Teaching arbitration to non-lawyers

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Introduction

The teaching of arbitration is a topic of vital importance for the future of this form of dispute resolution in Australia. Arbitration, being in most cases a consensual system of dispute resolution, will only survive if the men and women of commerce have confidence in the system. Education and training are the key components of the creation and maintenance of the necessary level of confidence. If there is insufficient confidence, the parties will revert to the traditional method of dispute resolution, litigation, or may attempt to resolve their dispute by mediation or conciliation.

In light of the importance of education and training of arbitrators, it is astonishing to find that there is a total dearth of published articles or materials in the relevant academic and professional literature on this subject. Besides revealing a lacuna which this article will attempt to fill, it also indicates that educational issues concerning arbitration have received insufficient attention in the past.

It is very timely to be considering the system of education of arbitrators. The Institute of Arbitrators and Mediators Australia (hereafter referred to as 'the Institute') has recently decided to restructure totally its system of training for graded arbitrators. In outline, the Institute is replacing the intensive long weekend General and Advanced Arbitration courses offered in different years in the different State capital cities with a new system of two semester-long university courses. The courses, which commence in March 1999, are the product of a joint venture between the Institute and the University of Adelaide.[1] The content of the courses are organised and arranged by the university, but the use of distributed written and taped materials and local tutors will be available in all the State and Territory capitals (except Darwin). This national course will qualify successful participants for grading as an arbitrator by the Institute and will also lead to the award of a Professional Certificate in Arbitration and Mediation awarded by the University of Adelaide.

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This article will not focus on educational issues generally in the field of arbitration. This raises such broad issues that it would more properly be the subject of a book. Rather, the article will focus on one aspect of the subject, that of the education of lay arbitrators. Past discussions and debates as to education and training of arbitrators have failed to draw what appear to me to be very important distinctions between legally trained and non-legally trained persons in this area.

The issue of legal training for non-lawyers in the professions is not unique to the field of arbitration. For many years law faculties in Australian universities have been called upon to provide basic teaching in the relevant laws affecting other professions, such as medicine, engineering and nursing. In some areas where the involvement of law is more substantial, such as accountancy, individual legal academics are employed and departments of law or legal studies are established within other disciplines to teach the legal components. In recent years the issue of legal training for non-lawyers has emerged at the graduate level, where professionals from other disciplines wish to undertake studies for specialist areas such as the environment and taxation for the award of Graduate Diplomas or Master's degrees in law. These issues have been resolved in a pragmatic, ad hoc manner as and when they have arisen. Sadly, however, little (if any) attention has been given to the educational issues associated with such decisions. There are thus no precedents or analogies in related fields that might be useful to adopt in respect of arbitration. The field of discussion raised by this article is thus virgin territory in every sense.

Why is this topic so important? I believe that there are four major reasons:

1. There are a very large number of lay arbitrators both in Australia and overseas. While there appear to be no precise statistics available, lay arbitrators appear to outnumber those with a traditional legal background. This situation has undoubtedly arisen because there are so many different types of disputes that are capable of resolution by arbitration. Building construction, which is the most popular field of arbitration, involves arbitrators who are engineers, architects, building consultants and valuers. Other types of disputes resolved by arbitration involve different professional and business groups. Thus amongst the ranks of graded arbitrators there are chartered accountants, medical practitioners, psychologists, economists, quantity surveyors, insurance loss adjusters, company directors, management consultants, union officials and teachers.

2. The availability of arbitrators with an expertise in a wide variety of professional and business backgrounds is the major reason why arbitration has historically

flourished in the commercial sector. In addition to the traditional delays in arriving at justice under the court system, there has always been the additional problem that judges have no particular expertise in commercial matters. The ability of the parties to choose their own arbitrator amongst a group of arbitrators with an expertise in the subject matter under dispute has been a powerful factor over the centuries in support of the arbitration of commercial disputes around the world.[2]

3. The possibility of having a dispute resolved in a binding way by a lay person is what most distinguishes arbitration from litigation in the eyes of the public. Amongst the plethora of different modes of dispute resolution, the most basic division is between binding and non-binding systems of dispute resolution. Non-binding systems consist of mediation, conciliation, mini-trial, expert appraisal and a variety of other models, while binding systems consist solely of litigation and arbitration. Arbitration and litigation are often difficult to differentiate, especially in complex cases, as the arbitration hearing and the award closely resemble a trial and a written judgment. If a genuine alternative is sought to litigation, many commercial persons think in terms of mediation rather than arbitration. It is thus important that the distinctions between arbitration and litigation are emphasised. I believe that the most distinctive difference is the fact that arbitrations can and frequently are conducted by non-legal experts.

