A Pro-Active Role in the Arbitral Process

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Introduction

In papers delivered to the Institute's 1996 Annual Conference held at Twin Waters Resort, Sunshine Coast, Queensland, various speakers dealt with the challenges facing arbitration if it is to maintain its place as an effective and attractive system of dispute resolution. As stated by Justice Drummond in the 1996 John Keays Lecture (see *The Arbitrator* - August 1996, at p. 76):

> *"It is trite to observe that we live in an age of consumerism. If the arbitration industry is unable to satisfy the demands of consumers of its services for an efficient, economical and expeditious dispute resolution service, then it will continue to wither. I say 'continue' because the process is already under way."*

This paper is a further development of a paper which I delivered to a Discussion Evening held by the N.S.W. Chapter on 11 September, 1996 entitled "Ways and Means in which Arbitrators may become more Pro-Active in the Arbitral Process", with the benefit of the discussion held that evening and subsequent discussions which I have had with a variety of people interested in arbitration, including a Judge of the Supreme Court of N.S.W., Queens Counsel, other barristers and experienced arbitrators.

It is abundantly clear that we cannot expect that arbitration will survive as an effective and attractive system of dispute resolution unless arbitrators abandon the traditional view that, because of the consensual nature of arbitration, arbitrators should properly take a passive role in determining the arbitral procedure, and accede to timetables and processes agreed between the parties' lawyers, which usually mirror the traditional (adversarial) court process with which the lawyers are familiar by training and experience.

For arbitration to retain (or regain) its position as an effective and attractive system of dispute resolution, arbitrators generally must be committed to becoming pro-active and taking the initiative in determining an arbitral procedure which will provide efficient, prompt and cost-effective dispute resolution. The aim of this paper is to explore various ways and means whereby arbitrators may safely become more pro-active in the arbitral process.

To establish the bounds as to what an arbitrator may safely do in taking a pro-active role in the arbitral process requires a consideration of the source and extent of the arbitrator's power and any constraints on the exercise of that power. These are contained in the following:

- the provisions of the uniform arbitration legislation;
- the arbitration agreement;
- any written agreement between the parties in relation to various matters referred to in the uniform arbitration legislation; and
- the requirements of natural justice.

In s. 4(1) of the uniform Commercial Arbitration Acts 1984, "arbitration agreement" is defined as meaning "an agreement in writing to refer present or future disputes to arbitration".

Legislative Provisions

The powers of the arbitrator to determine the procedure are expressed in extremely wide terms in the legislation. S. 14 of the uniform Commercial Arbitration Acts 1984 provides as follows:

> *"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."*

Other provisions in the uniform Commercial Arbitration Acts 1984, which provide the arbitrator with further powers to control the arbitration procedure, are as follows:

- the same powers as the Supreme Court to continue with arbitration proceedings in default of appearance or other act by a party to the arbitration agreement in the event of failure to comply with a subpoena or with a requirement of the arbitrator - s. 18(3);

- the duty on the parties to at all times do all things which the arbitrator requires to enable a just award to be made, and not to do or cause to be done any act to delay or prevent an award being made - s. 37.

Various provisions in the uniform Commercial Arbitration Acts 1984, which affect the arbitration procedure, are expressed in terms of "unless a contrary intention is expressed in the arbitration agreement". Those provisions are as follows:

- evidence may be given orally or in writing - s. 19(1)(a);

- power to make an interim award - s. 23;

- extension of ambit of arbitration proceedings on application by a party - s. 25(1);

- consolidation of arbitration proceedings on application by a party in each of the proceedings - s. 26(1);

- arbitrator shall include in the award a statement of reasons for making the award - s. 29(1)(c);

- it is an implied term of the arbitration agreement that it is the duty of each party to the agreement to exercise due diligence in the taking of steps that are necessary to have the dispute referred to arbitration and dealt with in the arbitration proceedings - s. 46(1).

