Re-inventing the Wheel:
Cost Effective Dispute Management in Arbitration and ADR

Robert Hunt[1]

1 INTRODUCTION

> *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.* (Justice Drummond, of the Federal Court of Australia,1996) [2]

> *I[I]n Australia, until lately, we did not always embrace wholeheartedly the different techniques needed for mediation and arbitration. Those techniques do not always come easily to people trained in the combative atmosphere of adversary trials before Australian courts. That is why the educative work of the Institute and of the centre are so important. Mediation and arbitration are not just court proceedings conducted in a different place. They require distinct skills, novel approaches, different techniques and a new psychology.* (Justice Michael Kirby AC CMG, of the High Court of Australia,1999) [3]

In 2004, it is timely to consider whether, in the practice of arbitration, we are living up to what Justice Kirby says that mediation and arbitration are (or should be).

I propose to do that by identifying the problem, and then looking at ways and means of saving time and costs in arbitration by:

considering some techniques and approaches which are effective in other dispute resolution processes to see what we can learn from them;

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[2] Justice Drummond, '1996 John Keays Lecture', cited in *The Arbitrator* 15 (2), August, p. 76.

dealing with an 'old chestnut', namely how much the requirements of natural justice are (or should be) a constraint on saving time and costs in the conduct of arbitrations;

offering some observations about the various phases of the arbitral process, namely the preparatory (or interlocutory) stage, the hearing, and preparing the arbitral award, including methods I have found to be effective in minimising time and cost.

In relation to the last aspect, I should say at the outset that by and large my experience as an arbitrator (and as counsel) has been in larger and more complex disputes. The matters to which I specifically refer obviously may need to be 'scaled down' according to the size and complexity of the arbitration. For example, proactive case management during the interlocutory stages may prove to be an effective tool in minimising the overall time and cost of a complex arbitration, but may well be inappropriate for a short simple arbitration involving a small amount of money or a limited number of issues.

As many of you undoubtedly know, this is not a new theme for me. In 1997, I delivered a paper entitled 'A Pro-active Role in the Arbitral Process', which was published in *The Arbitrator & Mediator* in November 1997, outlining many of the things I then did (and still do) in seeking to conduct arbitrations efficiently and cost-effectively.[4] In Section 5 in this paper, I will not waste time repeating the detail of what I then said about various matters including particulars, discovery and inspection, and expert evidence. I will simply note that you should refer to the earlier paper for that detail.

2 IDENTIFYING THE PROBLEM

In his introduction to a paper delivered to the 2004 IAMA Conference, 'New Directions in ADR', Peter Wood refers to what were traditionally regarded as the principal attractions of arbitration, including resolving disputes more expeditiously, flexibility and cost effectiveness. He then says:

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[3] Justice Michael Kirby (1999) cited in *The Arbitrator* 18 (2), September, p. 107.

[4] That issue of *The Arbitrator & Mediator* is, unfortunately, not on the IAMA website. However, a copy of 'A Pro-active Role in the Arbitral Process' is located in 'Recent Papers' at <www.roberthuntbarrister.com>.

> *It is clear that litigants in Australia no longer perceive arbitration to have these advantages because domestic arbitration generally mimics and adopts exactly the same procedures as litigation. Domestic arbitration utilises many of the expensive and time consuming interlocutory steps provided for by the rules of Court, involves a delay to commencement of the hearing which is not considerably shorter than the delay in the listing of a trial before a Court, involves a hearing itself which is not necessarily shorter than a trial before a Court, but involves the additional cost to the litigants of the arbitrator and venue. Indeed, with the advent of managed court lists, and early judicial intervention in the interlocutory litigation process in some courts, arbitration is now generally seen as a less efficient process than litigation.*[5]

I anticipate that not everyone will agree that this is a justifiable criticism, given the manner in which many large, complex commercial arbitrations have been conducted in recent years (at least in New South Wales). It is important to note, however, that this may be the perception of litigants and their lawyers.

Many people may see this as a classic 'chicken and egg' situation, largely brought about by lawyers pressing for (or insisting on) arbitral processes which enable them to operate within their comfort zone. In opening the IAMA Dispute Resolution Centre in Sydney in May 2000, the then Governor of New South Wales (and former Judge of the Court of Appeal), the Honourable Gordon Samuels AC expressed the view that the real reason why some lawyers press for arbitrations to be conducted in the manner of traditional litigation is because that is what they are familiar with. His Excellency then said:

> ***The fact that the standard adversarial procedures are generally rational and fair is insufficient to commend them for adoption in an arbitration***. …
>
> ***I am reasonably sure that it is the facile adoption of the standard and familiar adversarial procedure which adds time and cost to arbitrations***. *If such procedure is unnecessary to the solution of a dispute, as in many cases at least I believe it is, it is therefore inefficient.*
>
> *Well then, what is the remedy? It is, of course, to modify in the conduct of arbitrations the rigours of the adversarial system. In particular, it is not sensible, in my view, to run an arbitration on the footing that the parties alone decide what evidence they will produce (thus denying the arbitrator any right to call a witness) and determine the pace at which the caravan moves forward.* ***The parties must, of course, establish the basic issues which they desire to contest: but after that any***

[5] Peter Wood 'Domestic Lessons from International Arbitration – *Anaconda v Fluor*: a case study' (Paper presented at New Directions in ADR, 2004).

decisions about evidence or procedure must be made by the arbitrator in consultation with the parties. (emphasis added)

3 WHAT CAN WE LEARN FROM TECHNIQUES AND APPROACHES WHICH ARE EFFECTIVE IN OTHER DISPUTE RESOLUTION PROCESSES

(1) THE VARIOUS FORMS OF ADR (I.E. MEDIATION, CONCILIATION, EXPERT DETERMINATION)

Mediation and Conciliation

There is a lot that we can learn from tools which are effective in the practice of mediation and conciliation.