4. A number of commentators have stated in recent years that commercial arbitration in Australia appears to be losing market share to mediation and litigation.[3] The reasons for this cannot be scientifically proven. However, it may be assumed that at least part of the reason is that it has not been seen to be an effective form of dispute resolution compared with the alternative forms available. As will be discussed in detail later,[4] arbitrators have failed to take full advantage of the flexibility of procedure available generally in arbitral hearings. In so doing, arbitration has forfeited one of its major advantages over litigation. Part of the responsibility for this state of affairs must lie with the existing system of training of non-legally trained arbitrators.

[2] For a discussion of the historical origins of commercial arbitration, see H. Zelling, 'Judges as Arbitrators' (1993) 11 *the arbitrator,* 208; Sir N. Stephen, 'Historical Origins of Arbitration' (1991) 10 *the arbitrator,* 45; and B. Hutton, 'Arbitration – Some Historical Aspects' (1994) 13 *the arbitrator,* 51.

[3] See e.g. R. Bernstein, QC, 'Arbitration at the Crossroads: The Arbitrator as Leader? Or just Listener?' (1996) 14 *the arbitrator,* 209 at 209; D.M. Cato, 'Is the Australian Arbitrator Disadvantaged over his UK Counterpart?' (1998) 16 *the arbitrator,* 252 at 271.

[4] See p.5ff, infra.

Current arbitration training

The current system of training for prospective arbitrators is characterised by the following.

- The same training and examination programme is imposed on all applicants, regardless of their professional background. Thus, lay persons are treated in exactly the same manner as qualified lawyers and no allowance is made for the existing legal skills possessed by the latter. This has two consequences. First, lawyers are deterred from engaging in arbitration training by the requirement that they attend sessions and sit examinations on basic areas of law, such as contracts and torts, with which they are familiar. This tends to breed resentment on their part and a lack of interest in the course of instruction. Secondly, the lecturer is faced with the impossible task of trying to pitch his or her presentation in such a manner as to offer something interesting and original to both groups of students. In practice, either the lecturer concentrates most on the lawyers, in which case the non-lawyers will flounder in incomprehension faced with difficult legal concepts, or on the non-lawyers, in which case the presentation will inevitably appear simplistic and uninteresting from the standpoint of the lawyers.
- A failure to orient the presentation on traditional legal subjects to the needs of arbitrators. Thus, topics such as contracts, torts, evidence and procedure are often presented in the abstract without considering the special needs of the audience. It should surely be understood that the aim of such legal presentations is not to make prospective lay arbitrators fit and competent for legal practice, nor to ground them in the principles of the common law, nor to make them think and reason like lawyers. Rather, the purpose is solely to teach them sufficient materials so that they understand sufficient to be able to conduct an arbitration properly.
- Nearly all the lecturers in the arbitration courses are legally trained. This may be thought of as natural, in that lawyers are in a far better position to present and explain legal concepts arising in the relevant case law and legislation. However, it means that non-lawyers are not provided with the practical advice that could be offered by experienced arbitrators on various matters. Non-lawyers also have no role-models offered to them by the training programs. This is likely to increase their sense of timidity when conducting arbitration hearings.

One vital aspect of any form of legal training is that it takes full account of changes and developments in the relevant applicable law and legislation. In relation to arbitration, there have been changes in virtually every aspect of the law over the past 20 years. Many of these have been faithfully documented and discussed by the various arbitration lecturers. The majority of these changes are

technical and in practice only affect a small number of arbitrations. There are certain changes in the fields of evidence and procedure and administrative law which are more fundamental, however. A knowledge and appreciation of these are vitally important for lay arbitrators as, in the writer's opinion, the current lack of knowledge has been largely responsible for arbitration losing market share in the commercial dispute resolution context. These vital changes will now be separately discussed.

Evidence and Procedure

One major change introduced in each State and Territory by the new uniform Commercial Arbitration Acts[5] (hereafter referred to as 'the Act') was the addition of a number of provisions designed to give increased flexibility to arbitrators in relation to the application of the rules of evidence and procedure. Such wide flexibility did not exist under the earlier, now-repealed legislation.[6]

Section 14 of the Act reads:

> "Subject to this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit."

This provision replaced earlier provisions, the effect of which was to permit arbitrators to give directions as to procedural matters.[7]

The discretion conferred on arbitrators by s.14 is reinforced by the terms of s.19(3), which states:

> "Unless otherwise agreed in writing by the parties to the arbitration agreement, an arbitrator or umpire in conducting proceedings under an arbitration agreement is not bound by rules of evidence but may inform himself or herself in relation to any matter in such manner as the arbitrator or umpire thinks fit."

