 [54]–[57].
17 *Browne v Dunn* (1894) 6 R 67; *Allied Pastoral Holdings Pty Ltd v FCT* [1983] 1 NSWLR 1; (1983) 44 ALR 607.
18 [2016] QIRC 083 [54]–[57].
19 *Campbell v Whale* (AA 46/2018, 13 December 2018).

First, it did not identify any error of fact or law in the decision of the original Tribunal.

Second, at most, it suggested that the appellant thought that his prospects of success might have been improved had he been legally represented. It would be inappropriate to speculate as to whether that might have been so, particularly in the absence of a transcript of the hearing before the original Tribunal. In any case, the appellant should have been aware of free legal assistance providers because the conference notice sent to him by ACAT stated that 'You should ensure that you have made any enquiries about obtaining legal advice or representation prior to the conference. Information about free legal assistance providers can be found on the Tribunal's website'.

The fact that he did not have (and might not have been entitled to) free legal assistance does not create a basis for the appeal. In *Wsol v John James Memorial Hospital*, the ACT Supreme Court confirmed that 'It is not an error of law for the ACAT to proceed with a hearing where a party is unrepresented'.[20]

Third, not only does the ACAT Act not require parties to have legal representation but it is also implicit in parts of the ACAT Act, and explicit in the experience of ACAT, that people will often represent themselves in proceedings before it. As noted earlier, s 30 of the ACAT Act provides:

> A person may, in relation to an application before the tribunal, appear in person or be represented by a lawyer or someone else (other than a person prescribed under the rules).

Other elements of the legislative scheme (such as ss 6 and 7, quoted at the start of this article) focus on procedural fairness, not on whether or not a party is legally represented. The appellant did not contend that the original Tribunal denied him a fair hearing.

Possible ACAT action

Where appropriate, ACAT might explain in general terms the role of a legal representative in a hearing or, if a self-represented party appears concerned about (or objects to) a line of questioning from a lawyer, ACAT might explain the purpose of the questions in the context of a contested hearing.

Having sufficient mental and emotional distance from their case to understand points at which some advantage can be gained or lost by what they do or do not say

A combination of factors, including the range of emotions, their stake in a particular outcome and the understandable apprehension of conducting litigation in an unfamiliar environment, coupled with a lack of independent appraisal of the self-represented party's case, can result in a person having no sense of proportionality about the importance of their case. An inability to assess the merits of their case objectively, and a lack of emotional distance from the ACAT proceedings, can impair the party's tactical judgment about when to object or intervene or assess situations in which it is best to say nothing and let a point pass. In other words, it is sometimes difficult for people to stand back and observe how the proceedings are going in order to assess the nature and extent of the responses that they should make (or not make) from time to time.

Sometimes it will be apparent to the ACAT member (and presumably to the other side) when a self-represented party is effectively undermining their case by the way in which they conduct themselves or the approach they take to their evidence and the evidence provided by the other party or parties.

20 [2015] ACTSC 378 [53].

Possible ACAT action

It might be appropriate, on some occasions, for ACAT to caution a self-represented party about their conduct or a line of questioning, although such interventions by ACAT should be made sparingly in order to avoid any apprehension that ACAT is improperly assisting one party in the conduct of their case.

Understanding any hints or guidance from the presiding member

This point follows from, and is related to, the previous point. Sometimes self-represented parties are so close to the case they are presenting and so fixed on the way in which they are presenting it that they fail to understand or appreciate the significance of guidance from the ACAT member.

I have received occasional complaints from parties about the conduct of a presiding member on the basis that the member was biased in favour of the other party. When I reviewed the sound recording and/or the transcript, it was apparent to me that, if anything, the criticised member was attempting to assist the complainant rather than favouring the other side and that the assistance, by way of comment or suggestion, was not understood or appreciated, if it was heard at all.

Possible ACAT action

It goes without saying that the presiding ACAT member cannot and should not run any party's case for them. Procedural assistance is appropriate. Some other forms of assistance might not be appropriate. We all take a risk that, by offering some forms of assistance within the range of what is permissible, those attempts will be misunderstood, ignored or completely missed.