One is the importance of gaining the trust and the respect of the parties. Once an arbitrator has that trust and respect, parties will be more receptive to views that the arbitrator expresses about possible means of saving time and cost in the arbitration. Without that trust and respect, the prospects of persuading parties to adopt suggestions of the arbitrator which differ from the 'traditional' adversarial approach to court litigation will be very remote indeed. [6]

Another important lesson from mediation and conciliation is the technique of 'active listening'. I have found this to be particularly important in the interlocutory stage, when exploring ways and means of minimising the time and cost of the process. A related tool which is very useful is 're-statement', by which the arbitrator re-phrases what is put to him by the parties, as a means of guiding the dialogue with the parties in a direction which the arbitrator considers will be beneficial to minimising time and cost.

A further important lesson from mediation and conciliation is the benefit of developing options, particularly during the preparatory or interlocutory stage of the arbitration. Decisions made at that stage in respect of the arbitral process can have far-reaching effects on the ultimate time and cost of the arbitration.

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[6] See Part 3 below, particularly what was said by the Honourable Gordon Samuels AC.

Yet another thing we can learn from mediation and conciliation is the benefit of narrowing issues as a means of minimising the time and cost of the arbitral process. I have found, in my own practice, that because it seems I am regarded as a fairly proactive arbitrator, the work which I put into the narrowing of issues during the preparatory or interlocutory stages often results in the arbitration never in fact reaching a hearing. Those cases which do proceed to hearing usually take considerably less time than that originally estimated by the parties.

Expert Determination

There are various lessons that we can learn from expert determination as well.

Perhaps the most important is the increased popularity of expert determination, which indicates that the market is anxious to avoid processes that involve parties committing themselves to lengthy oral hearings. Instead, the proponents of expert determination (of which there are many) prefer a process where the person who is to determine the dispute makes that determination based on documents only, after a process where information can be supplied and exchanged and submissions made, in writing.

The downside, of course, is that the expert determination process is completely unsuitable for some disputes.

For example, where there are factual issues to be determined which are entirely dependent on questions of credit (i.e. choosing between two competing versions based entirely on whether the Expert believes the version of A or, conversely the version of B), the documentary material or inferences which may properly be drawn etc do not assist in determining which particular version should be accepted. In such cases, the only satisfactory method of determining those issues is for oral evidence to be given, and for the witnesses to be made available for cross-examination. That would tend to indicate that the process actually employed was in substance an arbitration, opening the door to a possible application for leave to appeal by the unsuccessful party under the *Uniform Commercial Arbitration Acts*. [7]

[7] Arbitration under the IAMA *Expedited Commercial Arbitration Rules* provides a better solution, as it offers a relatively quick process, which basically proceeds on documents, but leaves an option for an oral hearing to the extent considered appropriate by the arbitrator. See paragraph 9 of Schedule 2 to the Rules.

(2) ADJUDICATION

The use of adjudication has increased exponentially over the past few years, following the introduction in NSW of the *Building and Construction Industry (Security of Payment) Act 1999*, ('the Act') as amended in 2002.

Statistics kept in NSW indicate that, in the 13-month period to 31 March 2004, 658 applications for adjudication were made, for claims between $389 and $33,511,962, in an aggregate amount of $205,380,593. Of those claims, 444 were determined, for amounts between $842 and $25,943,413, in an aggregate amount of $122,647,389. [8]

Similar legislation has been enacted more recently in other states and is foreshadowed elsewhere.

The adjudication process has been in use in the UK for some time longer, emanating from legislation in 1996. The process was also used as part of the dispute resolution regime in the construction of the Hong Kong Airport in the early 1990s.

The adjudication process is directed to the determining of the amount of progress payment to which a builder is entitled, while not affecting the rights of the parties for later determination of substantive disputes in relation to such matters as variations, defects, liquidated damages for late completion. [9]

Anecdotal evidence from Great Britain suggests that as many as 90% of matters which formerly would be referred to arbitration are now being determined finally by the adjudication process. If this is correct, it would seem to support a common contention by builders, subcontractors and the like, that clients and developers were taking inappropriate advantage of alleged contractual disputes to deny builders and subcontractors the cash flow they need to stay in business.

There are some things that we can learn from how the adjudication process is conducted, under the present legislation in NSW, which may be beneficial in the conduct of arbitrations. The detail of the adjudication process is not properly the subject of this paper.

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8 The remainder were completed but not determined for various reasons.

9 See s. 32 of the Act.

For the purposes of this paper, however, it is worthy of note that the process is conducted basically on the papers, sometimes with the benefit of a view/inspection,[10] and that there are fixed times within which the adjudicator is required to deliver his or her adjudication. The Act provides that an adjudicator is to determine the adjudication as expeditiously as possible and, in any case, within 10 business days after the date on which the adjudicator notified the parties as to his or her acceptance of the application or within such further time as the claimant and respondent may agree. [11]

As can be seen from the statistics quoted above, tome of the adjudications which have been the subject of applications to the Supreme Court of NSW have involved adjudication determinations as high as $25 million. In those circumstances, an adjudicator needs to be focused and particularly well organised to be able to deliver an adjudication determination within a relatively short period of time. These are lessons that we can learn for the conduct of arbitrations as well.

(3) COURT REFERENCES

The court reference system is well established in NSW, pursuant to the provisions of Part 72 of the *Supreme Court Rules* and Part 28B of the *District Court Rules*. One particularly useful provision in the Rules is expressed in Part 72 Rule 8(5) of the *Supreme Court Rules* in the following terms: [12]

> *Each party shall, within a time fixed by the referee but in any event before the conclusion of evidence on the inquiry, give to the referee and each other party a brief statement of the findings of fact and law for which the party contends.*

Cole J (as he then was), said of this provision, in *Xuereb v Viola*: [13]

> *The recent amendment to Part 72 rule 8, by the insertion of a new subrule (5) providing "Each party shall, within the time fixed by the referee but in any event before the conclusion of evidence on the inquiry, give to the referee and each other party a brief statement of the findings of fact and law for which the party contends", ensures that each party is given the opportunity to place before the referee its submissions on fact and law. Of course, if parties breach their obligation under rule 8(5) by failing to comply with it, they cannot complain of a failure of natural justice.*

[10] See s. 32 of the Act.
[11] See s. 21 of the Act.
[12] A similar provision is contained in rule 7(5) of the *District Court Rules.*
[13] [1989] 18 NSWLR 453, at pp. 466 – 467.