Section 22(2) of the Act goes even further and permits what are commonly referred to as "equity clauses" or "amiable composition". The section reads:

> "If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness."[8]

[5] This legislation was introduced in New South Wales and Victoria (1984), Western Australia and the Northern Territory (1985), South Australia, Tasmania and the Australian Capital Territory (1986) and Queensland (1990).

[6] The earlier legislation was the *Arbitration Act* 1902 (NSW) (which also applied in the Australian Capital Territory); *Arbitration Act* 1958 (Vic.); *Arbitration Act* 1891 (SA) (which also applied in the Northern Territory); *Arbitration Act* 1895 (WA); *Arbitration Act* 1891 (Tas.).

[7] See *Esso Resources Ltd v. Plowman* (1995) 183 CLR 10 at 26, per Mason C.J.

[8] This provision is a rough copy of the art. 33, para. 2 of the UNCITRAL Arbitration Rules, and originates from continental Europe. Art. 33 is phrased slightly more conservatively than s.22 of the Act. By art. 33(3), the arbitrator is required in all cases to decide in accordance with the terms of the contract and to take into account the usages of the trade applicable to the transaction.

These provisions give the arbitrator effective powers to ensure that the procedure is conducted in such a way as to minimise the time and expenses associated with arbitration. Unfortunately, perhaps due to the inherent conservatism of the legal profession or to the fact that lawyers are more accustomed to litigation than to arbitration as a method of dispute resolution, the potential significance of such provisions has been downplayed and potential arbitrators have been advised to proceed very warily, for fear of judicial intervention. The inevitable result has been the unnecessary adoption of lengthy pre-hearing procedural steps sometimes even in straightforward arbitrations, an increase in the length of the hearing and a resultant increase in the costs of arbitration. This in turn leads disputants to question the value of arbitration, in comparison with litigation, and to turn away from arbitration.

There is no justification for such a conservative approach to the use of these statutory provisions. While there has been no considered judicial analysis of the scope of ss14 and 19(3),[9] similarly-worded provisions have existed for many years in several other State and Territory statutes establishing specialist tribunals.[10] In exercise of these powers, the tribunals have established very flexible and streamlined procedures and conduct their cases rapidly and at low cost. None of these tribunals has been successfully challenged for exceeding the powers equivalent to ss14 and 19(3).

As for the interpretation of s.22(2), the courts have rejected possible interpretations designed to restrict the power of the arbitrator to those of ignoring technicalities and strict constructions, and limiting the section to procedural matters.[11] In *Woodbud Pty Ltd v. Warea Pty Ltd*,[12] Young J. cited with approval the following dictum of Lord Selborne in a nineteenth-century decision of the Privy Council:

> "Their Lordships would, no doubt, hesitate much before they held that to entitle arbitrators named as *amiables compositeurs* to disregard all law and to be arbitrary in their dealings with the parties; but the distinction must have some reasonable effect given to it, and the very least effect which can reasonably be given to the words is, that they dispense with the strict observance of those rules of law the non-observance of which, as applied to awards, results in no more than irregularity."[13]

[9] Note the decision in *Esso Australia Resources Ltd v. Plowman* (1995) 183 CLR 10, where the High Court held that there is no reason to doubt that pursuant to s.14 an arbitrator may decide who shall be present at an arbitration hearing.

[10] See e.g. *Residential Tenancies Act* 1995 (SA), ss32(1)(2); *Small Claims Tribunals Act* 1973 (Vic.), s.31(3); *Consumer Claims Tribunals Act* 1987 (NSW), ss17(1); 23(4).

[11] For a discussion of seven possible interpretations of s.22(2), see M.J. Mustill and S.C. Boyd, *Commercial Arbitration*, Butterworths, London, 2nd ed. 1989, at 76-83. The authors do not venture a definite conclusion as to the correct interpretation, but state (at 80) a preference for the interpretation that the arbitrator need not respect the rules of law, but must apply the express terms of the contract.

[12] (1995) 125 FLR 346.

[13] *Rowland v. Cassidy* (1888) 13 App. Cas. 770 at 772.

Young J. believed that s.22 has a somewhat broader scope. His Honour stated:

> "Probably the clause goes further than evidentiary and procedural problems and permits an *amiable compositeur* to disregard such rules as the parol evidence rule, the rule that contracts by specialty cannot be varied by oral contract, and the rule that one cannot look to subsequent conduct to construe a contract.
>
> The *amiable compositeur* may also disregard the rule that collateral contracts cannot be inconsistent with the main contract, he or she may apply principles of rectification and perhaps may also supplement the contract by filling out the contractual regime in areas where the parties have not thought through it. It is uncertain how far, if at all, the *amiable compositeur* can go beyond this. Certainly the absolute ceiling is where the doctrine of manifest disregard by the arbitrator of his mandate comes into play."[14] [Citations omitted]

Administrative Law

Commercial arbitrations must comply with the various requirements of administrative law. Failure to do so will mean that an aggrieved party may seek appropriate remedies before the courts. Depending on the circumstances, the remedy may consist of the removal of the arbitrator from the reference, the reversal of the decision on appeal, the setting aside of an award or the remitting of the matter to the arbitrator for reconsideration. Today such powers exist under the Act. However, such powers have always existed, both at common law and under earlier arbitration legislation.