Where procedural assistance is given to one party, it can be helpful to also direct attention (even if briefly) to the other party to confirm that party's procedural next steps. This even-handedness promotes the sense of equal hearing and equal treatment.

Challenges for other parties

There are challenges for other parties, particularly where they are legally represented. On the one hand, lawyers must advance the interests of their client and can quite properly take issue with ill-founded, imprecise or otherwise objectionable statements or questions from the unrepresented party. On the other hand, it can sometimes be in the represented party's interests to allow considerable latitude in order to not delay further the conduct of the conference or hearing.

The New South Wales Bar Association has published *Guidelines for Barristers on Dealing With Self-represented Litigants*. Those guidelines include practical suggestions, some of which are paraphrased as follows:

- Although a barrister's primary duty is to the client, the long-term interests of clients are best served by a barrister observing rules which facilitate a fair hearing. There is little point for a client in achieving a result which, for example, is set aside on appeal on the basis that the self-represented litigant was denied natural justice.[21]

- In a case where inflammatory material has been filed, or belligerent or offensive behaviour has previously been manifested, a barrister should prepare the client

21 New South Wales Bar Association, above n 8, [2].

in advance on the desirability of not over-reacting to questions clearly designed to antagonise or upset the client.[22]

- A barrister should be aware of a possible resentment by the client that the person is having to pay legal fees (which are often increased by the activities and attitudes of the self-represented litigant) while the court is perceived as bending over backwards to be more than fair to the self-represented litigant. These perceptions, and questions from the client such as 'Why is the judge helping them so much?', can be minimised by proper communication with the client at the first available opportunity.[23]

- There can be frustration and annoyance over the fact that settlement chances are usually significantly reduced in cases where a self-represented litigant is involved.[24]

- Some tribunals were established to deal with significant numbers of people who are not expected to obtain legal advice and representation before approaching the tribunal. Such tribunals have often designed different systems specifically for cases involving self-represented litigants. One of the rules for survival for any barrister is to be aware of the culture, systems, expectations and rules (written and unwritten) for the tribunal in which the barrister appears. It is important for a barrister venturing into a tribunal where opposed by a self-represented litigant to check whether there are any different approaches or systems for self-represented litigants which might affect the conduct of the case.[25]

- Generally, cases involving self-represented litigants are more difficult and require more interpersonal skills of patience and adaptability on the part of the barrister. Barristers need to retain their objectivity and commitment to their various duties and obligations notwithstanding the frustration experienced. For example, where a self-represented litigant might be obsessed by the litigation and is unable to exercise rational judgment in relation to the dispute, great care needs to be taken not to become embroiled in apparently personal attacks or criticisms which may emanate. In such circumstances, any refutations of comments made should occur in as professional and non-personalised way as is possible.[26]

- The best service a barrister can render to their client when opposed to a self-represented litigant is to ensure that every stage of the litigation is meticulously prepared and presented. It might be appropriate to advise the self-represented litigant in advance of submissions which may be made or evidentiary matters which might arise. Common sense would dictate that a trial judge is likely to grant an adjournment where the submission or issue, when raised, will obviously be new to the self-represented litigant. Similarly, the barrister should have their solicitor provide the self-represented litigant with an advance copy of any authorities to be relied on to forestall an inevitable adjournment for the self-represented litigant to consider the authority.[27]

- A barrister should avoid conduct and language which indicate a familiarity with the judge to an extent that there is an appearance of unfairness or imbalance. Similarly, care needs to be taken to ensure that the language used (for example, the use of abbreviated terms and legal jargon) does not confuse a self-represented litigant and

22 Ibid [9].
23 Ibid [10].
24 Ibid [11].
25 Ibid [16].
26 Ibid [19], [20].
27 Ibid [30], [31].

> potentially incur resentment towards the party and the judge who has to translate the jargon into comprehensible language.[28]

The Queensland Law Society has published *Self-represented Litigants: Guidelines for Solicitors — Practice Support*, which provides a range of practical suggestions for solicitors.