I have found that to be a useful direction to make in arbitrations as well, because it provides a ready checklist of the matters that need to be dealt with in the arbitral award.

Another issue in relation to court references that can be usefully considered is the practice which the Courts usually adopt of not referring a matter for a report pursuant to the Rules until the pleadings are closed and the various interlocutory steps have been completed (e.g. service of witness statements and experts' reports).

That should mean that the Referee should then be able to fix a hearing date for the Reference within the relatively near future on the basis that all of the interlocutory steps have been attended to. Unfortunately, that seems to rarely be the case for a number of reasons, including the fact that many parties seem to put off considering the detail of how the hearing will be conducted until the Referee is appointed, and then realise that pleadings, statements and reports may need to be amended.

One undesirable consequence of this sort of procedure by the Court is that it means that the parties have expended considerable sums of money in the preparation of experts' reports. Experience shows that, when a Referee conducts a conclave of experts, or directs that there be a meeting between the experts with a view to narrowing issues and producing a joint report identifying matters on which they agree and matters on which they disagree, much of the time and effort which has gone into producing the experts reports in the first place may well have been avoided.

I was very pleased to hear from Janet Grey [14] of a case when she was appointed early in the process, with a much better outcome. In her words:

> *I was appointed as referee in a Supreme Court case recently between a Plaintiff/Lessee and Defendant/Lessor.*
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> *Water penetration was occurring in the premises. The Lessee said it was coming from faults in the original building fabric and the Lessor said it was coming from faults caused by the Lessee's fit-out. The parties were unable to agree on what rectification work was required.*

[14] NSW Grade 1 Arbitrator.

I was appointed as referee early on in the proceedings with the parties saying to me go out to the site with the experts and try and sort the mess out (although not in those words). Prominent in the Lessee's mind was the need to have a waterproof place in which to run its business.

I met with the experts on site about five times. We crawled and climbed over the building and then debated the cause of each leak. First substantial agreement was reached between the experts on what the causes of the leaks were and whether or not they were building or fit-out related (there were about twenty in all). Then agreement was reached on what was needed to be done to rectify the leaks, and the parties agreed on who would organise the rectification work.

We then met during and after rectification work and tested it (flood and pressure) and the experts decided what further work needed to be done and further clarified some of the causes of the leaking. Finally, when the work was completed, there was a half day conclave regarding the additional cost of fixing up the fit-out mess (drooping plasterboard ceilings etc. followed by outline submissions. That concluded the hearing (apart from receiving final submissions). Prior to hearing final submissions the parties asked for an adjournment to discuss settlement options, which I have been informed are close to a successful conclusion.

Ninety percent of the time in the reference was either on site with the experts or drafting up summaries of the experts' agreements and advising the parties lawyers of progress etc.

Had the Court waited until all witness statements had been concluded and exchanged the horse would have bolted, and the Court would not have had the benefit of the referee's expertise through the process of the identification of the problems and their rectification.

In these kinds of situations the very early appointment of the referee can be very useful.

(4) PROCEDURES IN THE COURTS

There are three particular aspects of procedures adopted by the Courts (at least in NSW) which are worthy of consideration.

Case Management

There is a practice in NSW commercial and construction lists of relatively detailed case management. This is a technique that I find is useful in arbitrations for two principal reasons. The first is that the setting of a long interlocutory timetable with a hearing date inevitably means that the matter is not ready to proceed on the appointed hearing date. In my opinion, it is better to

have a number of preliminary conferences to better manage the flow of the interlocutory processes, and only fix a hearing date when it is clear that that hearing date can be realistically achieved. The second reason is that case management in this way is a particularly effective technique for developing options and narrowing issues, to which reference was made in Sub-section 2(1) above.

The Expert Witness Code of Conduct

The Federal Court of Australia and the Supreme and District Courts of New South Wales have all introduced an *Expert Witness Code of Conduct*. Expert reports are not admissible unless experts acknowledge that they have read the *Expert Witness Code of Conduct* and agree to be bound by it.

The *Expert Witness Code of Conduct* in Schedule K of the *NSW Supreme Court Rules* provides as follows:

General Duty to the Court

2. *An expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise.*

3. *An expert witness' paramount duty is to the Court and not to the person retaining the expert.*

4. *An expert witness is not an advocate for a party.*

The Form of Expert Reports

5. *A report by an expert witness must (in the body of their report or in an annexure) specify:*

   (a) the person's qualifications as an expert;

   (b) the facts, matters and assumptions on which the opinions in their report are based (a letter of instructions may be annexed);

   (c) reasons for each opinion expressed;

   (d) if applicable – that a particular question or issue falls outside his or her field of expertise;

   (e) any literature or other materials utilised in support of the opinions; and

(f) any examinations, tests or other investigations on which he or she has relied and identify, and give details of the qualifications of, the person who carried them out.

6. If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in their report.

7. If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.

8. An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter shall forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect which shall contain such of the information referred to in 5(b), (c), (d), (e) and (f) as is appropriate."

Compulsory Mediation

The third aspect to which I would refer in the court procedures is that, under amendments to the *Supreme Court Act* in NSW, judges now have the power to refer matters to mediation without the consent of the parties.

That is not a power that an arbitrator presently has. The best that an arbitrator can do is to seek to persuade parties that it would be beneficial to at least attempt mediation for some (or all) remaining issues in the case.[15]

4 NATURAL JUSTICE: HOW MUCH OF A CONSTRAINT IS IT (OR SHOULD IT BE) ON SAVING TIME AND COST IN THE CONDUCT OF ARBITRATIONS

There are two aspects to natural justice, namely procedural fairness and bias or, perhaps more correctly, the appearance of bias.

[15] See paragraph 8 under 'Becoming Pro-active' in Hunt, above note 4.

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*,[16] Mason J (as he then was) said:

> ***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?*** (emphasis added)

(1) PROCEDURAL FAIRNESS

There is a perception, amongst some lawyers and arbitrators, that affording procedural fairness requires that a contested arbitration be conducted in much the same manner as a traditional contested trial. That perception is not correct.