The existence of the court's supervisory powers over arbitrators has always been emphasised in arbitration training courses. In the writer's opinion, it has been over-emphasised. The court's powers to intervene are in fact significantly less under the present Act than was previously the case.

For example, prior to the commencement of the modern legislation the case stated procedure was available in all arbitrations. Pursuant to this any party could request an adjournment in order for a point of law to be referred to the Supreme Court, with all the associated consequent delays and expenses. Such a request was usually granted by the arbitrator for fear that a refusal would be challenged as 'misconduct', within the meaning of the legislation. The case stated procedure has been repealed by the present Act and has been replaced by s.39. This section enables a party to make an application to the Supreme Court for the determination of a point of law arising in the course of an arbitration, but (in the absence of the consent of all other parties) only with the consent of the arbitrator and only where the court is satisfied both that the determination of the application might produce substantial savings in cost to the parties and the question of law is one in respect of which leave to appeal would be likely to be granted.

[14] (1995) 125 FLR 346 at 355-356. This case is discussed in (1995) 14 *the arbitrator* 155.

The judicial review of awards has also been significantly circumscribed under the Act. There is no longer any automatic right of appeal on a question of law arising out of an award to the Supreme Court. By ss38(2) and (4), in the absence of the consent of all other parties to the arbitration agreement, an appeal on a question of law requires the leave of the Supreme Court. Section 38(5) states that the Supreme Court shall not grant leave under s.38(4) unless it considers that:

"(a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and

(b) there is –

(i) a manifest error of law on the face of the award; or

(ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law."[15]

In reported decisions under the Act, the courts have shown themselves reluctant to find that errors of law committed by arbitrators are 'manifest'. For example, Byrne J. of the Supreme Court of Queensland held in *Re Tiki International Ltd*[16] that an arbitrator who construed an instrument in a way that was fairly arguable did not commit a 'manifest' error of law within the meaning of the sub-section. In *Commonwealth of Australia v. Thiess Contractors Pty Ltd*[17] it was stated that it is usually only where an arbitrator's decision is "obviously wrong" that the court would grant leave to appeal.[18]

The most relevant recent judicial pronouncement on this point is that of Matheson J. in *Prosser v. D. J. & J. Barrie.*[19] Referring to the correct interpretation of s.38(5), his Honour cited with approval[20] a dictum of an English judge (Mocatta J.) in *Gunter Henck v. Andre & Cie SA*:[21]

"It is well established on the authorities that although the courts are entitled to and, indeed, must set aside awards containing errors of law on their face, this jurisdiction is not lightly to be exercised. If parties choose to have their disputes settled by arbitrators, then, subject to certain limited exceptions, the attitude of the courts has been that the parties should take arbitration for better or for worse. They have chosen their tribunal."

[15] All the requirements for leave must be established clearly before it can be granted: *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd* (1994) 35 NSWLR 704 at 708; *Promenade Investments Pty Ltd v. State of New South Wales* (1991) 26 NSWLR 203.

[16] [1994] 2 Qd R 674. See also and compare *Leighton Contractors Ltd v. Western Australian Government Railways Commission* (1966) 115 CLR 575 at 578; *D. Phillips Constructions (Vic.) Pty Ltd* [1980] VR 171; *Commonwealth v. Rian Financial Services and Developments Pty Ltd* (1992) 36 FCR 101.

[17] (1990) 4 WAR 425.

[18] Id., at 433, per Master White.

[19] (1994) 62 SASR 312.

[20] Id., at 323.

[21] [1970] 1 Lloyd's Rep. 235 at 238.

In another passage of his judgment, Matheson J. cited the observation of Roskill J. in *Aktiebolaget Legis v. V. Berg & Sons Ltd* that "the courts should be very slow to upset an award made by a commercial umpire because he may not have used or has not used the precisely correct legal phrase when expressing his decision".[22]

It is only in the field of natural justice that the courts have maintained a strict control over arbitral proceedings. Under s.42(1), the court may set aside, either wholly or in part, an award where "there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings". 'Misconduct' is defined in s.4(1) as including the rules of natural justice. While there have been a number of cases where the courts have set aside arbitral awards on natural justice grounds,[23] the courts do not single out arbitrations for special scrutiny, but simply apply their normal procedures as in the case of all judicial and quasi-judicial proceedings.