For present purposes I note that those guidelines make two general observations. The first general observation is:

> The same high standards which apply to your conduct towards other practitioners and your duties to the court, should apply equally when dealing with people who are self-represented. In other words, your conduct as a solicitor should in no way be affected by the fact that the other party to a matter is self-represented. However, the way in which you discharge your duty to your client and the court may require you to be more creative and thoughtful in your approach and communication style when dealing with a self-represented person.[29]

The second general observation is:

> Better communication between solicitors and people who are self-represented is likely to benefit solicitors, their clients and the courts. It could assist to reduce stress associated with legal disputes, facilitate an amicable, speedy and cost-effective solution, reduce matters that have unnecessarily progressed to trial, and improve the quality of hearings when disputes do come before the courts. It could also increase public confidence in the legal profession and improve the way solicitors are perceived through their dealings with people who are self-represented.[30]

Challenges for ACAT

The challenges are not confined to the parties. Those who adjudicate face a separate but equally complex suite of challenges.

The appearance of self-represented parties can affect the capacity of ACAT to administer justice fairly and efficiently and to ensure that (in the words of s 7 of the ACAT Act) ACAT's procedures are as 'simple, quick, inexpensive and informal as is consistent with achieving justice'.

Despite the difficulties described earlier, all parties have the right to a fair hearing (whether at a conference or a hearing). Consequently, ACAT members and registry staff often need to take particular care to ensure that the Tribunal is aware of all matters relevant to the proceedings and that justice between the parties is achieved.

Each ACAT member has given an undertaking to the ACT to 'do right to all people, according to law, without fear or favour, affection or ill will'.[31] That undertaking, like other judicial oaths and affirmations of office, imports the notion of impartiality, which requires members to be fair, even-handed, patient and attentive to all parties.

On the one hand, ACAT cannot enter the arena and assist a party in ways that give rise to an apprehension that the Tribunal is running the case for one party. On the other hand, it is equally irresponsible and counterproductive for a presiding member to sit mute while a party in person struggles to present their case in a sensible way, produce evidence from their own witnesses, respond to objections from the other side, cross-examine the other party's witnesses and make submissions which are coherent, relevant to the legal issues to be decided and in a logical sequence.

28 Ibid [60], [61].
29 Queensland Law Society, *Self-represented Litigants: Guidelines for Solicitors — Practice Support* (November 2017) 4.
30 Ibid.
31 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 109, Sch 1.

In order that parties in person can have some appreciation that they have been treated fairly by the system, the system sometimes needs to assist them, irrespective of the merits of their case.

The *Australia and New Zealand Tribunal Excellence Framework*, published by the Council of Australasian Tribunals (COAT), states that a central obligation of a tribunal is the provision of a fair hearing:

> An important element of this obligation is the duty to provide assistance to self-represented parties (sometimes called litigants in person). Members and staff should identify the difficulties experienced by any party. … A tribunal has an obligation to assist litigants in person to overcome these disadvantages to the extent necessary to ensure a fair hearing.[32]

The recently published fourth edition of the COAT *Practice Manual for Tribunals* (Practice Manual) refers to the need for clear and calm communication to parties by tribunal members about matters such as:

- the nature and legal limits of the tribunal's role;
- what is expected and permitted of parties;
- how the proceedings will be conducted; and
- parties' appeal rights.[33]

The Practice Manual notes that the absence of representation for parties imposes upon tribunal members additional responsibilities to enable parties to participate effectively in proceedings. These extend to:

- providing additional information to self-represented parties;
- giving guidance about the posing of questions to witnesses;
- exploring technical matters of which self-represented parties may be unaware; and
- posing questions in raising issues which have not been canvassed by parties.[34]

The Practice Manual acknowledges that, in such circumstances,

> tribunal members may need to be more detailed in their explanations of tribunal procedures than they would otherwise be and to extend a measure of latitude to non-legally-trained persons who wish to ask questions and make submissions. It can also necessitate tribunal members being more involved in asking questions that self-represented persons are not able to formulate and in assisting parties than they otherwise would be where effective legal representation was involved.[35]

What ACAT must do to assist a self-represented party depends on the individual, the nature of the proceedings and the person's intelligence, abilities and understanding of the case.

While that is accepted, there can be difficulties for ACAT in a particular case where only one party is self-represented. ACAT must maintain a perception of impartiality and ensure that no party feels that the Tribunal is taking sides.