The requirements of natural justice were the subject of detailed consideration by Cole J (as he then was) in *Xuereb v Viola*,[17] a case concerned with a Reference under Part 72 of the New South Wales *Supreme Court Rules*. In relation to procedural fairness, his Honour said: [18]

> ***[I]n my judgment, it can be said that non-compliance with procedures normally applied in Court proceedings does not, of necessity, result in a denial of natural justice****. Were an inquiry to be directed by a court as to what monetary indebtedness of a party was shown by a set of books of account (as distinct from determining the indebtedness generally), there may be no denial of natural justice to either party by a judge directing a competent accountant, as referee, to report on that matter without reference to the parties. In contrast, if a referee were asked to the indebtedness of A to B having regard to the set of books of account and any other circumstances, it may well constitute a denial of natural justice not to permit each party to advance to the referee such factual circumstances relating to indebtedness, or falsity of such books, as may be relevant. Equally, it may constitute a denial of natural justice not to permit a party to respond to an allegation of indebtedness made against him.*
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> ***The example I have given is an endeavour to demonstrate that what is required by natural justice will vary with particular circumstance****.*
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> ...

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16 [1985] 159 CLR 550, at pages 584 – 585.

17 [1989] 18 NSWLR 453.

18 At p. 468 – 469.

> ***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***. (emphasis added)

(2) BIAS (OR THE APPREHENSION OF BIAS)

A succinct summary of the relevant principles was given by Cole J (as he then was) in *Xuereb v Viola*, where he said: [19]

> *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.* (emphasis added)

The application of these principles means that it is inappropriate for an arbitrator to privately 'caucus' with parties and their professional advisers, notwithstanding that it is a perfectly proper practice for a mediator or conciliator. The difference is that a mediator or conciliator is not called upon to decide the substantive issue.

5 MINIMISING TIME AND COST IN THE ARBITRAL PROCESS

It is probably stating the obvious to say that not all arbitrations are the same, and not all arbitrators are the same. Nevertheless, I think it needs to be acknowledged in considering how best to minimise time and cost in the arbitral process.

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[19] At p. 469.

Various techniques I use seem to be more effective in some arbitrations than others, as the mix of issues and personalities changes. I find that, as a general rule, inexperienced parties and their professional advisors take more persuasion to try something new. As indicated in Section 2 above, one tends to find that lawyers like to operate within their comfort zone, that is, on their territory rather than yours. A similar comment could probably be made about experts.

There is a wide range in personalities and styles among successful arbitrators. Some arbitrators find an assertive proactive approach suits their style, while others are less comfortable with it. It is probably fair to say that I am in the former category.

With that disclaimer, I can describe what I think is important at the various phases of the arbitral process, and the techniques I find are effective.

(1) GENERAL

(a) The powers of the arbitrator

Section 14 of the *Uniform Commercial Arbitration Acts* ('the Acts') provides an arbitrator with very wide powers in determining the arbitral procedure, namely:

> *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.*

The only express constraints on the exercise of those powers are the Acts and the arbitration agreement. However, it would be unwise for an arbitrator to exercise those powers in a manner which was opposed by both parties.[20]

Other relevant provisions of the Acts that are worthy of note are:

- section 18(3): the arbitrator has the same powers as the Supreme Court to continue with arbitration proceedings in default of appearance or failure to comply with a subpoena or with a requirement of the arbitrator etc;

[20] See paragraph 2 under 'Becoming Pro-active' in Hunt, above note 4.

- section 19(3): unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator is 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;

- section 37: the parties have a duty 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;

- section 46(1): unless a contrary intention is expressed in the arbitration agreement, 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;

(b) The style of the arbitrator

While acknowledging the differences in personality and style among arbitrators, I believe there are some important things we all should do if we are serious about trying to conduct arbitrations efficiently.

The first is to focus on what you are trying to achieve, and not lose sight of 'the wood for the trees'. There is no point in adopting innovative techniques if they involve more time and cost than what you are trying to save. Related to the first point is that you need to be flexible in your approach to achieving your aim. If you try something and it does not work, then try something else rather than giving it away as too hard.

You need to be enthusiastic in 'selling' the benefits of something a party is not familiar with. Related to that point is the need to be committed to what you are seeking to persuade the parties about. Sometimes, it may be better to come back to a suggestion at a later time, rather than pressing it to the point of rejection. If you do not appear committed and enthusiastic, you can hardly expect the parties to be.

Finally, the 'firm but friendly' arbitral style invariably yields the best results.

(c) The importance of preparation

In my opinion, preparation is one of the most important ingredients for an arbitrator in the efficient conduct of the arbitral process.

While it requires more time and more effort on the part of the arbitrator, it pays dividends throughout the process. During the preparatory stage of the arbitration, it enables the arbitrator to appreciate the relative importance of issues, which is a prerequisite to devising an efficient process for dealing with those issues. During the hearing, it places the arbitrator in a better position to deal with matters which arise, including such things as objections to oral evidence, minimising cross-examination as far as possible, and questions from the arbitrator after re-examination.

While it takes time, it ultimately saves time that is expensive when solicitors, barristers and others are present. This can lead to a significant saving in time and cost of preliminary conferences and hearings.

(d) The importance of being seen to be in control of the process, and having the respect of the parties

Good preparation is an important ingredient here as well. Most experienced arbitrators would probably admit that, on occasions, they may have slipped a little in this regard. Experience shows us that having the respect of the parties, and being seen to be in control of the process, are interdependent. While it is not something which one achieves by 'bullying' the parties, it is important that the parties perceive the arbitrator to be in control. How an individual achieves that is very much a question of personal style. While some arbitrators are assertive, others achieve much the same result by engendering a spirit of cooperation. I find that, in most arbitrations, at least one of the parties (or their representatives) will test the envelope, or test the limits which an arbitrator will accept in pursuit of their own client's interests. I find it is useful to establish, relatively early in the process, that it is the arbitrator who controls the process, rather than either party. At the risk of repeating myself, this is only possible with proper preparation. This is encompassed in the phrase 'firm but friendly'.

(e) Electronic copies of documents

Used appropriately, electronic documents can lead to a significant saving in time and cost in the arbitral process.