The overall result of these changes is that arbitrators have far more flexibility in terms of procedure than is often realised and that they have less need to fear that their decisions will be set aside by the courts. Arbitrators can therefore afford to be less timid and more adventurous in terms of their approach to procedural questions. At present their current thinking appears to be based on the law as it existed prior to the new uniform Act and the decisions that it has spawned.

Changing attitudes here can best be illustrated by reference to two cases relating to the courts' supervisory role over arbitrators in relation to procedural, including pre-hearing, matters. Both cases involved a consideration of the scope of s.14 of the Act, cited earlier. The first was the decision of the Full Court of the Supreme Court of South Australia in *South Australian Superannuation Fund Investment Trust v. Leighton Contractors Pty Ltd.*[24] This case concerned a claim by a builder for approximately $10 million. The arbitrator directed that the builder file and serve Points of Claim. The builder did this in the form of six binders of written materials. The Investment Trust objected that the Points of Claim were not in proper form and did not amount to proper pleadings. The arbitrators found that the six binders were sufficient and refused to order the filing of further Points of Claim. The issue for the court was whether the court had jurisdiction to direct the arbitrators to insist on the delivery of properly pleaded Points of Claim. The Full Court held by a two to one majority in the affirmative, despite the broad flexibility

[22] [1964] 1 Lloyd's Rep. 203 at 214.

[23] See e.g. *Van Dongen v. Cooper* [1967] WAR 143. For a discussion of the requirements of natural justice in this context, see *Gas and Fuel Corporation of Victoria v. Wood Hall Ltd* [1978] VR 385 at 396; *E Rotheray & Sons Ltd v. Carlo Bedarida & Co.* [1961] 1 Lloyd's Rep. 220 at 225. See also *Sharkey and Dorter*, op. cit. at 283ff.

[24] (1990) 55 SASR 327.

provided to arbitrators by s.14. White J., having noted the requirement in s.22(1) that procedural matters be decided according to law and the 'misconduct' provisions in ss4 and 44, stated:[25]

> "The policy of the Act is, in my opinion, clear. It is to keep a tight hold upon arbitrators in the course of their pre-trial and trial procedures in those cases where the exigencies of the arbitration call for strict compliance with court rules while leaving arbitrators free to use whatever procedures "they think fit" in uncomplicated informal arbitrations. The letter and spirit of the Act is such that it allows for such variations in approach to procedures in simple arbitrations while requiring strict compliance with the rules in complex arbitrations."

This approach was decisively rejected in a later New South Wales decision by Rogers C.J. Comm D in *Imperial Leatherware Co. Pty Ltd v. Macri & Marcellino Pty Ltd.*[26] This case also concerned an expensive building dispute, where an interim award of the arbitrator was challenged by one of the parties. In the course of his judgment, Rogers C.J. considered the decision in *Leighton Contractors* as to the proper interpretation of the Act and the correct role of the courts' supervisory jurisdiction over arbitrations. His Honour rejected the conclusion of the majority of the South Australian Full Court that procedural justice requires that in complex arbitrations an arbitrator should follow as closely as practicable the Supreme Court pre-trial pleading, discovery and other procedures. His Honour stated that in his view this decision was contrary to accepted current theories of arbitration.[27] Referring to the dictum of White J. above, Rogers C.J. commented:[28]

> "With the greatest possible respect I can see nothing in the 'spirit of the Act' which supports that view. So far as the letter of the Act is concerned, it gives the parties the greatest possible freedom in the conduct of arbitrations. Even the requirements of s.22 may be relaxed. The laws of evidence need not be followed (s.19). The sole requirement in the 'letter and spirit' of the Act is the call of natural justice which, while requiring that each party have a proper opportunity of putting its own case, and meeting the case for the other party, does not regard adherence to court procedures as necessary."

He continued:[29]

> "One reason why parties submit to arbitration is so that they should avoid pre-trial pleading, discovery and other procedures of the court. This is so whether the arbitration is long and complex, or short and simple. The heart of the arbitral procedure lies in its ability to provide speedy determination of the real issues. Those aims, to a large extent, are made impossible of achievement if the procedures of a Court are mimicked. Nor is there anything in the requirement to provide 'procedural justice' which requires adoption of the pleadings and procedures of Courts. What is required is that the parties enjoy the benefits of natural justice consistently with the requirements of arbitrators for

[25] Id, at 331.
[26] (1991) 22 NSWLR 653.
[27] Id, at 661.
[28] Id, at 666
[29] Id, at 661.

dispensing with technicalities, with discovery, and doing away with interrogatories. The proper requirement that each party have full notice of the case to be made by the other and a full opportunity to prepare and to answer that case does not require pre-trial pleading, discovery and other procedures of the Court."

