

COMMENTARY

Following amendments to the Supreme Court Rules in several States/Territories a number of matters have been referred out by the courts to Special Referees for hearing and report back to the courts. This is not arbitration or mediation. It could be described as a fact finding procedure. The Special Referee (he is not acting as an Arbitrator or other dispute resolution facilitator) obtains his powers from the court and these are contained in the order issued by the court. These powers may be quite extensive and wide. To assist the Special Referee, the Order may contain a number of questions which the Special Referee is required to answer. Matters may arise during the Referral which may require the Court Order to be amended; The Special Referee may require guidance from the Court; the parties may wish to expand the scope of the reference or even seek to have the Referee removed from office.

As the Courts, Special Referees and the parties and their legal representatives gain experience in the process four main issues have emerged which those who undertake these references should always bear in mind.

First, regardless of the wording of the Order the Special Referee must always conduct the reference in a manner which will not deny natural justice to any of the parties involved in the dispute.

Secondly, a unique relationship exists between the Court and the Special Referee. The Referee should not hesitate to keep the Court informed of progress with the reference and seek the Court's assistance if necessary.

Thirdly, the Special Referee must limit the proceedings to the matters referred to him/her. The scope of the reference and the questions to be answered cannot be expanded or altered without first obtaining an appropriate amendment to the Order.

Fourthly, unlike the Arbitrators Award, the report of the Special Referee may express alternative views on matters and also contain other information which the Referee feels may assist the judge handling the matter eg. comment regarding the use of witnesses.

At the end of the day the Court may totally accept or reject the report of the Special Referee or accept part of the report only. The court, having considered the report and perhaps submissions on behalf of the parties, may refer further questions to the Referee for consideration or seek further clarification from him of parts of his report.

Unlike the Arbitrator the Special Referee is not "Functus Officio" when he reports to the Court.

It is already evident that the reference of matters to Special Referees has substantially assisted in the management of cases coming before the Courts and in reducing waiting lists. Clearly the use of referees with specialised knowledge, and expertise has the potential to reduce considerably the time taken in resolving disputes.

The Courts have shown a willingness to use their reference out powers. Those who accept appointments as Special Referees have a responsibility to discharge their duties promptly and in a professional manner, hopefully with satisfaction to the Courts who appoint them, to the parties, and to themselves.