The April issue of *Insights – International Arbitration* contains a very useful article by Andrew Stephenson and Simon Chapple entitled 'Using Technology in International Arbitration'.[21]

My current practice is to direct that the parties provide me, and the other party, with copies of documents in both hard copy and electronic form. If the arbitrator is provided with electronic copies of documents such as witness statements, experts reports and written submissions, those documents need to be provided to the arbitrator in a form which the arbitrator can use to cut and paste sections as required into the arbitral award.

I have found there are two problems which arise. Firstly, some solicitors jealously guard their intellectual property rights in those documents, and prefer to provide them in 'pdf' form to the opposing lawyers. The second problem I have experienced is that, if you are using a program such as 'Outlook Express', those programs find it difficult to cope with very large attachments. Some documents transmitted to me electronically have been as big as five megabytes, and have caused quite a problem in my electronic mail system.

I have found that a convenient solution to both problems is that the electronic copy of such documents served by email is in pdf form, and I later receive CD ROMs containing a version of those documents, in 'word' format, which I can then cut and paste.

(2) THE PREPARATORY (OR INTERLOCUTORY) STAGE

(a) Before the first Preliminary Conference

The initial notice to the parties convening the preliminary conference provides an important opportunity to define the parameters within which you intend to conduct the arbitration. I use a form of letter which is somewhat different to Annexure 'A' to the IAMA Practice Note 3C 'The Preliminary Conference', along the lines described in the 1997 paper.[22]

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[22] See paragraph 3 under 'Becoming Pro-active' in Hunt, above note 4.

I do this for two main reasons. Firstly, to gain some initial appreciation of the sorts of issues involved in the dispute. It is important to know, at the outset, whether there are legal, technical and/or quantum issues involved in the dispute, as well as gaining some appreciation of whether there is a cross claim, and the quantum of what is in dispute. As indicated in Section 1 above, the type of procedure one might suggest for a complex multi-million dollar dispute will be significantly different to the sort of procedure which is appropriate for a simpler dispute where the amount in issue is much less.

The other principal reason for this form of letter is that, by being proactive from the outset, an arbitrator should be perceived by the parties as being in control of the process, and thereby gain the respect of the parties at a very important stage. Another benefit I have found is that the initial statement of issues is often the first occasion on which the parties address the types of issues involved in other than very general terms. An illustration of this was in an arbitration I conducted in late 2003, where the provision of that sort of document in a multi-million dollar commercial case led to settlement of the matter within 2 weeks of the first Preliminary Conference.

(b) The first Preliminary Conference

The first Preliminary Conference is also an important opportunity to set the parameters for the arbitration.

It provides the first opportunity for face to face contact between the arbitrator, the parties and their lawyers.

In the sorts of matters in which I have been involved, I have found that almost invariably I do not have enough information by the first Preliminary Conference to make procedural directions for the matter up to and including the hearing. Accordingly, my practice at the first Preliminary Conference is to set a timetable for properly particularised pleadings and a preliminary bundle of documents. Provision of this material, added to the initial statements of issues by the parties, means that I am in a better position at the next Preliminary

Conference to assess what procedure should be adopted in that particular arbitration in preparing the matter for hearing.

(c) 'Pleadings' and particulars

The adequacy of particulars in pleadings, and requests for further and better particulars, are often an occasion when lawyers for a party may try some 'muscle flexing'. I am a strong proponent of procedural directions by which objections to the adequacy of particulars are notified to the arbitrator and the arbitrator directs what (if any) further particulars are to be provided. [23]

While it may sometimes be inconvenient to have to deal with arguments concerning the adequacy of particulars within a very short time frame, I consider it is well worth the effort involved for various reasons, namely:

- it creates a favourable impression, of the arbitrator being across the issues in the arbitration;
- it establishes that you, as arbitrator, are firmly in control of the process (rather than a solicitor for one party, who may have a multi page request for particulars in its precedent file); and
- it does (or should) earn you the respect of the parties.

All of those things are important matters for the efficient conduct of the remainder of the arbitration.

(d) 'Case management' in further Preliminary Conferences and otherwise

In most cases with which I am involved, I use a 'case management' type of approach which is not dissimilar to case management processes in some courts. Basically, the approach

[23] See Annexure 2 to IAMA Practice Note 3C and paragraph 6 under 'Becoming Pro-active' in Hunt, above note 4.

involves an initial stage of information gathering and exchange (i.e. properly particularised pleadings, joint bundles of documents etc), and then developing options, narrowing issues.

I sometimes find that a suggestion which does not find favour at an early Preliminary Conference is then adopted by the parties at a later Preliminary Conference. This is particularly so in relation to joint reports of experts and a 'chess clock' approach to fixing the hearing.

I have found that there is no single case management approach that works in all arbitrations. Sometimes I find that as few as three Preliminary Conferences are required before the hearing. On other occasions, at various stages through the process, considerably more attention is required. For example, in a substantial construction arbitration recently, we found that a stage was reached in the preparatory stage where considerably more was required than a one to two hour Preliminary Conference. With the consent of the parties, I scheduled a Preliminary Conference for an entire day, during which we made substantial progress in formulating an appropriate process. That Preliminary Conference involved the parties, their solicitors and barristers and, perhaps most importantly, their respective experts in two areas. At one stage during the Preliminary Conference, I conferred separately with the barristers and the experts together, to generate some options for how the expert evidence could be dealt with. When a process was agreed, the Preliminary Conference was reconvened, and the minutes of the Preliminary Conference recorded what was agreed with the barristers and the experts.

I have also found that, on some occasions, something emerges from documents served that requires attention before the next Preliminary Conference. If that happens, my practice is to formulate appropriate draft directions for dealing with the problem, and inviting submissions from the parties if there is any disagreement with the directions proposed.

It is important to remain flexible. In an arbitration recently, an issue was raised concerning determination of a matter as a preliminary question, by way of interim award.

Courts are extremely cautious about embarking on determination of matters as preliminary questions. They will usually only do so on the basis that facts are agreed and the

determination of the preliminary question appears likely to lead to an early determination of the proceedings. One particular problem which judges and arbitrators face in determining matters as a preliminary question, is the prospect that the unsuccessful party will then seek that the judge or arbitrator disqualify himself or herself from the further conduct of the proceedings. This has more serious consequences in arbitration than in a trial before a judge, because a good deal of costs may already have been expended in the arbitration and, unless the parties expressly agree, any replacement arbitrator would need to begin afresh.