32 Council of Australasian Tribunals, *Australia and New Zealand Tribunal Excellence Framework* (COAT, 2nd ed, 2017) 16.
33 Council of Australasian Tribunals, *Practice Manual for Tribunals* (COAT, 4th ed, 2017) 109.
34 Ibid.
35 Ibid 110.

The perceptions can go either way and sometimes both ways simultaneously. Some self-represented parties might perceive the ACAT member to be partial towards the represented party simply because lawyers and ACAT members are seen to be part of the same system from which the self-represented party is excluded.

Those misperceptions might not be excluded entirely. However, an ACAT member can assist all the parties at a hearing by making some introductory statements which clearly set the context in which the hearing occurs and spell out the procedures to be followed.

At the beginning of the hearing, the presiding member should identify and, if possible, have the self-represented party and other parties agree upon the real issues in the case. A careful explanation might ensure that the self-represented party appreciates which issues are to be addressed and why the hearing is confined to those issues. That might help shorten the proceedings by focusing attention on the real issues and avoid irrelevant arguments.

The ACAT member should also explain to the self-represented party matters such as:[36]

- the purpose of the hearing and the particular issue on which a decision is to be made;
- that the issue will be decided on the oral and documentary evidence before ACAT;
- the manner in which the hearing will proceed;
- the order of the calling of witnesses and the party's right to ask questions of witnesses;
- the procedural rules that seek to ensure that parties receive a fair hearing;
- the self-represented party's right to object to certain matters, such as evidence or the taking of a particular procedural course; and
- the role of case law as precedent or persuasive authority.

It might be necessary to repeat some explanations during the hearing as issues arise.

It might be advisable to inform the self-represented party at the outset to speak slowly and take time in the presentation of their case. That may reduce some pressure on that party and enable them to articulate their case more clearly.

When oral evidence is being taken, the ACAT member might assist the self-represented parties to obtain basic information from witnesses such as their name, address and occupation.

At the end of the hearing, if the decision is reserved, it might be useful to advise the self-represented party of the period within which decisions are usually released and the process by which the reasons for decision will be made available to each party. It might relieve the self-represented party of some anxiety to know that the time frame for decision is not indeterminate and will also temper any expectations of an immediate decision. The effect of such communications could reduce unnecessary contact between the party and ACAT. Indeed, all parties should be advised that they should not contact ACAT after the decision is reserved unless they have contacted the other parties or their representatives, providing a copy of the proposed written communication.

One consequence of dealing appropriately with some self-represented parties is that the mediation or hearing of matters takes less time when the parties or their representatives

36 The following suggestions are adapted from the *Equal Treatment Benchbook*: Supreme Court of Queensland, above n 5, 142–3.

can identify and narrow issues and focus on them. When matters are not settled in mediation or conference, realistic amounts of time need to be allocated for the hearing to allow for the hearing to be completed as scheduled (not adjourned for conclusion at a later date) and to ensure that sufficient member time is scheduled to avoid overlap with other cases.

The flow-on effect of some matters involving self-represented parties is that other matters cannot be dealt with in a timely fashion or members have less time to write reasons for decisions in other matters. As the Victorian Court of Appeal stated recently:

> The management of cases involving unrepresented litigants is a source of continuing difficulty for judicial officers. They are required to balance the interests of justice in the particular case with the competing public interest in the efficient use of public resources and in access to justice for other litigants waiting to have their cases heard. What is required is a combination of patience and judgment and an ability to discriminate between those cases where the interests of justice demand a prolongation or adjournment of the hearing — so that the unrepresented litigant's case can be fairly presented — and those where the interests of justice call for expeditious disposal.[37]

The New South Wales Bar Association's *Guidelines for Barristers on Dealing With Self-represented Litigants* make the following observations about the impact on judicial officers of having self-represented litigants before them:

> The principal effect on the judicial officer of a matter involving a self-represented litigant is to increase the time spent on the case before and during the hearing. Other effects reported … include more delays, more adjournments, more judicial work, cases not being heard, frustration, anger at staff (errors in documents, lost documents) increased stress and raised blood pressure for judges.[38]

Recent court decisions

The challenges for ACAT in conducting proceedings which are simple and quick but observe natural justice and procedural fairness are outlined above. In that context, it is appropriate to look at two recent superior court decisions which give some practical guidance to courts and hence tribunals about how the appropriate balance is to be struck when seeking to conduct fair hearings in circumstances where the self-represented party is difficult and, in particular, refuses to accept the procedural rulings of the court.

