General Arbitration Course
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The preliminary conference and legal representation

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The preliminary conference

1. *Introduction*

1.1 A person nominated as an arbitrator in any particular dispute will need to turn his or her mind to two important questions at an early stage. The first is whether there is any reason why the nominee should not act and the second is how the arbitration should proceed. Generally an arbitrator is nominated either by agreement between the parties or by a nominating person, such as the President of the Institute of Arbitrators Australia. In some instances a person may be nominated as arbitrator for an arbitration under the provisions of the *Commercial Arbitration Act* 1984 ('the Act') or under legislation such as the *Victorian Retail Tenancies Act* 1986. Generally, the basis of nomination makes little difference to the matters now discussed, save that where the arbitration is based on an agreement between the parties it will be necessary for the nominee to consider the terms of that agreement as distinct from the terms of any legislation under which his or her appointment is made.

Jurisdiction and expediated procedures are considered briefly, in the context of the Preliminary Conference.

1.2 The Institute of Arbitrators Australia publishes a Practice Note (Practice Note 3B by John A. Morrisey, revised November 1991) which provides both a draft agenda and/or minutes for the Preliminary Conference and an explanatory note as to the contents of the draft agenda/minutes and in relation to the Preliminary Conference generally.

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1.3 The preliminary matters that should be considered are conveniently summarised at page i of Practice Note 3B:

> Dispute resolution agreements may be oral or written. An oral agreement is generally perfectly valid but is not an agreement to which the Act applies. An agreement must be in writing to come within the ambit of the Act – the Act provides that 'except in so far as the context or subject matter otherwise indicates or requires' – 'arbitration agreement' means that agreement in writing to refer present or future disputes to arbitration' (s 4(1)).
>
> Thus the nominee should make sure that the agreement is in writing and is in fact agreed between the parties. If it is otherwise, the nominee will have no authority to act as arbitrator. In such a case, or where doubt exists, the nominee can invite the parties to sign and date a simple agreement such as: 'We agree to refer all matters in dispute between us to the award of AB'.
>
> The nominee should also consider whether there is anything which would disqualify the nominee from acting. There are three disqualifications (as distinct from what are special qualifications required by the agreement) of a nominee to act as arbitrator:
>
> 1. an interest in the matter in issue of such a nature that it is incompatible with the duty of an arbitrator to be impartial as between the parties;
> 2. bias against one party; and
> 3. being a necessary witness for a party in the arbitration.
>
> The test for bias is whether a reasonably intelligent observer fully apprised of all the circumstances would feel a reasonable apprehension of bias or whether the reasonable independent observer would lose confidence in the initially perceived impartiality of the arbitrator.
>
> Three conditions must be fulfilled before any arbitrator is validly appointed:
>
> 1. the person must know of the appointment;
> 2. the person must consent to act; and
> 3. the person's name and the fact of the person's appointment must be communicated to the other parties or to all parties when the appointment is not made by a party.
>
> The effective date of appointment is whichever is the last in time to occur.

1.4 The maintenance and application of the rules of natural justice is of fundamental importance to the arbitration process both by reason of the requirements of the Act and the general law and by reason of the general perception that fair mindedness and procedural fairness is required in decision making processes that affect the rights of individuals, whether by the courts, arbitrators or other processes. More particularly the word 'misconduct' is defined in section 4 of the Act as including corruption, fraud, partiality, bias and a breach of the rules of natural justice.* Under section 42(1) of the Act an

* Generally as to misconduct and the rules of natural justice, see J.J.A. Sharkey and J.B. Dorter, *Commercial Arbitration* (1986, Law Book Company), 277 and following and M.S. Jacobs, *Commercial Arbitration Law and Practice* (loose leaf, Law Book Company), p.10,291 and following, particularly p.10,295 and 10,318 referring to *Gas & Fuel Corporation of Victoria v. Woodhall Limited and Leonard Pipeline Contractors Ltd* and *Allanson v. Langhorn* (1988) 7 ACLR 33, respectively. See also the Hon. Barry O'Keefe, AM, QC, 'Judicial Review, Preliminary Points and Misconduct' (1995) 14 *the arbitrator*, 4.