On that basis, my initial view was against determining the issue as a preliminary question. However, it was then explained to me that one party was seeking the determination of a question of law as a preliminary question, because the time experts for the parties were unable to agree on the proper construction of the contract in relation to the matters to be taken into account in assessing extensions of time.

If this issue was not determined as a preliminary question, it would mean that the joint deliberations of the experts would need to proceed on the basis of two competing assumptions as to the proper construction of the contract. This would obviously be less efficient and more costly than if the experts had the benefit of a determination on the proper construction of the contract beforehand. For that reason, I indicated to the parties that I would be prepared to determine the question of construction of the contract as a preliminary question, provided that the parties agreed that neither would take the point that I should disqualify myself from the further conduct of the arbitration by reason of determining such a preliminary question of law.

In the end, that agreement was not forthcoming.

(e) Documents: discovery & inspection, and preparation of joint bundle of documents

I usually find that informal discovery and inspection is accepted by the parties and their lawyers as the appropriate manner in which discovery and inspection should proceed. I cannot now recall the last occasion when a party sought to argue that discovery should comprise a detailed list of all documents in the traditional manner. It seems to be generally accepted that discovery be by identified folders of documents, in which the documents in the folder are individually numbered (but not described in an index). In relation to joint

bundles of documents, my practice is to direct preparation of a joint bundle at two different stages of the interlocutory process. Initially, I find it useful to have a joint bundle of documents by the time of the second Preliminary Conference, to assist me to appreciate the issues (particularly in relation to the contents of contracts and other documents), rather than simply having the documents summarised in a pleading (regardless of how well particularised the pleading is). With that joint bundle of documents, I direct that it is to be prepared on the basis that it comprises only documents which are agreed by both parties. If one party objects to the inclusion of a document in the joint bundle, then it is excluded. I use that bundle of documents solely to gain a better appreciation of the issues, and not for any evidentiary purposes.

At a later stage, I seek to persuade the parties to prepare a joint bundle of documents for use as evidence in the proceedings. This saves a considerable number of trees in eliminating multiple copies of documents all attached (or exhibited) to various witness statements. It simplifies matters considerably if all witnesses refer to a single bundle of documents, rather than the arbitrator being faced with the prospect of cross referencing between the versions respectively attached or exhibited to particular witness statements.

This sort of process usually involves the addition of further documents to the initial joint bundle of documents. Those documents are included in the evidentiary joint bundle on the basis that I will rule on objections to the documents in due course (before the hearing). Objections are dealt with further in subsection (2)(k) below.

(f) The factual evidence: do witness statements save time and cost or not?

There are a number of competing arguments in relation to this particular issue. As a case increases in complexity, it obviously becomes less efficient to have the evidence in chief given *viva voce*. Oral evidence in chief usually turns out to be a stop start sort of process, and cross-examination can tend to be prolix until counsel has seen the transcript of the oral evidence. On the other hand, the wording used in witness statements often tends to more closely reflect the language of the lawyer involved in preparing the statement rather than that of the witness. This may be particularly significant where there is disputed evidence about a conversation which took place many years earlier. It is undoubtedly correct that the preparation of written witness statements involves significant time and expense. However,

the time involved will usually be that of a witness and a solicitor. If the evidence is given orally at the hearing, the time taken involves the arbitrator, counsel for the parties, the solicitors, and the ancillary costs of transcript, hearing room and so on..

There are two other aspects which probably tip the balance in favour of written witness statements in most matters. The first is that service of written witness statements certainly encourages settlement at an earlier stage than if the evidence in chief is given *viva voce* at the hearing. The second aspect is that it shortens the time required at the hearing for dealing with objections to evidence and also the time taken in cross-examination. My practice in dealing with objections is set out in subsection (2)(k) below.

(g) The expert evidence: reports before (or after) meetings or conclaves of experts?

This is an issue that I dealt with in my 1997 paper.[24] I have found that, almost invariably, initially the parties prefer to serve their respective experts reports before meetings or conclaves of experts. I am strongly of the view that this is extremely inefficient. In most cases, I find that a joint report prepared after experts meet involves a very substantial degree of agreement between the experts. Often one finds that opinions between experts differ simply because of the different factual instructions which they receive.

As indicated above, I find that I am often successful in persuading parties to move from that position. Sometimes it is simply a matter of chipping away patiently, until the parties accept what you regard as commonsense.

A copy of my standard directions for experts meetings is Annexure 'A' to this paper. In most cases, some amendment is required to those directions before they are accepted by the parties. However, I consider that this sort of procedure is worth persevering with because of the significant saving in time and cost which may result. That saving is not limited to the time costs of the experts themselves. If this sort of process can be put in place before factual witness statements, it can also lead to a substantial saving in time and costs in the

[24] See paragraphs 12 and 13 under 'Becoming Pro-active' in Hunt, above note 4.

preparation of witness statements, as there is no need to deal at length with matters which are not controversial to provide the factual foundation for expert evidence. If a procedure is adopted whereby the factual witness statements are prepared first, and expert reports follow, parties may not be prepared to take the risk in not dealing with particular factual matters, until they know that those facts are not controversial or are not germane to the respective opinions of the experts.

(h) Conducting meetings or conclaves of experts

There are differing views on the extent to which the arbitrators should be involved in meetings or conclaves of experts. In my 1997 paper, I expressed a note of caution in relation to the conduct of expert conclaves. [25] A further concern which I have is the prospect that something may be said in a conclave at which the arbitrator is present, which is not part of the evidence in the case, but which has some perceptible influence on the decision of the arbitrator. One way of dealing with this is for a transcript to be kept of the conclave, and to require that the transcript be tendered as evidence in the arbitration. However, transcripts are expensive and it may not always be cost effective to proceed in this manner.

Another practical reason for the arbitrator not to take part in the deliberations of the experts is that one sometimes finds that, in the absence of the parties, the lawyers and the arbitrator, it is a much shorter and more efficient process. In some matters where I have proceeded in this manner, the amount of face to face meetings between the experts has been minimal, and much has been done by telephone or email. That may not be practical if the arbitrator is to be involved in the actual deliberations.