One unfortunate effect of this judicial disagreement is that the uniform Act is now not uniform in terms of its interpretation.[30] The *Leighton Investment* case still represents good law in South Australia. However, elsewhere the *Imperial Leatherware* case appears to be regarded as more sound in terms of its judicial analysis and is regarded as correctly stating the law.[31]

These changes to the law and judicial attitudes are not currently reflected in the curriculum of the arbitrators' training courses. The major topics considered in both the General and Advanced courses consist of the law of contracts, torts, the Commercial Arbitration Act, evidence, trade practices, the expert witness, laying the ground for arbitration and alternative dispute resolution, opening processes for formal arbitration, pre-hearing processes for formal arbitration, the proceedings of formal arbitrations, consummating formal arbitration hearings, an overview to mediation and other alternative dispute resolution processes, and the application of alternative dispute resolution processes in arbitration. The focus is heavily on formal arbitrations and the associated procedural aspects which closely resemble those found in litigation. The manner of presenting the law of evidence and the role of the courts, as evidenced by past papers presented at the General and Advanced courses, also appears to downplay the use of flexible procedures in arbitration and to exaggerate the fears of judicial intervention.

Proposals for change

It is clear that greater attention must be paid to the arbitration training of lay persons, and that the training programmes should pay particular attention to their needs.

Ideally, a different arbitration programme should be offered to lay persons than to lawyers. The needs of the two groups are so different that it is very difficult to provide a proper training programme without separating them. In the lectures and tutorials on the traditional common law subjects applicable to arbitrations, such as contracts, torts, evidence and administrative law, there is the inevitable problem that if the level of treatment of the topics is pitched low enough for lay persons to understand the lawyers in the group will learn nothing. On the other hand, to interest the lawyers would inevitably involve pitching the subject at such a level that lay persons could not possibly understand. The same problem also arises in

[30] Rogers C.J. stated (at 659) that he deeply regretted this inevitable result of his decision.

[31] For a discussion of the two decisions, see S. Hepburn, *'Natural Justice and Commercial Arbitration'* (1993) 12 *the arbitrator* 133; C. Hackett, *'Expedited Rules and Mediation in the Context of the Arbitration Process'* (1995) 14 *the arbitrator* 173.

respect of the treatment of the procedural aspects of formal arbitrations. It is only in respect of those topics which are not covered by traditional legal training that the same classes should be offered to both the non-lawyers and lawyers. These topics would include the *Commercial Arbitration Act* (which is not taught in the Bachelor of Laws programme in most universities), the role of preliminary conferences, section 27 issues relating to the role of the arbitrator as mediator, and award writing.

This is the ideal solution. Unfortunately, it is probably impracticable in terms of financial and professional resources for arbitration training programmes to be offered in this manner. Other more limited solutions must be found. One possibility is to offer additional tutorials to lay persons on certain topics in the training programme in order to assist them in understanding basic principles of the common law or procedure. This would be particularly helpful in topics such as contracts, evidence and administrative law. Another possibility is to devote one or two additional lectures to 'Special Problems for Lay Arbitrators'. The lawyers in the arbitrator training group would be exempt from these extra sessions. A third possibility is to ensure that the procedural aspects are taught by lay arbitrators. Such teachers would have a far greater affinity for the problems of comprehension likely to be experienced by lay persons in the group and would be able to share with the group their own experience and difficulties. These three possibilities could be offered singly or in combination. Even these more limited solutions have significant financial impacts which would need to be carefully thought through by the Institute.

The education and future health of arbitration in this country is not just the responsibility of the Institute and the University of Adelaide (as the partner university for the National Course on Arbitration and Mediation). It is submitted that this responsibility is shared by the State and Territory legislatures, the courts and the legal profession. The exact role of these institutions in this matter should be examined further.

The State and Territory Legislatures

The legislatures have responsibility in that they have the power to amend the Act or to frame a new Act so as to facilitate and encourage arbitration as an alternative to litigation. By enacting the present uniform legislation in the 1980s the State and Territory legislatures gave a significant boost to arbitration in this country. By reforming this legislation the legislatures could give commercial arbitration a further boost.[32]

[32] In respect of international commercial arbitrations, which are governed by the *International Arbitration Act* 1974 (Cth), it is the Commonwealth legislature which has the onus of taking action to support arbitration.