award may be set aside either wholly or in part where there has been misconduct on the part of an arbitrator. 'Bias' for the purposes of the rules of natural justice may be actual or imputed. If actual bias is established then the position is clear. The test for determining whether or not an arbitrator should be removed on the ground of imputed bias is, on the authorities, an objective test. A number of authorities may be cited but for present purposes reference is made to the statement of His Honour Mr Justice Marks in *Gas & Fuel Corporation of Victoria v. Wood Hall Ltd and Leonard Pipeline Contractors Ltd* [1978] VR 385 at 413:

> "Suspicion may reasonably have been engendered in the minds of the Corporation or in the minds of the public that the arbitrator did not and would not bring to the resolution of the question arising before him a fair and unprejudiced mind."

1.5 The arbitrator should also have regard to any procedure which the parties have agreed for the arbitration whether in the arbitration agreement itself or on any other basis. In *London Export Corporation Ltd v. Jubilee Coffee Roasting Co. Ltd* [1958] 1 All ER 494 (affirmed by the Court of Appeal [1958] 2 All ER 411) Diplock J. said (at 497):

> "Where the award has been made by the arbitrator in breach of the agreed procedure, the applicant is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties had not agreed to be bound by an award made by the procedure in fact adopted: contrast *Spence v. Eastern Counties Ry. Co.* (1839) 7 Dowl. 697."

It is not uncommon to find arbitration agreements containing express provision as to the right, or otherwise, of the parties to have legal representation.*

2. *Notice of the Preliminary Conference*

2.1 A form of notice of the time and place of the Provisional Preliminary Conference is contained in Practice Note 3B in Form 1. Form 2 of that Practice Note contains notification of the reappointed date of the Preliminary Conference in circumstances where a party does not appear at the Conference as originally scheduled.

2.2 An important point to keep in mind in relation to the notification of the arrangements for the Preliminary Conference, whatever form of notice is ultimately chosen, is that all references to the Preliminary Conference should be to a *Provisional Preliminary* Conference and all correspondence should be signed by the person nominated as arbitrator as the '*Nominee*'. Failure to adopt this practice may lead to the position that the person nominated is regarded by the parties and, in due course, a court, as having entered upon the reference and taken upon himself or herself the capacity of arbitrator prior to

*Editor's note – see 4.1 at p.109 'Representation'.

completion of the Preliminary Conference process at which the nominated person has the opportunity to assess whether there are any reasons why he or she should not enter the reference as arbitrator. A person is generally nominated as an arbitrator prior to the filing or exchange of anything in the nature of 'pleadings' which will give a clear indication of the nature of the dispute, the parties and possible witnesses involved to enable the nominee to assess his or her position. The names of the parties to the dispute and the consensual or statutory arbitration agreement or reference is likely to be most unhelpful in this respect. The Preliminary Conference provides a forum at which the nominee is able to obtain any further information that may be necessary and also to hear general submissions which will give a better appreciation of matters in dispute and any possibility of a conflict of interest.

2.3 The form of notice of the Provisional Preliminary Conference is very much a matter of the preference of the individual arbitrator. However, it is often helpful to the parties for the nominee to provide information as to fees and the manner of charging for hearing time and cancellations in this notice. (Mr Ronald Fitch in *Commercial Arbitration in the Australian Construction Industry* (1989, The Federation Press), Appendix VII, pages 161-4, provides a more comprehensive form of notice than that already referred to in paragraph 2.1. It is helpful to set out this notice in full:

APPENDIX VII
A Preliminary Conference Notice

Date ....

To	Claimant's solicitor
(The Claimant)	(if known)
To	Respondent's solicitor
(The Respondent)	(if known)

Dear Sirs,

ARBITRATION: .... and ....

I have been advised by the President of the Institute of Arbitrators Australia that I have been nominated as arbitrator to hear and determine the disputes or differences that have arisen between the above named parties in relation to an agreement entered into between them.