The technique I use is to convene the meeting between the experts, prepare a list of issues that I ask the experts to consider, invite the experts to amend or supplement that list of issues as they see fit (on the basis that they have a better understanding of the technical issues than I do, at least at that stage), invite the lawyers and representatives of the parties

[25] See paragraph 14 under 'Becoming Pro-active' in Hunt, above note 4.

to be present when I am giving the experts their 'riding instructions', and then receive joint reports from the experts on the progress of their deliberations in a form which can be circulated to the parties. Sometimes that is by email, if the meetings are being conducted before the hearing. On other occasions it has involved a joint report by the experts during the hearing, which is recorded on the transcript. I find that this sort of process works efficiently.

However, I respect the views of others (obviously better technically qualified than I am) who adopt a more proactive role in the deliberations of the experts during the conclaving process. For example, the sort of procedure described by Janet Grey which is referred to in section 3(3) above was obviously heavily dependent on her active involvement in the deliberation process.

(i) The significance of the Code of Conduct for Expert Witnesses

A longstanding problem in litigation and arbitration has been that many experts have not recognised the obligations that flow from a privileged position of being able to give opinion evidence, and tended to tailor their evidence according to the interests of the party on whose behalf they are engaged.

As noted in section 2 above, the Federal Court of Australia and the Supreme Court and District Court of New South Wales have included in recent years requirements for experts to abide by an Expert Witness Code of Conduct. This requires an express statement from experts that they agreed to be bound by the Code of Conduct as a precondition to admission of an expert's report.

This is something which can, and should, in my view, be adopted in arbitral proceedings. I tend to find that, these days, most expert's reports in arbitrations contain the necessary statement. If such a statement is not contained in expert reports, I usually make a direction that it be provided.

I then find it useful to remind the experts of the obligations under the Code of Conduct before their joint deliberations. Some may consider this is overkill, but I find it useful to remind experts that their paramount obligation is not to the parties who retained them. I

find it is better to do that at the commencement of the joint meeting, rather than telegraph it beforehand, as clients do not always understand that the expert they have paid is required to proceed in a manner which does not put their interests first.

(j) Fixing the hearing (the 'chess clock' approach)

Before the arbitration proceeds to a stage when hearing dates can be fixed, I circulate proforma 'Further Procedural Directions', a copy of which is Annexure 'B' to this Paper.

Paragraph 15 of Annexure 'B' sets out my standard direction for a 'chess clock' type hearing. I find it is useful to circulate that document before the time of actually fixing the hearing date, as often there is initial reluctance to the concept of a fixed hearing time.

One of the difficulties with large complex arbitrations is that, if such an approach is not adopted, one may find that when the end of the hearing time fixed has expired, the evidence is only partly complete and, due to prior commitments of barristers, expert witnesses and arbitrators, a resumption of the hearing is not possible for many months. When a hearing is interrupted in this manner, further time and cost is involved on everyone's part in getting back up to speed for the resumption of the hearing.

I usually find that, at a subsequent Preliminary Conference, the parties agree to a 'chess clock' type approach to the hearing provided that sufficient time is fixed for the hearing. The practice I adopt is that, if one party says that X weeks should be set aside for the hearing, and the other party says that X plus 2 weeks should be set aside for the hearing, then unless there is agreement to the contrary, I fix the hearing for X plus 2 weeks. By doing so, neither party can later say that further time should have been fixed for the hearing in the first place.

It is interesting to note that, even if there is initial resistance to a 'chess clock' approach, I can recall only one occasion since 1995 when the hearing has taken the full time allocated for the evidence. On one other occasion, the evidence was not completed within the allocated time and required further hearing dates to be set. That was due to something which could not reasonably be anticipated at the time of fixing the hearing, being the

consequence of something which arose from joint meetings of experts which were being conducted while the hearing proceeded.

It is important to remain flexible and reasonable in the face of such changed circumstances.

(k) Other matters (statements of issues, statements of findings contended for, dealing with objections, directing security and service of offers of compromise etc)

The proforma 'Further Procedural Directions' in Annexure 'B' deal with various other matters that I find useful in the arbitral process.

I have included in Annexure 'C' to this paper the proforma schedule that I use for objections. Objections and preliminary rulings on objections are dealt with in paragraph 14 of Annexure 'B'. My practice is then to finalise my rulings on objections as each witness is called. This saves considerable time at the hearing in dealing with these sorts of matters, particularly as I find that, in most cases, there is no serious challenge to my preliminary rulings.

I have dealt with statements of findings of fact and law contended in section 3(3) above, and do not need to repeat that here.

I have found that directing security, and directing service of offers of compromise, are both useful tools in facilitating early settlement. On one (perhaps notable) occasion, when I made a direction for the service of offers of compromise, the claimant's offer of compromise was that it would accept a lesser amount than the amount offered by the respondent in its offer of compromise. As was to be expected, the matter immediately settled.

Unfortunately, that experience has not been repeated, although I live in hope. However, the process is useful because it encourages parties to consider, at an early stage, the cost consequences of the amount of the Offer of Compromise. Instead of the usual situation of a claimant starting high and a respondent starting low, the Offer of Compromise (or Calderbank letter) encourages lower offers by claimants and higher offers by respondents.

Directions for the provisions of security for the arbitrator's costs can also assist in encouraging parties to focus on the potential costs involved if they are not successful in the arbitration. In NSW, legal practitioners are required under the *Legal Profession Act 1987* to provide costs estimates to their clients. This, coupled with providing security for the arbitrator's costs beforehand, can provide a reasonably powerful incentive to early settlement.

Another matter that I should deal with at this stage is the direction in paragraph 18 of Annexure 'B'. This is an important tool in the arbitrator retaining control of the process, as it enables prompt attention to minimising delays to the timetable which has been set. As a matter of prudence, I periodically check on progress rather than simply relying on the parties to notify me of any noncompliance. This is facilitated by checking compliance with directions made where material is to be served on the arbitrator as well as being served on the other party.