Some provisions in the uniform Commercial Arbitration Acts 1984, which affect the arbitration procedure, are expressed in terms of "unless otherwise agreed in writing by the parties to the arbitration agreement". Those provisions are as follows:

- arbitrator not bound by the rules of evidence but may inform himself or herself in relation to any matter in such manner as arbitrator thinks fit - s. 19(3);

- any question arising for determination in the course of proceedings shall be determined according to law - s. 22(1).

Naturally, such agreement in writing may be contained in the arbitration agreement itself.

Finally, so far as relevant to the topic of this paper, the uniform Commercial Arbitration Acts 1984 also provide as follows:

- parties to an arbitration agreement may be represented in proceedings before the arbitrator by a legal practitioner where another party is (or is represented by) a legally qualified person, where all parties agree, where the amount in issue exceeds $20,000 or such other amount prescribed instead by regulation, or where the arbitrator gives leave for such representation - s. 20(1);

- if "the parties to the arbitration agreement so agree in writing", the arbitrator may determine any question arising for determination in the course of proceedings "by reference to considerations of general justice and fairness" - s. 22(2).

The Arbitration Agreement

As noted above, various provisions in the uniform Commercial Arbitration Acts 1984 are expressed in terms of "unless a contrary intention is expressed in the arbitration agreement". I am not aware of any proforma standard contracts in common use in the Australia which contain any provisions which restrict the arbitrator's powers under the relevant uniform statutory provisions. Certainly the proforma standard contracts commonly used in the construction industry, namely AS 2124-1986, AS 2124-1992, JCC-B, JCC-D, JCC-E, JCC-F, NPWC-3 and SBW-2, contain no provisions dealing with the procedure to be adopted in the conduct of the arbitration.

However, the arbitration agreement may, by amendment of a proforma standard contract, special condition, variation or collateral agreement, incorporate by reference other procedural rules for the conduct of the arbitration, such as The Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitrations, which may restict or extend the arbitrator's powers as provided in the uniform statutory provisions referred to above. Accordingly, in

turning his or her mind to the arbitral procedure, the arbitrator must ensure that he or she is provided with a copy of the entire arbitration agreement and should, as a matter of prudence, record the parties agreement as to the arbitration agreement in the initial Preliminary Conference before making any procedural directions.

Written Agreement between the Parties

As noted above, s. 19(3) of the uniform Commercial Arbitration Acts 1984 provides that unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator is not bound by the rules of evidence. It needs to be borne in mind that Preliminary Conference minutes signed by the parties or their authorised representatives would constitute such written agreement, such that an arbitrator's proforma Preliminary Conference minutes should not invite the parties to agree that the rules of evidence should apply by including an item such as:

"Rules of evidence to apply Yes / No"

It would be preferrable if the Preliminary Conference minutes dealt with this aspect in the following manner:

"Is there any written agreement between the parties that the rules of evidence shall apply (s. 19 (2) Commercial Arbitration Act) Yes / No"

Natural Justice

It has been my experience that many non-lawyer arbitrators are deterred from taking a robust pro-active role in determining arbitration procedures (and conducting arbitration proceedings) in a manner different from court procedures and proceedings out of a concern that to do so contrary to the wishes of a party would involve a breach of the requirements of natural justice. Such concern is unfounded.

The principles of natural justice were expressed by Marks J in Gas & Fuel Corporation of Victoria v Wood Hall Ltd. [1978] VR 385, in the following terms at p. 396:

> *"There are two rules or principles of natural justice... The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim - nemo judex in causa sua. The second principle is that the parties must be given adequate notice and opportunity to be heard. This in turn is expressed in the familiar Latin maxim - audi alteram partem. In considering the evidence in this case, it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done..... Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgement only after a full and fair hearing given to all parties."*

The requirements of natural justice are not fixed and immutable, but are dependent on and will vary with the circumstances and nature of the case. In Kioa v West [1985] 159 CLR 550, Mason J. (as he then was) said, at pp. 584 - 585:

> *"What is appropriate in terms of natural justice depends on the circumstances of the case, and they will include, inter alia, the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting.....The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the case?".*