On 28 August 2018, the Victorian Court of Appeal (President Maxwell and Beach and Niall JJ) allowed two appeals against findings that self-represented litigants had been denied procedural fairness in cases before the Magistrates Court (*Roberts v Harkness*[39] (*Harkness*)) and the County Court (*Doughty-Cowell v Kyriazis*[40] (*Kyriazis*)).[41]

In both matters the Court of Appeal discussed the fundamental obligation of every court to ensure a fair hearing.

In determining whether the requirements of procedural fairness were met, the question was whether each party was given a reasonable opportunity to present their case. It was held, in both cases, that the court had done all that was reasonably necessary to ensure a fair hearing.

37 *Roberts v Harkness* [2018] VSCA 215 [66].
38 New South Wales Bar Association, above n 8, [12].
39 *Roberts v Harkness* [2018] VSCA 215.
40 *Doughty-Cowell v Kyriazis* [2018] VSCA 216.
41 The following discussion of these cases draws and expands upon the Summary of Judgment issued by the Supreme Court of Victoria on 28 August 2018.

In *Harkness*, the Court said:

> Axiomatically, what is 'reasonable' for this purpose will depend on the circumstances of the case. Matters to be taken into account in determining the practical content of fairness in the particular case will include
>
> - the nature of the decision to be made;
> - the nature and complexity of the issues in dispute;
> - the nature and complexity of the submissions which the party wishes to advance;
> - the significance to that party of an adverse decision ('what is at stake'); and
> - the competing demands on the time and resources of the court or tribunal.[42]

Harkness

Mr Harkness was charged with summary offences listed for hearing in the Magistrates Court. In documents filed prior to the hearing, he outlined objections to the jurisdiction of the Court. At the commencement of the hearing, the magistrate informed Mr Harkness that she would dismiss his objection, refusing his requests to make oral submissions.

Following a persistent refusal to accept that ruling, and disrespectful and disruptive behaviour, Mr Harkness was excluded from the hearing and the charges were heard and determined in his absence. On appeal to the Supreme Court, it was held that the magistrate had breached the rules of natural justice by failing to hear oral submissions as to jurisdiction and failing to provide Mr Harkness with due assistance in relation to those submissions.

The Court of Appeal reversed that decision, saying:

> Especially given that the objection to jurisdiction was only a preliminary point, it was perfectly appropriate for the Magistrates' Court to have directed the filing of argument in advance. That is a procedure routinely adopted by courts. It serves the interests of justice, by giving parties time to formulate their arguments in writing and by enabling judicial officers to prepare for hearings by reading the written arguments before going to court.
>
> It was readily apparent from both of the documents which Mr Harkness had filed with the court that he was able to articulate, fully and clearly, the basis of his objection to jurisdiction. It was equally clear that the objection had no foundation whatsoever in law and that no amount of elaboration could have altered that position.[43]

Kyriazis

Mr Kyriazis had been convicted of summary offences in the Magistrates Court. He represented himself before the County Court on an appeal against his convictions. Following a ruling by the judge that the proceeding could be sound-recorded but not videotaped, Mr Kyriazis refused to participate in the proceeding. He was convicted and discharged. He sought judicial review of the decision in the Supreme Court, where it was found that the County Court judge had breached the rules of natural justice and was guilty of 'ostensible bias'.

The Court of Appeal reversed that decision. It found that Mr Kyriazis had been provocative and confrontational in pre-hearing correspondence and, from the first moment of the

42 *Roberts v Harkness* [2018] VSCA 215 [49].
43 Ibid [11], [12].

hearing, had refused to accept the judge's ruling on the question of whether he could record the proceeding.