(3) THE HEARING

(a) Maintaining control of the process

Maintaining control of the process remains important during the hearing. It is not unusual for counsel's tempers to become frayed, out of a sense of frustration when the hearing does not proceed in the manner which they anticipated. The best approach, yet again, is 'firm but friendly'.

(b) Expressing a 'preliminary view'

There is a lot to be said for expressing an informed preliminary view, during the course of the hearing. Particular care needs to be exercised in expressing a preliminary view before a hearing and, perhaps, even before witnesses are cross-examined on contentious factual issues.

Any such view needs to be carefully expressed as a preliminary view, so as not to appear to be a prejudgment of the issue.[26] An appropriately worded expression of a preliminary

[26] See paragraph 10 under 'Becoming Pro-active' in Hunt, above note 4.

view by the arbitrator can often lead to a narrowing of the issues or settlement of the matter.

A good example was provided by an arbitration in which I was counsel many years ago, which involved deemed practical completion of a domestic building contract. The owner in that case sought liquidated damages for completion of the works. In cross-examination, it emerged that the owner in fact commenced occupation of the premises some considerable time before the date of practical completion certified by the architect. The particular contract provided for deemed practical completion on occupation. After that evidence in cross-examination, at the next convenient time during the hearing, the arbitrator asked to speak to both counsel, and pointed out the deemed practical completion clause in the contract. The arbitrator requested that counsel for the owner indicate what (if any) other evidence was intended to be led on this issue, given the admission by the owner in cross-examination. The owner's counsel requested a short adjournment to obtain instructions, and the matter settled shortly thereafter. If the arbitrator had not expressed that sort of preliminary view at the time, the hearing would have lasted for a number of further days, and then involved written submissions by both parties.

(c) Further meetings or conclaves of experts while the hearing proceeds

Not infrequently, the factual evidence on which expert opinions have been expressed may 'shift' during the course of the oral hearing, more particularly during cross-examination.

It is, therefore, useful to retain the facility for further meetings or conclaves of the experts.

For this reason, I tend to require that all of the factual evidence be given at the hearing before any expert evidence is given, unless persuaded that there is some difficulty in adopting this course.

(d) Other matters (including encouraging the narrowing of issues)

It often emerges, during the course of the hearing, that issues perceived at the outset are not necessarily contentious, or germane, by the time the hearing concludes. If this can be

identified during the hearing, it saves time and costs in closing submissions and the preparation of the award.

Care needs to be taken in this process, however, so that what is said by the arbitrator does not appear to be a prejudgment of issues, contrary to the requirements of natural justice.

(4) PREPARING THE ARBITRAL AWARD

(a) Written submissions and oral addresses

The procedure I find works best is for written submissions in chief to be exchanged, followed by written submissions in reply, and then oral addresses on a day or days some two weeks or so after written submissions in reply. In my opinion, this is a process which is fair and also minimises the time taken in the written submission process. For that reason, it is preferable to the alternative of submissions in chief by the claimant, then submissions in response from the respondent, followed by submissions in reply by the claimant. The latter process usually involves at least another two to four weeks.

As indicated in subsection 5(1)(d) above the written submissions should be provided in electronic form, as well as a hard copy, so that the arbitrator can reduce the time and costs involved in the preparation of the award.

(b) What issues need to be addressed in the award

Where cases are put in the alternative, this can often mean that there is no need for the arbitrator to provide reasoned findings on all issues which have been raised. A recent arbitration that illustrates this point involved a claimant's case which was put on various alternative bases, some in contract and some on various extra contractual bases. It became evident that if a finding was made on one or more of the contractual bases, there was no need to determine the various extra contractual bases. In those circumstances, I thought it was prudent to raise that matter with the parties. Initially, I raised it during the course of the hearing, in the hope of encouraging consideration of that issue in the written submissions. When that consideration was not forthcoming, I raised it again with the parties following oral addresses. It was then agreed by the parties that my reasoned findings did not necessarily need to deal with all of the alternative bases on which the

claim was put, but need only deal with those matters to the extent I considered appropriate in determining the matter overall. This led to a significant saving in the time and cost of preparing the award.

(c) Tips on award preparation

I find it useful to prepare a skeleton outline of the reasons for the award, in which I set out headings for the various matters with which I will deal in my reasons.

Where issues of credit are involved, I will usually make notes of my impressions of the witness within a relatively short time after the witness has given oral evidence. If one does not use this sort of approach, sometimes a lengthy period of time elapses and one's memory becomes hazy about aspects that may ultimately affect the acceptance of one witness's version in preference to another. I find that one cannot always rely on the written submissions of the parties to necessarily provide references to all of the evidence which favours the acceptance (or otherwise) of the version of a particular witness.

Before commencing drafting the award, it is then my practice to consider the written submissions and oral addresses in detail, as well as the findings of fact and law contended for respectively by the parties, to ensure that I deal with all issues and consider all of the appropriate evidence.

As indicated in sub-section 3(3) above the requirement for the parties to provide a statement of findings contended for provides a useful checklist to ensure that nothing is omitted in the award and reasons.

This does not mean that all arguments put by the parties must be dealt with expressly in the reasons. As Mahoney JA said of the duty to give reasons, in *Housing Commission of NSW v Tatmar Pastoral Company Pty Limited and Anor*:[27]

> *However,* ***such a duty does not exist in respect of every matter, of fact or of law, which was or might have been raised in the proceeding. It is not the duty of the Judge to decide every matter which was raised in argument. He may decide a case in a way which does not require the determination of a particular submission: in such a case he may put it aside or, as Lord Scarman***

[27] [1983] 3 NSWLR 378, at p. 385.

> ***said, merely salute it in passing****:* R v Barnett London Borough Council; ex parte Nilish Shah *[1983] 2 AC 309, at 350.* (emphasis added)

6 CONCLUSIONS

In closing, at the risk of becoming repetitive, there is much which arbitrators can do to ensure that arbitrations are conducted efficiently and cost-effectively, subject of course to the 'you can lead a horse to water, but cannot make it drink' principle. However, it is probably worthwhile quoting, yet again, the views expressed by Justice Drummond in the John Keays Lecture in 1996: [28]

> ***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.* (emphasis added)

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[28] Drummond J, above note 2, p. 87.