The requirements of natural justice were explained by Cole J (as he then was) in Xureb v Viola [1989] 18 NSWLR 453, a case concerned with a Reference under Part 72 of the NSW Supreme Court Rules. His Honour said, at pp. 468 - 469:

> *"....non-compliance with procedures normally applied in court proceedings does not, of necessity, result in a denial of natural justice.....*
>
> *Referees, no doubt, look to the courts for elucidation upon what is meant by 'natural justice'. Its absence is readily recognised but its constituents are difficult to define. In essence it means fairness between the parties. If an allegation is put by one party against the other, the other should have the chance to respond. Yet the process of responding is not indeterminable. For once a party is aware of the case or argument or fact asserted against him, natural justice is usually satisfied by giving to his opponent the opportunity to respond. The response may, of course, throw up material not adverted to by the first party. It is usual, in the courts, for the first party to be given a limited right of reply to deal with any such new material, whether factual, argumentative or a matter of legal concept. But it is not always essential that such a right be given. If issues are clearly defined, particularly if they be of a technical nature, and if each party*

> *is given a full opportunity to place before the referee that which it wishes in relation to those issues, it does not necessarily follow that there is a denial of natural justice by not permitting each then to respond to any new material advanced by the other. Particularly is that so where the referee is a person of technical competence able to understand the material placed before him by each party.*
>
> *.....Another aspect of natural justice is that the referee must be actually impartial, and must be perceived by a disinterested bystander to be so. Accordingly, he must not hear evidence or receive representations from one side behind the back or in the absence of the other."*

His Honour then concluded, at p. 470:

> *"How are such principles to be reconciled with Pt 72 r 8, and in particular r 8(2)(b) which permits a referee to 'inform himself...in relation to any matter in such manner as the referee sees fit'. Further, it has become common for orders to be made pursuant to Pt 72 r 8(1), to permit a referee "to communicate with experts retained on behalf of the parties or any of them'. The utility of such a direction is obvious for it enables a person technically qualified who does not understand a particular technical aspect of the report of an expert retained by a party to inquire of that expert what he meant. But such an order is not to be understood as permitting a referee to have a private conversation with one expert. He may call the experts for opposing parties together to seek clarification, or he may arrange a conference telephone discussion with the experts for competing parties. Pursuant to r 8(2), the referee may be permitted to carry out his own tests. But if he does so, ... he must give, in most cases, the information so derived to the competing parties to permit them to express their views upon it to him."*

It should be noted that the wording of Part 72 rule 8(2)(b) being considered by Cole J. in Xureb is identical to the wording of s. 19(3) of the uniform Commercial Arbitration Acts 1984.

The extent to which the arbitrator may use his or her expertise and the duty which an arbitrator has to put views based on that expertise to the parties was considered by the English Court of Appeal in Annie Fox & Ors v P J Wellfair Limited (1981) 2 Lloyds Reports 514. In that case, the arbitrator was a practising barrister, chartered architect and chartered surveyor. The owners of a flat sought damages against the builders, which were said to arise out of defects in the block of flats. Only the owners appeared at the hearing. A number of experts gave evidence on behalf of the owners that the repairs would cost 93,000 pounds. This evidence was not contested due to the builders' non-appearance. The arbitrator awarded the owners only 13,000 pounds. The owners appealed, seeking to set aside the award on the

grounds of misconduct. In an affidavit filed in the appeal proceedings, the arbitrator set out the basis of his decision, indicating that he had rejected much of the expert evidence given on behalf of the owner and had replaced this evidence with his own opinions. His award was set aside. The Court of Appeal held that he was in error in not communicating to the owners that he was rejecting the evidence led by them. The relevant principles were stated by Lord Denning M.R., with whom Dunn L.J. agreed, in the following terms at pp. 521 - 522:

> *"I cannot think it right that the defendants should be in a better position by failing to turn up. Nor is it right that the arbitrator should do for the defendants what they could and should have done for themselves. His function is not to supply evidence for the defendants but to adjudicate upon the evidence given before him. He can and should use his special knowledge so as to understand the evidence that is given....and to appreciate the worth of all that he sees upon a view. But he cannot use his special knowledge - or at any rate he should not use it - so as to provide evidence on behalf of the defendants which they have not chosen to provide for themselves. For then he would be discharging the role of an impartial arbitrator and assuming the role of advocate for the defaulting side. At any rate he should not use his own knowledge to derogate from the evidence of the plaintiffs' experts - without putting his own knowledge to them and giving them a chance of answering it and showing that his own view is wrong.....*
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> *I am afraid that the arbitrator fell into error here. He felt it was his duty to protect the interests of the unrepresented party - in much the same way as a Judge protects a litigant in person. But in a case like this I do not think it is the duty of the arbitrator to protect the interests of the unrepresented party. If defendants do not choose to turn up to protect themselves, it is no part of the arbitrator's duty to do it for them. In particular, he must not throw his own evidence into the scale on behalf of the unrepresented party - or use his own special knowledge for the benefit of the unrepresented party - at any rate he must not do so without giving the plaintiffs' experts a chance of dealing with it - for they may be able to persuade him that his own view is erroneous ."*

Becoming Pro-active

In becoming pro-active, it is important to keep in mind that the arbitrator's aim is (or should be) to provide efficient, economical and expeditious resolution of disputes. How this is best achieved in each particular case will of course largely depend on the circumstances of that particular case. However, there are a number of general aspects which I commend to you as worthy of consideration in most if not all cases.

1. The arbitrator should be flexible and innovative in determining the arbitral procedure. The second scenario posed by Justice Drummond in the 1996 John Keays Lecture (see

The Arbitrator - August 1996, at pp. 73 - 75) demonstrates how flexible and innovative an arbitrator may be in shaping a procedure which will best achieve an efficient cost-effective outcome in a particular factual situation.

2. It is obviously not desirable to insist on pro-active measures which are unanimously opposed by the parties and their lawyers. It is to be expected (at least initially) that lawyers, and possibly those of their clients who have experienced the traditional passive approach to determination of the arbitral procedure, may well view a pro-active approach with a good deal of apprehension. To overcome this, the arbitrator must "sell" the benefits of what is proposed to the parties and their lawyers. The best time to do so is the first Preliminary Conference, where the parties (or their representatives) are present as well as their lawyers. I suggest that, after explaining to the parties the procedure you propose, and why you see that procedure saving time and cost, you ask the lawyers to take instructions from their respective clients on the proposed procedure on the basis that if, contrary to the view you have expressed, the parties thereafter agree on a process which is likely to be significantly more time consuming and expensive, you will require an express acknowledgement to that effect from the parties or their representatives (not the lawyers) which you will record in the Minutes of the Preliminary Conference.

3. The arbitator must drive the arbitral process. This will require an appreciation at the earliest possible time of precisely what is in dispute between the parties, so as to determine the best procedure or combination of procedures to resolve the dispute. One way of achieving this is to require each party, at (or preferably before) the initial Preliminary Conference to provide an outline of its case, identifying precisely what legal, technical and quantum issues are involved, and suggesting what is the most expeditious and cost-effective means of resolving it. Once the issues are defined, the arbitrator will then need to spend time in identifying the key issues and devising an appropriate procedure for resolving these issues expeditiously and cost effectively. For example, where there are competing claims of wrongful repudiation etc, delivery of an interim award on liability would obviate the necessity for expenditure of time and cost of preparation and hearing of the damages case of any party who is unsuccessful on liability.