I .... of .... accept the nomination on the clear understanding that my Award as arbitrator will be accepted by both parties as final and binding.

The fees and expenses of the arbitration including costs incidental to the submission, reference and award will be paid by the party or parties to the disputes or differences in such sum or sums as the arbitrator shall decide, and shall include the following:

(a) The service charges:
The Institute of Arbitrators Australia Nominating Fee $.................

(b) Arbitrator's Fees
 (i) per day of sitting
 (ii) per half day or less of sitting
 (iii) for all time occupied in preparation, review and analysis of evidence, viewing the works, travel, preparation and publication of the Award, at the rate per hour of $................

(c) Where a hearing is cancelled or postponed at the request of either or both parties the following charges may be made:
 (i) with less than one full days notice the minimum fee for the arbitrator for the hearing set out in (b) above will be the fee for the first day as set out in (b) above and $............... for each further day reserved for the hearing; that is, a maximum of one full days fees and four days at $................
 (ii) with less than five working days notice the arbitrator will charge half the minimum fee for hearings set out in (b) above for one day only.

(d) Legal costs should the arbitrator believe such to be necessary for consultation on points of law or for any other proper purpose concerned with the arbitration.

(e) Secretarial Services: Secretarial services, sundries and out of pockets.

(f) Room Hire: Hire of suitable rooms for the hearings.

(g) Other services: Such other services and charges permitted by the Arbitration Act, as incurred.

The parties shall indemnify the arbitrator against:

(a) reference costs and legal costs incurred by the arbitrator for matters arising during the hearing or arising from the arbitration when the Award has been published;

(b) or any judgment against him related to this arbitration for technical misconduct.

Evidence has been received that (the claimant) has lodged a security deposit of $................ with the Institute of Arbitrators Australia. This deposit and such additional deposits as I may direct from time to time during the hearing will be security for the fees and expenses incurred by me. Such additional deposits if so directed shall be a condition precedent to continuing the hearing and the publishing of the Award.

I hereby call a preliminary conference for .... a.m. on .... 199..... at the rooms of ....

It is anticipated that this preliminary conference will last for approximately one hour.

At this conference I will require the submission of:
- the original Agreement and Conditions of Building Contract
- any other documents related to this dispute
- receipts for monies lodged as security fund deposits.

The purpose of the preliminary conference is to establish:
(i) all the questions to be answered by the arbitrator
(ii) the nature of the representation of each party at the hearing
(iii) the form and location of the hearing
(iv) documents required by the arbitrator prior to the first day of hearing
(v) a date for the first hearing
(vi) any other matters.

The failure of one party to appear will not necessarily prevent the hearing from taking place as there are procedures which allow the hearing to proceed *ex parte*.

When providing any information to the arbitrator, each party is requested to provide identical information to the other party and to indicate clearly in any correspondence that this has been done.

Section 20 of the *Commercial Arbitration Act* 1984 should be noted and the parties are directed to comply.

*Representation**

20. (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, a party to an arbitration agreement –

(a) shall appear before the arbitrator or umpire personally or, where the party is a body of persons, whether corporate or unincorporate, by an officer, employee or agent of the body; and

(b) may, with the leave of the arbitrator or umpire, be represented by a duly qualified legal practitioner or other representative.

Yours faithfully,

....

Nominee arbitrator

It should be noted that the parties are required to attend a Preliminary Conference as part of the general statutory duty not to wilfully do or cause to be done any act to delay or prevent and award being made under the terms of section 37 of the Act. A nominee may think it desirable to point this provision out expressly in the notice confirming the Preliminary Conference.