In terms of encouraging confidence in lay arbitrators, and in the process increasing confidence in commercial disputants to have their cases resolved by such arbitrators, the following four legislative changes are suggested:

1. Consistent with modern approaches, the current Act should be written in plain English and existing ambiguities should be removed. While the current Act is nowhere near as legalistic and obscure in its wording and meaning as certain other statutes, it is not easily intelligible to lay persons. The uncertainty thus generated in the mind of lay arbitrators is likely to lead to the timidity of handling procedural matters complained of earlier.[33]

2. The exact scope of the arbitrators' discretion in evidence and procedural matters should be clarified. Lay arbitrators are more likely than their legally-trained counterparts to find the uncertainty in this area more difficult to accept and out of caution will be likely to 'play safe' by applying the rules applicable to litigation. The current situation represented by the contradictory judgments in the *Leighton Investment* and *Imperial Leatherware* cases is unsatisfactory from every standpoint. Flexibility of procedures is such an essential feature of arbitration that only legislative reform of the most central provisions, ss14 and 19(3), would seem sufficient in this area.

3. Section 20 of the Act, which concerns the parties' right of legal representation, should be amended so as to ensure that it is limited to the most serious disputes. While this is the intention of the current s.20, it has not always worked out this way in practice. The current s.20 gives a broad discretion to arbitrators to permit legal representation and, by s.20(3), requires arbitrators to permit such representation when "the granting of leave is likely to shorten the proceedings or reduce costs" or "the applicant would, if leave were not granted, be unfairly disadvantaged". This requires the arbitrator to foresee likely developments in the case during the arbitral hearing. Legally trained arbitrators are likely by their legal training and experience to be able to appreciate in advance the circumstances when either of these situations are likely to apply. Such is not the case with lay arbitrators, however. The danger in this situation is that out of an abundance of caution lay arbitrators will permit legal representation in circumstances not really intended by the Act and in so doing lengthen the hearing and increase costs.

It is suggested that s.20(3) should be repealed and that the current broad discretion given to arbitrators to permit legal representation contained in s.20(1)(d), "where the arbitrator or umpire gives leave for such representation", should be left unfettered. In this way the chances of a successful challenge being

[33] See nn 8-14, supra, and accompanying text.

made to an arbitrator's decision to refuse legal representation would be dramatically reduced and lay arbitrators would have greater confidence in refusing requests for such representation.

4. The legislatures should ensure that judicial intervention in commercial arbitration is kept to an absolute minimum. This is particularly important in the context of the present discussion as lay arbitrators, in light of their lesser knowledge of administrative law, are likely to be more fearful of being found to have committed personal misconduct or to have misconducted the proceedings than legally trained arbitrators and therefore more hesitant and cautious in their handling of the arbitration.

Several precedents exist for further limiting judicial intervention. First, the current uniform Act, which is largely based on reforms introduced in the United Kingdom in the *Arbitration Act* 1979, represents a distinct improvement in this regard in comparison with the earlier, now-repealed State and Territory commercial arbitration legislation.[34] However, the United Kingdom has now gone further down this path in its new *Arbitration Act* 1996 and introduced reforms that have not yet been adopted in this country.[35] By s.68 of that Act the court will only intervene where a "serious irregularity occurs". This may arise where an arbitrator fails to comply with its general duty to act fairly and impartially or makes an award which is uncertain or ambiguous. By s.69 the courts retain the power to set aside the award on a question of law, but only where the decision is obviously wrong or the question is one of general and public importance and the decision is at least open to serious doubt, and that despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

Secondly, it is also noteworthy that the Model Law, which applies to international commercial arbitrations conducted in this country pursuant to the *International Arbitration Act* 1974 (Cth), provides fewer opportunities for judicial intervention than the uniform Act. This is anomalous.

Finally, as a number of commentators have discussed,[36] the role of judicial supervision over arbitrations has historically been much stricter in common law

[34] The earlier legislation is cited above in n6.

[35] For a discussion of the new British legislation, see R. Quick and G. Petersen, 'The Arbitration Act 1996 (UK): The Shape of Things To Come?' (1998) 16 *the arbitrator* 241.

[36] See e.g. Justice R.S. French, 'Arbitration – The Courts' Perspective' (1992) 11 *the arbitrator* 130 at 132ff.

[37] Lord Scrutton stated in *Czarnikow v. Roth Schmidt & Co.* [1922] 2 KB 478 at 488: "There must be no Alsatia in England where the King's writ does not run". Mocatta J. stated in *Prodexport State Company for Foreign Trade v. E.D.&F. Man Ltd* [1973] 1 QB 389 at 395: "It is well known that English law is nearly unique in the degree of interference it permits the court in the conduct of arbitrations and the settlement of disputes thereby".

countries than elsewhere.[37] As Australia is now in the position of trying to attract arbitrations to this country, and as the possibility of judicial intervention is a significant deterrent to business interests agreeing to resolve their disputes by arbitration, the current position would appear to be counter-productive.