4. Driving the process should start from receipt of the nomination. When informing the parties of the nomination and the date and time of the first Preliminary Conference, the arbitrator should raise with the parties that he or she will be making directions at the first Preliminary Conference for the expeditious and cost-effective conduct of the arbitration, indicating the ambit of directions being contemplated by the nominee / arbitrator, so that the parties and their representatives know in advance what to expect at the first Preliminary Conference. I would suggest that the notification indicate that the directions to be made will include directions concerning :

A. Preparation for the Arbitration, including:
   a. Properly particularised pleadings (if pleadings are appropriate).
   b. Informal discovery and inspection of documents (if discovery is appropriate).
   c. Preparation of an agreed bundle of documents, indexed and paginated if required.
   d. Preparation of joint reports of experts in particular disciplines etc.
   e. Determination of preliminary questions, the determination of which may reduce overall hearing time and costs.

B. The conduct of the Arbitration, including:
   a. The form of the evidence from factual witnesses (ie orally, or written affidavits or statements).
   b. Conclaves of experts, and whether limitations should be placed on expert evidence (and, if so, to what extent - eg. limited to issues remaining in dispute after joint reports and/or conclaves of experts).
   c. Whether and to what extent an oral hearing is required and, if so, the form and extent of opening and closing addresses.
   e. Preparation of a Statement setting out what facts are agreed between the parties and what facts are disputed.

5. In determining an expeditious and cost-effective procedure, the arbitrator should avoid, as far as possible, time-consuming and costly interlocutory procedures, such as formal discovery and requesting & providing further & better particulars, and should require

any party advocating such procedures to provide a convincing explanation for why they are necessary (and not just desirable).

6. The test for the provision of particulars is very simple, namely does the party know the nature of the case it is called upon to meet so as to identify the evidence it will need to bring to meet that case. If Points of Claim and Defence are properly particularised (which is something which should be determined by the arbitrator, rather than by reference to the multi-page precedent contained in the opposing solicitor's word-processing system), no further and better particulars should be required. The directions I usually make are as follows:

> *"i. Properly particularised Points of Claim to be filed and served by DATE*
>
> *ii. Properly particularised Points of Defence / Cross Claim to be filed and served by DATE*
>
> *iii. Properly particularised Defence to Cross Claim (if any) to be filed and served by DATE*
>
> *iv. Any objection to adequacy of particulars provided to be notified to the Arbitrator within 48 hours of service of pleading, whereupon the Arbitrator will direct what (if any) further particulars are to be provided."*

If the Points of Claim are delivered at or by the initial Preliminary Conference, my usual practice is to determine there and then what (if any) further and better particulars should be provided. I have found that this then sets the tone, and thereafter particulars do not seem to cause any problem.

7. As any lawyer who has had any experience in preparing or assessing a bill of costs will attest, the process of formal discovery is enormously time consuming and expensive. It involves the solicitors for each party preparing a List of Documents, specifying all documents which are or have been in the possession, custody or power of the party

which may assist or harm the case of that party, and including an affidavit verifying that all such documents are contained in the List. Proponents of formal discovery argue that it provides a means of safeguarding against failure of a party to produce all such documents for inspection by the opposing party, particulary documents actually or potentially harmful to the case of the producing party, and that compulsory listing and production of those documents provides a powerful incentive to early settlement. It is questionable whether the enormous cost involved in formal discovery can be justified on these bases. It is worthy of note that the Supreme Court of N.S.W. has recently (ie. proceedings commenced on or after 1 October 1996) removed a litigant's former entitlement to require formal general discovery, by Notice for Discovery, in favour of a rquirement that a litigant seeking discovery must seek an Order of the Court, thereby signalling that formal discovery will be the exception rather than the rule in future proceedings in the Supreme Court of N.S.W.

In my experience, informal discovery and inspection of documents provides an efficient and cost-effective means of discloure and inspection of documents. Parties in an arbitration arising out of a contractual relationship can usually tell fairly quickly whether a particular document or class of documents is missing from the "paper trail" documenting the relationship between those parties, and can then informally request production thereof. On the rare occasion where there remains any dispute which the parties are unable to resolve, the arbitrator can then step in and make whatever directions are appropriate, such as requiring an affidavit that there is no such document or class of documents as alleged by the opposing party.