The Court said:

> The hearing [before the County Court judge] was remarkable for the level of hostility, anger and aggression directed by Mr Kyriazis (and some of his supporters) towards the Court. The judge for the most part remained calm and patient, although — unsurprisingly — he did occasionally raise his voice in his requests that Mr Kyriazis keep quiet.[44]

The Court reiterated that the content of the judge's obligation to provide assistance in order to ensure a fair hearing varies with the circumstances of the case and, in particular, the capabilities and attitudes of the self-represented litigant.

The Court concluded as follows:

> [T]his was not a case where the judge was obliged to take extra measures to provide assistance to Mr Kyriazis. On the contrary, it was Mr Kyriazis who — for no good reason — decided to withdraw from his own appeal and who thereafter engaged in what can only be described as disgraceful conduct towards the judge. There was nothing more his Honour could have done to ensure a fair hearing.[45]

Does a self-represented party need a litigation guardian for the proceedings?

In some instances, ACAT might have concerns about whether a self-represented party is capable of conducting their proceedings and, hence, whether that party needs a litigation guardian for those proceedings.

ACAT considered this question in detail in *Complainant 201717 v The Australian Capital Territory*.[46]

At common law there is a rebuttable presumption that an adult is legally competent to bring or defend legal proceedings.[47] Where a person is not legally competent, a litigation guardian may be appointed to protect the person, the other parties to the proceedings and the legal process.

The ACAT Act sets out who may apply to ACAT[48] and who are the parties to an application,[49] and provides that a party may appear in person.[50] These provisions do not replace the common-law principles about legal competence but work in conjunction with them. Procedural Direction 8 of the ACT Civil and Administrative Tribunal Procedural Directions 2010 (No 1) (Procedural Directions) provides:[51]

> **8. The Representation of people under a legal disability**
>
> 8.1 A person who is under a legal disability may only be a party to an application if they are represented by a litigation guardian unless the Act or an authorising law or these Directions provide otherwise.

44 [2018] VSCA 216 [4].
45 Ibid [8].
46 *Complainant 201717 v The Australian Capital Territory* [2019] ACAT 1. The following discussion draws on the reasons for decision in that case: [44]–[52].
47 *Murphy v Doman* [2003] NSWCA 249.
48 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 9.
49 Ibid s 29.
50 Ibid s 30.
51 Procedural Direction 9 then provides for a process of appointing a litigation guardian by way of affidavit.

The term 'legal disability' is defined in the Procedural Directions as follows:

> 'a person with a legal disability' means a child or a person who is not legally competent to be a party to an application because of a mental disability ...

ACAT may in its discretion dispense with the requirements of the Procedural Directions.

Where a question as to the legal competence of a party arises, ACAT should consider the implications of that issue for the particular case before proceeding further. It should do so even if the other party does not wish to raise any point about competence but ACAT has serious doubts about the party's capacity.[52]

Hearing the matter when one party lacks the requisite capacity, even to determine preliminary points, may be to provide to that party no hearing at all.[53] This would be a breach of the requirements of procedural fairness.[54]

Nevertheless, in some cases it will be appropriate to proceed to hear and decide a matter without determining the question of legal competence, or even where satisfied that one party is not legally competent.[55] Whether ACAT should proceed or not will depend upon the 'need' for a litigation guardian in the circumstances of the case.

In some situations, the utter hopelessness of an action may make it a proper case for summary dismissal, without there being any need to consider the party's capacity to conduct it. The appropriate course for ACAT to take will, of course, inevitably depend on the circumstances of the case, bearing in mind that the threshold for the summary dismissal of a proceeding is a high one.[56]

The approach to determining competence for legal proceedings, and particularly for a self-represented litigant, was summarised by Kyrou J in *Slaveski v State of Victoria*[57] (*Slaveksi*) as follows:

> 25. There is a presumption that a person of full age is capable of managing his or her own affairs, which must include the management of litigation to which he or she is a party. The person who alleges the contrary bears the onus.
>
> 26. There is no universal test for determining whether a person is capable of managing his or her affairs. Lack of capacity is usually denoted by a person's inability to understand the nature of an event or transaction when it is explained. In relation to litigation in which a person is a party, the person must be able to understand the nature of the litigation, its purpose and its possible outcomes, including the risks in costs.
>
> ...
>
> 31. Where a person is a self-represented party to a proceeding, the level of mental capacity required to be a 'capable' litigant will be greater than that required to instruct a lawyer because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation.