It is accordingly recommended that Part V of the Act, containing the powers of the court, be re-examined with a view to reducing the circumstances of court intervention to an absolute minimum. A detailed consideration of the actual reforms is beyond the scope of this paper. However, subject to the retention of the duty of the arbitrator to comply with the rules of natural justice, which seems basic to any civilised system of justice, it is submitted that every other right of intervention should be re-examined. The greater the steps that can be taken in this direction, the less timid are lay arbitrators likely to be in terms of the procedures adopted. The retention of the rules of natural justice will not detract from the goal of flexibility since, as stated by Rogers C.J. in the *Imperial Leatherware* case, "there is nothing in the requirements of natural justice which calls for interference by the court in relation to pleadings or discovery".[38]

The Courts

Even without legislative change, the courts can do a lot to support arbitration. Such support is particularly important for the confidence of lay arbitrators. In the past the courts were more noted for their hostility and for regarding arbitration as a rival which threatened to take away the courts' commercial work.

Perhaps as a result of their own increasing case loads the courts' attitude has changed fundamentally over the past two decades. In modern times the courts have shown far more judicial restraint when considering applications to remove arbitrators or set aside awards. Rogers J. stated in *Qantas Airways Ltd v. Dillingham Corporation:*[39]

> "It is now more fully appreciated than used to be the case that arbitration is an important and useful tool in dispute resolution. The former judicial hostility to arbitration needs to be discarded and a hospitable climate for arbitral resolution of disputes created. It used to be thought that complex questions of fact presented a sufficient reason for relieving a party from the obligation to abide by an arbitration clause. That approach should be treated now as a relic of the past."

More recently, Smart J. observed in *Park Rail Developments Pty Ltd v. R. J. Pearce Associates Pty Ltd:*[40]

> "There has been a change in the attitude of the courts as to the value of arbitration and references and the desirability of people of suitable standing, experience and qualifications dealing with inter alia, technical matters and contract administration. In part this has been due to the training provided by bodies such as the National Institute of Arbitrators."

[38] (1991) 22 NSWLR 653 at 667.
[39] (1985) 4 NSWLR 113 at 118; cited in French, op. cit. at 139.
[40] (1987) 8 NSWLR 123 at 126.

As stated by Justice French of the Federal Court,[41] what is required is judicial acceptance of the different procedural philosophy in arbitrations which is inevitably less precise than in litigation, especially when conducted by non-lawyer arbitrators. In the words of Barwick C.J. in *Tuta Products Pty Ltd v. Hutcherson Bros Pty Ltd*:[42]

> "Finality in arbitration in the award of the lay arbitrator is more significant than legal propriety in all his processes in reaching that award established only after successive appellate processes."

The Legal Profession

The attitude of the legal profession to arbitration is also important in furthering its use in commercial matters. In the past the legal profession has been particularly hostile to non-lawyer arbitrators. McGarvie J. of the Supreme Court of Victoria once justified this hostility as follows:[43]

> "From a client's point of view, arbitration seemed usually the worst mode of dispute resolution. If the arbitrator was not a lawyer the application of the rules of evidence tended to create chaos. To impress the lay arbitrator the parties tended to brief more senior counsel than the issues justified. The concept of arbitration as an alternative to a court hearing was often blurred."

Our aim must be to re-educate the profession both as to advantages of the modern system of commercial arbitration under the uniform Act and to the advantages of using lay arbitrators. If the profession is to remain hostile to non-lawyer arbitrators and to challenge regularly their decisions and awards, arbitrations will inevitably closely resemble litigation and it will be impossible to alter the present system of training for arbitrators. However, if we can escape from the overbearing attitude of lawyers to lay arbitrators and to their 'harassment', the opportunity opens for a reassessment of the correct approach to the current training system, with a lesser emphasis on matters of evidence, procedure and administrative law.

Conclusion

As stated earlier,[44] the Institute, in conjunction with the University of Adelaide, has recently amended its training programme so as to provide for the new Professional Certificate. This new syllabus does not take account of the matters raised in this paper and does not provide for separate training for lay arbitrators. The new syllabus continues the previous tacit assumption in arbitrator training schemes that all potential arbitrators should receive the same training regardless of their professional background.

[41] French, op. cit. at 137.
[42] (1972) 127 CLR 253 at 258.
[43] Cited in French, op. cit. at 135.
[44] See n1, supra, and accompanying text.

This should not be a cause for despondency or inaction. The syllabi for the General and Advanced courses leading to the Professional Certificate is in constant evolution and can and should be reviewed on an annual basis. This Paper is an attempt to provide an impetus to reassess past assumptions as to the appropriate content of arbitrator training schemes in Australia. Ultimately, the matter is far too important to be left here. Existing weaknesses in the arbitral system identified throughout the Paper should be considered and rectified by the courts, the legislatures and the legal profession as a precursor to a fundamental reform of the arbitrator training scheme. Once this is achieved, reforms along the lines suggested above can and should be adopted which would make Australia a leader in the field of arbitrator training.