8 A matter which the arbitrator could (and in my view should) explore is whether there are some identifiable issues which could be better dealt with by mediation or binding expert appraisal, by someone other than the arbitrator, during the period that the remainder of the case is being prepared for hearing. For example, in cases where loss of profit is an issue, it may be more appropriate for binding expert determination by an accountant, rather than by an arbitrator who has been appointed on the basis of his or her technical knowledge and experience. Similarly, there may be a number of small variation claims, or claims for rectification of defects, where the time and cost of preparing and hearing evidence is likely to be out of proportion to the amount in issue. If the parties are not able, with the arbitrator's encouragement, to reach some

commercially sensible compromise between themselves in respect of such claims, mediation or binding expert appraisal may provide an expeditious and cost-effective resolution. Naturally, these types of measures could only be adopted with the agreement of all parties to the arbitration agreement.

9. The arbitrator should also give consideration to directing that the parties exchange Offers of Compromise at an early stage in the proceedings. The Offer of Compromise procedure is designed to elicit realistic cost offers from both Claimants and Respondents, on the basis that a Claimant who does better than its Offer of Compromise should ordinarily be entitled to indemnity costs from the date of its Offer, and be ordered to pay the Respondent's costs from the date of the Respondent's Offer if it does not do better than the Respondent's Offer of Compromise.

10. The arbitrator should not shrink from expressing an informed preliminary view, on the material before him or her, on those issues the early resolution of which could either significantly improve the prospects of early settlement or reduce the further time and cost of preparation and hearing. Naturally, any such view should be carefully expressed as a preliminary view, so as not to appear to be a pre-judgement of the issue contrary to the requirements of natural justice. Consistent with the principles expressed by Lord Denning M.R. in Annie Fox v P. G. Wellfair Ltd. referred to above, the party against whom the view is expressed should then be asked to address that particular issue, both to correct any misconception of the evidence or the applicable law on the part of the arbitrator, and also to indicate what evidence is to be led (or proposed to be led) with a view to causing a change in the arbitrator's preliminary view. Early preparation of a joint bundle of documents and a joint experts report, as suggested above, would significantly enhance the arbitrator's ability to express a considered preliminary view at the earliest possible time, thereby maximising the potential saving in time and cost.

11. The arbitrator should be vigilant in monitoring compliance with the directions made at any Preliminary Conferences. To facilitate this, the directions made at the first Preliminary Conference should include a direction to the following effect:

> *"The parties are to notify the Arbitrator of non-compliance with any direction made by the Arbitrator not later than 48 hours after the time fixed*

by the Arbitrator for compliance with that direction. Any such notification is to be provided by facsimile. The party which has failed to comply with the direction shall provide, with its notification, an explanation for its non-compliance and a proposed amended timetable which shall as far as possible minimise delay to the overall timetable directed by the Arbitrator."

12. In many construction cases, the time and costs associated with experts' reports are a very significant part of the overall time and costs of preparing a matter for hearing, with costs often approaching (or even exceeding) the legal costs. In the 1996 John Keays Lecture (see *The Arbitrator* - August 1996, at p. 80), Justice Drummond referred to the Australian Institute of Judicial Administration study in 1992 which found that, in a major class of litigation in Victoria involving relatively simple technical issues, expert witness expenses accounted for between 16% and 27% of the cost of cases.

With a view to minimising the time and cost of preparation of experts' reports, once a particular technical (or quantum) issue has been identified, the arbitrator should give consideration to directing that the experts for the parties prepare a joint report, identifying areas of agreement and specifying their respective contentions (with reasons) on any areas of disagreement, and then limiting subsequent expert evidence to any technical issues which remain in dispute.

I suggest that an appropriate way of dealing with this aspect would be for the arbitrator to require any party opposing such direction to provide cogent reasons why such direction should not be made. If the arbitrator then directs that the experts prepare a joint report then, for the reasons set out in paragraph 13 below, the experts should be directed to express their agreement (or disagreement) on "assumed" facts which cover the ambit of the competing factual contentions of the parties e.g.