52 *L v Human Rights & Equal Opportunity Commission* [2006] FCAFC 114 [33].
53 *Murphy v Doman* [2003] NSWCA 249 [47]–[51].
54 ACAT is required by its legislation to perform its functions in a way which is procedurally fair but also to aspire to being 'quick' and 'efficient'. Sometimes there is a tension between these imperatives. A failure to provide procedural fairness will not make the decision of ACAT a nullity but may be an appellable error: *Legal Practitioner v Council of the Law Society (No 2)* [2014] ACTSC 352.
55 See *Clarey v Permanent Trustee Co Limited* [2005] VSCA 128.
56 *L v Human Rights & Equal Opportunity Commission* [2006] FCAFC 114 [35].
57 [2009] VSC 596.

32. In my opinion, where a plaintiff is self-represented, the following issues are potentially relevant in determining whether he or she is a person under disability for the purposes of r 15.01 of the [Supreme Court (General Civil Procedure) Rules 2005 (Vic)]:

    (a) Does the plaintiff understand the factual framework for his or her claims and the type of evidence required to succeed in his or her claims?

    (b) Is the plaintiff capable of understanding what is relevant to the proceeding and what is not relevant when these matters are explained to him or her?

    (c) Is the plaintiff capable of assessing the impact of particular evidence on his or her case?

    (d) Is the plaintiff able to understand the Court processes and the basic rules for conducting his or her case when these matters are explained to him or her?

    (e) Is the plaintiff able to understand Court rulings made during the trial when they are explained to him or her?

    (f) Assuming the plaintiff is able to understand Court processes, the basic rules of conducting his or her case and Court rulings, is he or she capable of complying with them and directions given by the judge?

    (g) Does the plaintiff understand the roles of counsel for the defendant, witnesses and the judge and is he or she capable of respecting those roles and allowing the relevant individuals to discharge their duties without inappropriate interference or abuse?

    (h) Is the plaintiff able to control his or her emotions and behave in a non-abusive and non-threatening manner when events do not go his or her way during the trial (such as when adverse rulings are made by the judge, questions are asked in cross-examination on sensitive issues or unfavourable answers are given by witnesses)?

    (i) Does the plaintiff have an insight into the possible adverse consequences of his or her behaviour in court, including delay in the resolution of the claims, the defendant incurring additional costs that the plaintiff might have to pay if the claims are unsuccessful and the tying up of scarce judicial resources when these matters are explained to him or her?

    (j) Does the plaintiff understand that he or she could possibly lose the case in whole or in part when this matter is explained to him or her?

    (k) If the cumulative effect of the evidence is such that a lay person of reasonable intelligence and common sense would form the view that a particular claim will fail, would the plaintiff be capable of forming such a view?

    (l) Is the plaintiff capable of assessing any settlement proposal on its merits, having regard to the state of the evidence, the parties' submissions and other developments in the proceeding as at the time the proposal is made?

    (m) If the trial is long and complex, is there a risk that the stress and pressure of the litigation might harm the plaintiff's physical or mental health?

33. A self-represented person who is incapable of continuing to act as his or her own advocate is not necessarily incapable of managing his or her affairs in relation to the relevant proceeding, as that person may be capable of retaining legal representatives to continue to conduct the proceeding.

...

35. A decision on whether to appoint a litigation guardian is usually made after giving the party affected and the other parties to the proceeding an opportunity to be heard on the matter. However, the party affected will not need to be heard personally where it is incontrovertible that he or she is incapable of making any meaningful submissions on the matter.[58]

The factors described in *Slaveski* can be usefully applied in ACAT context, subject to the qualification that in that case the Court was considering a litigant attempting to represent himself in a court, faced with the rules of evidence and civil procedure. It should be expected that a self-represented party would find the processes of a tribunal that is not bound by the rules of evidence and conducted informally less intimidating.