3. *Preliminary Conference Procedure*

3.1 It goes without saying that the Preliminary Conference should be conducted in a professional manner and in an appropriately private venue that will allow the parties or their representatives to put their position with respect to the matters dealt with at the Preliminary Conference and to allow the nominee to properly consider all matters. The fact that the Conference is 'preliminary' or that until some stage in the Preliminary Conference proceedings the potential arbitrator may be just that, a nominee, does not mean that the same standards of impartiality and procedural fairness are not to be applied throughout the process. Indeed, the less formal proceedings are potentially the greatest trap. The Preliminary Conference requires some submissions and discussion between the parties or their representatives and the arbitrator as to the nature of the dispute and the most appropriate procedure to follow in its preparation

*Editor's note – Note that section 20 has been amended since the writing of Mr Fitche's book. See 4.1 at p.109 'Representation'.

for hearing and hearing. Jurisdictional objections may be raised (which are discussed later) all of which provide ample opportunity for a nominee or arbitrator to make some unguarded remark having been comforted by a false sense of informality which may lead to his or her removal for misconduct on the grounds of a breach of the rules of natural justice.

3.2 The Preliminary Conference needs an agenda if it is to be a disciplined process and to ensure that no issues that should be agreed or addressed are forgotten. The agenda may be set out in general or particular terms in the document giving notice of the Preliminary Conference or it may be given to the parties at the Preliminary Conference or be a private checklist used by the arbitrator. An example of an agenda covering the main procedural items is set out by *Fitch* at pages 47-49. It is helpful to set out that agenda in full:

1. (a) Note date and time of commencement of conference.
   (b) List those present. This is effected by requesting those in attendance to complete an attendance sheet which includes a requirement that they confirm their status pursuant to s.20 of the uniform acts. See Appendix IX for a model attendance sheet.

2. (a) The arbitrator should sight the original contract agreement and the arbitration agreement and examine the arbitration agreement to ascertain if there are particular procedures that should be followed by the arbitrator and whether the parties have complied with the terms of the arbitration agreement.
   (b) In other than State domestic arbitrations, the arbitrator should be satisfied as to what law applies.

3. (a) The parties are requested to submit what they believe to be the general nature of the dispute and differences and the approximate amount of the claim. The respondent should indicate whether there will be a counterclaim and if so the approximate amount of the claim.
   (b) The parties should be asked if there has been an attempt to settle.

4. The expected period of the hearing should be canvassed with the parties.

5. The arbitrator should ask the parties whether
   (a) they agree that the arbitration agreement is proper and that the arbitrator has been properly appointed;
   (b) there are any supplementary agreements to the arbitration agreement. This is important relative to the consensual sections of the uniforms acts.

6. The arbitrator has the power to make progress payments and disbursements out of the security fund on account of fees and expenses, but it is prudent to seek approval from the parties before exercising the power.

7. The parties are asked whether they accept the terms of appointment as set out in the arbitrator's letter to them dated... Refer to Appendix VII for a model letter.

8. It is at this stage that the arbitrator considers whether the nomination or appointment will be accepted. If the decision is one of acceptance, the arbitrator states 'I accept the appointment and formally enter upon the reference'.

9. Where the parties are inexperienced in arbitration procedure, there is value in briefly explaining the procedures.

10. If there are two arbitrators, the arbitrators should consider the appointment of an umpire.

11. After hearing submissions from the parties, a ruling is made by the arbitrator relative to representation pursuant to s.20 of the uniform acts.

12. The arbitrator seeks an assurance from the parties that they will endeavour to agree a set of questions for the arbitrator to answer.

13. The pleadings programme is settled

    Pleadings Programme (simple)

*	Points of Claim	by date
*	Points of Defence and Counterclaim (if any)	"
*	A reply if required	"
*	Discovery of documents	"
*	Inspection of documents	(contemporaneously?)

    Pleadings Programme (extended)

*	Points of Claim	by date
*	Request for Particulars (if required)	"
*	Reply to Request for Particulars	"
*	Points of Defence and Counterclaim (if any)	"
*	Request for Particulars (if required)	"
*	Reply	"
*	Reply to Defence and Counterclaim (if any)	"
*	Rejoinder and Reply to Counterclaim (if any)	"
*	Discovery and Inspection	"
*	List/Affidavit of Documents Required	"

14. Is a transcript of the Hearing required by the parties? If so the arbitrator should direct that the parties make the arrangements and he should ensure that he receives a copy.