"On Issue No. 1, we agree that if the facts are A, B, and C (as contended by the Claimant), our joint opinion is X. On the other hand, if the facts are A, D, and E (as contended by the Respondent), our joint opinion is Y".

13. If, for some reason, it is not appropriate to direct the preparation of a joint report at the outset (for example, if one or more of the parties had in fact commissioned separate

expert reports before the arbitration), then experts' conclaves could (and in my view) should be used to narrow the technical and/or quantum issues. The purpose of an experts' conclave should be to identify the extent to which the experts agree on a particular issue or issues and their respective contentions on any issues on which they do not agree (together with the reasons for their respective contentions), and to prepare a joint statement or report recording those matters. It is often the case that the reason experts do not agree on particular technical issues is because of the different factual contentions advanced by the parties which respectively engaged them. Accordingly, in conclaving and preparing a joint report, experts should be directed to express their agreement (or disagreement) on "assumed" facts which cover the ambit of the competing factual contentions of the parties (see paragraph 12 above).

14. I should also express a note of caution in relation to the conduct of experts' conclaves. It is relatively common for arbitrators to make directions for experts' conclaves presided over by the arbitrator in which the legal representatives are either excluded from the conclave or have observer status only. If agreed by all parties to the arbitration agreement, this type of arrangement is unexceptional. However, if one party objects and takes the point that such conclave presided over by the arbitrator constitutes "proceedings" before the arbitrator in which it is entitled to legal representation pursuant to s. 20 of the uniform Commercial Arbitration Acts 1984, the law as it presently stands (at least in NSW) is that the parties are entitled to legal representation at such conclave. The right to legal representation was considered, in proceedings in the NSW Supreme Court concerning a Part 72 Reference, in Argyle Lane Corporation Pty. Ltd. v Tower Holdings Pty. Ltd. anor (No 55116 of 1992 - O'Keefe CJ CommD - unreported - 3 Sept 1993). His Honour cited with approval the judgement of Mahoney JA (as he then was), with whom the other members of the Court of Appeal agreed, in Triden Properties Ltd. v Capita Financial Group Ltd. (CA 40585 of 1992 - unreported - 1 June 1993), where his Honour said at p. 7:

> *"There is no principle of law that in every case where a party may take part in a proceeding, he may as of right be represented by a lawyer. In the end, a party's rights in this regard depend on the intention of the statute or document from which the proceedings originate and the requirements of justice in the circumstances of the case."*

Conclusion

I trust that this paper is of assistance to arbitrators in considering what they should do in taking a pro-active role in the arbitral process. By doing so, commercial arbitration as it is practised in Australia will provide an effective and attractive system of dispute resolution, thereby ensuring its continuing viability. Given the sentiments expressed by the judicial speakers at the 1996 Annual Conference, and the expressed reluctance of judges of superior courts generally to interfere with the manner in which an arbitrator exercises his powers, any such efforts seem likely to enjoy the support of most (if not all) of the judiciary.

There is no doubt that taking a pro-active role will demand considerably more time and effort on the part of individual arbitrators, at least until the users of commercial arbitration and their lawyers adapt their thinking and conduct to recognise that arbitration does not, and should not, merely mirror the procedures of the court system. As indicated by Justice Drummond in the 1996 John Keays Lecture (see *The Arbitrator* - August 1996, at p. 87):

> *"Informed parties can be expected to contribute to structuring an arbitration so as to deliver, quickly and economically, a measure of final justice that is acceptable to them. But arbitrators have a special responsibility to educate and encourage the parties who have appointed them to pursue those objectives. The arbitrator who adopts that approach, in an attempt to give the parties the best service, will take up a heavier burden than is borne by the arbitrator conducting an old-style arbitration, ie, one that mirrors equally old-style court processes. But it is that pathway which I believe is most likely to lead to the arbitration system achieving a high degree of acceptability, across the whole community, as a valuable means of resolving disputes that is truly alternative to litigation and ADR.."*