The question whether a self-represented party needs a litigation guardian might be raised by a party to the proceedings. The Queensland Law Society's *Self-represented Litigants: Guidelines for Solicitors* states:

> If a party to litigation may have impaired capacity and if the issue of capacity is raised and found to exist by the Court or QCAT [Queensland Civil and Administrative Tribunal[, the UCPR [*Uniform Civil Procedure Rules*] requires that the matter can only proceed if a litigation guardian is appointed. If you are acting for a plaintiff in the matter and there is a finding that the defendant has impaired capacity, then unless a litigation guardian is appointed your client will not be able to continue the proceedings. If your client is defending a matter where the plaintiff has impaired capacity, then the matter may sit unresolved, indefinitely, until a litigation guardian can be appointed. Where you suspect that the self-represented person may have impaired capacity the question arises as to whether you or your client has an obligation to make the court aware of your suspicions. Further, there is a risk that the validity of any settlement agreement could subsequently be challenged on the grounds of impaired capacity.[59]

What is more important — a fair process or a legally exemplary outcome?

Although a tribunal will focus on reaching a fair and legally sound outcome, it is not necessarily the case that the parties judge the process by reference only to that outcome. In a review of the literature about the factors driving public and participant satisfaction with courts and tribunals, the authors concluded:

> the suggestion that satisfaction is simply dependent upon outcome, driven solely by the self-interest of each participant, and somehow anathema to justice, is challenged by the evidence. Even losing parties may gain some satisfaction from a process which is palpably just.[60]

Participant and public perceptions about the fairness of process (that is, about procedural justice) depend upon a complex mix of factors. The authors of that review of the literature found that five process-oriented factors contributed to the perception of fairness and hence satisfaction:

- the expectations of, and information provided to, participants;
- the quality of participation granted to participants (that is, the extent to which, and the process through which, participants are able to get their story out in a way they view as accurate and fair);
- the quality of treatment and, in particular, the respect shown to the participant during their time at the tribunal;
- issues of convenience and comfort including timeliness and efficiency; and

58 Ibid [25]–[35] (footnotes omitted).
59 Queensland Law Society, above n 29, 8.
60 RL Moorhead, M Sefton and I Scanlan, *Just Satisfaction? What Drives Public and Participant Satisfaction With Courts and Tribunals — A Review of Recent Evidence* (Cardiff Law School, Cardiff University, 2008) 7.

- judgments about tribunal members and staff — whether they were perceived as helpful and empathetic.[61]

Tribunals also have an obligation to provide a fair and efficient dispute resolution service, such as mediation and conciliation conferences, where the tribunal controls the process but the parties control the outcome. Those forums provide an opportunity for the parties to fashion outcomes they can live with rather than have one imposed upon them after a hearing.

I note that, although such processes might be inherently fair to the parties and provide the context in which just outcomes might be reached, there will be a proportion of parties who will seek to use whatever processes are available to advance their interests. They might use the system to delay any decision or other outcome that might require them to take action — for example, by paying a sum of money to the other party. Such users of the system necessarily result in costs to ACAT in staff and member time and a diversion of scarce resources away from more productive activities.

Conclusion

ACAT needs to prepare on the basis that one or more of the parties will represent themselves in most of the proceedings before it, whether at mediation, preliminary conference or hearing.

The involvement of self-represented parties raises numerous challenges for those parties and for other parties, as well as for ACAT.

We need to bear that in mind as we seek to refine our ways of doing our work on a case-by-case basis, while remembering the implications of giving intense attention to one case for the overall disposition of many other matters before ACAT.

It might be that some parties cannot, or will not, be helped procedurally. We have to ensure that, to the best of our ability, each matter is resolved 'as quickly as is consistent with achieving justice' while ensuring that the 'decisions of the tribunal are fair'.

However, there are some self-represented parties for whom ACAT might need to take a significant extra step.

We need to be alert to the needs of the parties in each case and the nuances of individual cases in fashioning appropriate procedures and adjusting our individual approaches for and during the proceedings.

Sometimes that will feel like we are doing at least as much work as the parties to bring the proceedings to an appropriate conclusion. So be it. That is part of the challenge, and sometimes the satisfaction, of being a member of ACAT.

61 Quoted in Council of Australasian Tribunals, above n 33, 8.