15. The parties should be made aware that if they write to the arbitrator, a copy of the correspondence must be sent to the other party. Spoken communication is to be avoided.

16. Security Fund
    (a) The claimant or the parties (depending upon the requirements of the arbitration agreement) are requested to provide evidence of a security fund deposit for the arbitrator's fees and expenses.
    (b) The parties are requested to deposit further moneys. The amount is related to the expected period of the hearing.

17. The Hearing
    (a) Next day of Hearing.
    (b) Venue.
    (c) Hours of Hearing.

18. Order documents and exhibits to be filed and indexed by the parties before forwarding to the arbitrator.

19. Any other business.

20. The conference closed at ...

It will be noted that paragraph 1(b) of the above agenda proposes a list of those present at the Preliminary Conference. A very convenient way of obtaining and retaining a record of those present at the Preliminary Conference is by means of an attendance sheet (a form of which is set out by *Fitch* at Appendix IX). As an aside, I note that the reference to 'uniform acts' in the agenda is a reference to the uniform Commercial Arbitration Acts of the Australian States and Territories, which includes the Victorian *Commercial Arbitration Act* 1984.

The reference in paragraph 7 of the agenda to Appendix VII is a reference to the Preliminary Conference notice which contains the terms of appointment of the arbitrator as indicated above.

If the above agenda or a document like it is used proceedings at the Preliminary Conference will need confirmation. This may be achieved by preparing minutes based on the agenda which are later forwarded to the parties by the then arbitrator as confirmation of the agreements and the parties may or may not be asked to sign these minutes.

3.3 An alternative means of proceeding is to use the combined agenda/minutes contained in Practice Note 3B (Form 3). A copy of this Practice Note is attached to this paper. It will be seen from examining Form 3 that this agenda and minutes is a comprehensive document which may be readily adapted to any type of dispute, though it does make specific reference to matters more likely to be encountered in building or engineering disputes. In particular, procedurally, it contains in paragraph 10(a) the question whether the parties

agree that the arbitrator will confirm the matters determined at the Conference or whether the parties will sign the agenda/minutes as a true record. If the nominee arbitrator completes the agenda/minutes during the course of the Preliminary Conference they may be signed at the end of the Conference as a complete record of the Conference and copies then provided to the parties or their representatives. This, in my view, substantially reduces administrative costs for all concerned and avoids any subsequent argument as to what was or was not decided at the Preliminary Conference (and the consequent costs and uncertainty that would follow as a result).

The agenda/minutes provide some space on the last page for including any matters of particular relevance to the arbitration with which they are concerned. There may be agreed orders on procedure or substantive aspects of the matter which can be entered in the minutes and signed by the parties. Also, in some disputes it may be necessary to schedule or otherwise provide for the possibility of a further Preliminary Conference or Directions Hearing, the nomenclature is not important. However, given the possibility of subsequent preliminary proceedings it seems desirable to insert a further sub-paragraph 10(d) expressly reserving liberty to apply to the arbitrator for any directions on any particular matters or for further preliminary hearings on reasonable notice to the other party or parties.

3.4 The Preliminary Conference remains provisional until the nominee decides to enter upon the reference – in other words, after the nominee is satisfied that there is no obstacle to entering upon the reference (see 1.3). Paragraph 7 of the agenda/minutes provides as follows:

> 7. ENTERING ON THE REFERENCE
> In view of these agreements and arrangements between the parties, the nominee(s) accept(s) his/her/their nomination(s) and now formally enter on the reference PROVIDED THAT the parties affirm the same as being part of the Preliminary Conference. Do parties so affirm? Yes/No

4. *Representation*

4.1 The question of representation is dealt with in paragraph 1 of the agenda/minutes in Practice Note 3B (Form 3) and paragraph 11 of the *Fitch Agenda*. It should be noted that the Act was amended in Victoria by the *Commercial Arbitration (Amendment) Act* 1993. Where a person establishes a right to legal representation under the provisions of section 20 of the Act and leave is granted a party is entitled to be represented in accordance with that leave notwithstanding any contrary agreement between the parties (section 20(4)). The salient points with respect to the operation of section 20 are conveniently summarised by *Jacobs* (at [18.25] p.4936):

"Under s.20(1) (as amended by the *Commercial Arbitration (Amendment) Act* 1990 (NSW) of the model uniform legislation, a party is entitled to legal representation:

(i) where another party to the proceedings is a legally qualified person or is represented by a legally qualified person;
(ii) where all parties agree;
(iii) where the amount or value of the claim exceeds $20,000 (or such other amount as is prescribed by regulation); or
(iv) where leave is granted by the arbitrator or umpire.

Under s.20(2), a party may be represented by a non-legal practitioner:

(i) when the party is an incorporated or unincorporated body and the representative is an officer, employee or agent of that body;
(ii) where all parties agree; or
(iii) where the arbitrator or umpire gives leave for such representation when requested for such representation by the party.

Section 20(3) stipulates that leave must be granted for legal representation when, as a result of legal representation:

(i) there is a likelihood that the proceedings will be shortened or costs reduced; or
(ii) the applicant would be unfairly disadvantaged if leave is refused.

Section 20(6)(a) defines the terms 'legal practitioner' as a person who is admitted or entitled to practise as a barrister, solicitor or legal practitioner in New South Wales or any other jurisdiction, either within or outside Australia.

Included in the definition of 'a legally qualified person' in s 20(6)(b) is a legal practitioner or other person who, although not a legal practitioner, possesses good qualifications or experience in law (acquired in New South Wales or elsewhere), and would be likely to contribute positively to the proceedings in the opinion of the arbitral tribunal."

In any event the Preliminary Conference cannot be conducted effectively unless it is attended by persons who have authority to make decisions on behalf of the parties (in this respect, see G.R. Masel, 'Expediting Arbitration Procedures' (1992), *the arbitrator*, 27).

5. *Arbitration Agreement*

5.1 The nominee must at an early stage in the preliminary proceedings consider the terms of the arbitration agreement. The arbitration agreement may be the product of an express agreement between the parties or it may be derived from other legislation in accordance with sub-section 3(4) of the Act. That sub-section provides:

(4) Subject to this section, this Act shall apply to arbitration provided for in any other Act or by an order of a court as if –
  (a) the other Act or the order of the court were an arbitration agreement;
  (b) the arbitration were pursuant to an arbitration agreement; and
  (c) the parties to the dispute which, by virtue of the other Act or the order of the court, is referred to arbitration where the parties to the arbitration agreement –

except insofar as the other Act or the order of the court otherwise indicates or requires.

An example of such a statutory reference to arbitration under the Act is under Part 3 of the Victorian *Retail Tenancies Act* 1986.

The reference to the arbitration agreement is contained in paragraph 5 of the *Fitch Agenda* and paragraph 2 of the agenda/minutes in Practice Note 3B (Form 3). The arbitration agreement itself is likely to be a term in more elaborate contractual provisions agreed between the parties. As *Sharkey and Dorter* point out (see p.79) the nominee should focus primarily on the arbitration agreement and not be concerned about the whole contract between the parties. There are two general exceptions to this advice. First, the jurisdiction of the nominee or arbitrator is at times challenged at the Preliminary Conference and it may be necessary for the arbitrator to determine this issue (the question of jurisdiction is considered below). The second is that the arbitrator should be satisfied that there is a genuine dispute or difference between the parties.

5.2 Arbitration is not some hypothetical exercise to satisfy the curiosity of one or more parties. It is likely to be costly to the loser and the process is not to be embarked upon lightly. *Sharkey and Dorter* put the position as follows (at p.79-80):

> "Any dispute or difference must be genuine. It must not be a sham or specious pretext. The party raising it must honestly contest the issue and that contention must be bona fide. Provided these conditions are met, the fact that it may appear prima facie plainly ill founded is no ground for dismissing it summarily. Genuine belief by the party is the test, not the prospect of success."

In support of this proposition reference was made to statements by Adam J. in the Victorian Supreme Court and Samuels J.A. in the New South Wales Court of Appeal.

In *Reservoir Hotel Pty Ltd v. V.S. Clementson (Vic.) Pty Ltd* [1961] VR 721 Adam J. said (at 725):

> "... I have concluded that where a difference has arisen in fact between the parties to a contract, by reason of one of them contending for a construction thereof which does not find favour with the Court, a dispute within the meaning of an arbitration clause should nevertheless be considered to have arisen, unless it is found that the contention is merely a specious pretext – a sham and not a bona fide contention. A dispute must, I would think, be a real one, but its reality should depend, I would think, not on views which a court might hold as to the merits of the dispute, but on whether the divergent views of the parties are in reality entertained by them."

In *J.&H. Manktelow Pty Ltd v. Alloway Grazing Pty Ltd* [1975] 1 NSWLR 385 Samuels J.A. said (at 396):

> "It may be that, once the proprietor made out a prima facie case, it was then an evidentiary onus upon the builder to show that what appeared to be a dispute was

> no more than a sham or device concocted by the proprietor to enable it to have the benefit of arbitration. But at the end of the day, it was for the proprietor to establish such facts as were necessary to attract the clause. It may also be accepted that a dispute, to have this effect, must be genuine, in the sense that the parties seeking to arbitrate must honestly contest the liability with which he is charged."

5.3 Practice Note 3B contains very useful questions in paragraph 2. In particular, in the present context, it is asked whether it is clear that the *Commercial Arbitration Act* (referring to the 1990 NSW equivalent of the Victorian Act as amended) applies. This question raises the matters referred to in the preceding paragraph and also the question whether the technical requirements of the Act have been complied with, particularly whether there is an 'arbitration' agreement in existence as defined in section 4 of the Act. An 'arbitration agreement' is defined in sub-section 4(1) as "... an agreement in writing to refer present or future disputes to arbitration". In paragraph 2(i) the question is asked whether the arbitrator appears to have jurisdiction. This is the trigger for objections to jurisdiction being taken at the Preliminary Conference. The arbitrator's power to decide jurisdictional questions is considered below. For the purposes of paragraph 2(i) it is often useful to simply note the objection to jurisdiction so that no waiver or estoppel can arise against the objector and to deal with the question whether to determine some preliminary jurisdictional matter prior to any other questions in the course of setting the timetable for the hearing (see paragraph 8 of the agenda/minutes).

Paragraph 2(l) asks the question whether there is any objection to the nominee or nominees. This is a necessary question to ensure compliance with the rules of natural justice. The tests for determining whether there has been compliance with the rules of natural justice have been referred to briefly (see paras 1.3 and 1.4). However, it is one thing for the arbitrator or nominee to make an assessment as to whether he or she is biased or has some conflict of interest but the rules are more concerned with objective matters rather than what is in the mind of the arbitrator and this question goes to the perceptions of people and is relevant to the tests referred to.

5.4 The question of security for costs of the arbitration is dealt with in a subsequent part of the agenda/minutes but is raised in paragraph 2 with respect to the arbitration agreement itself. Also, as appears in question 2(j) it is necessary to note whether any deposit has been paid by a party and, if so, when.

5.5 Finally, the arbitrator should actually sight the original arbitration agreement or contract document in which the arbitration agreement is to be found. The agreement should be examined to determine whether there are any particular

procedures prescribed and they should be followed (see para. 1.5). With statutory arbitrations it would be expected that he or she would have received a written notice of his or her nomination or appointment signed by an appointor under the relevant legislation. This is the case with arbitrations under the Victorian *Retail Tenancies Act*. The original instrument of nomination or appointment should be provided to the parties for inspection on request.

6. *Nature of Proceedings*

6.1 Paragraphs 3(a) and (b) of the agenda/minutes in Practice Note 3B (Form 3) provide for a general statement of the nature of claims and counterclaims and the approximate amount of any claim or counterclaim. It is not necessary to provide an elaborate record of these matters in the Preliminary Conference minutes. Nevertheless, the questions do provide a good basis for asking the parties to make submissions as to the general nature of the claims, defences and any counterclaims and also provide the nominee arbitrator with the opportunity of giving the parties a brief explanation of the arbitration proceedings where the parties are not familiar with them. As to this practice, *Sharkey and Dorter* say (at 82):

> "There is a good practice by experienced arbitrators in giving the parties early an explanatory, short introduction to the arbitration proceedings. This is especially useful where the parties are not represented. Even when the parties are represented, the practice has great practical value in (a) helping the parties properly thereafter to prepare and present the proceedings; (b) subsequent streamlining of the conduct of the arbitration; (c) on occasions, facilitating a settlement of the parties' disputes; (d) assisting the arbitrator in obtaining, and maintaining, control of the proceedings before him."

6.2 The procedural options open to the parties are as varied as imagination and innovation allow, within the requirements of the Act that the rules of natural justice be applied, given the provisions of sections 14 and 19 of the Act. It is useful for present purposes to set those provisions out:

> "14. *Procedure of Arbitrator or Umpire*
> 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.
>
> 19. Evidence Before Arbitrator or Umpire
> (1) Unless a contrary intention is expressed in the arbitration agreement, evidence before the arbitrator or umpire –
> (a) may be given orally or in writing; and
> (b) shall, if the arbitrator or umpire so requires, be given on oath or affirmation or by affidavit.

(2) Unless a contrary intention is expressed in the arbitration agreement, an arbitrator or umpire may administer an oath or affirmation or take an affidavit for the purposes of proceedings under that agreement.

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

However, it should be noted that the apparently untrammelled provisions of sections 14 and 19 have been construed strictly to the extent that a general departure from application of the rules of evidence would seem likely to lead to the finding or suggestion that the arbitrator has departed from the rules of natural justice (see *Sofos v. Coburn* (1992) V ConvR ¶54-439).

6.3 Sub-paragraphs 3(c)(i), (ii) and (iii) of the agenda/minutes in Practice Note 3B (Form 3) offer three options. The first is 'simplified' arbitration, which is a reference to arbitration according to the Institute of Arbitrators *Expedited Commercial Arbitration Rules*. These Rules provide an expediting procedure and, in particular, provide, in Rule 18, that the arbitrator may conduct the arbitration proceedings in such manner as he or she thinks fit and in particular may in his or her absolute discretion direct that:

- there be no pleadings;
- there be limited pleadings;
- there be limited discovery;
- there be no opening address by the parties or that opening addresses be of limited duration;
- that there be no final addresses or that final addresses be of limited duration;
- pre-hearing submissions be lodged by the parties accompanied by witness statements and documentation upon which the parties wish to rely, reserving a right of reply and cross-examination of any deponent to whom notice to attend for cross-examination is given;
- the number of expert witnesses to be called be limited in number;
- the reports of experts which are to be relied upon be exchanged at least seven days prior to the commencement of the hearing;
- that there be no oral evidence; and
- that the steps referred to above be taken within strict, pre-determined, time limits.

To a great extent the same results as opting for the expedited rules can be achieved by agreeing to a tight timetable for preliminary matters, discovery and other preparations for the hearing. Provision is made in sub-paragraph 3(c)(ii) of the agenda/minutes for 'formal arbitration'. As indicated this 'formal arbitration' may be as simple as the parties choose to make it; the difference between an arbitration under paragraph 3(c)(i) and (ii) being that in the latter case the matter is not being conducted in accordance with the 'Expedited Commercial Arbitration Rules'.

In some matters the dispute between the parties may involve only the construction or effect of a document or documents. In these circumstances a 'documents only' arbitration may be appropriate. The procedure may be a simple one, with the parties agreeing the relevant documents and making submissions in writing on the documents and the law. The submissions may follow the usual order of submissions in an oral proceedings – i.e., generally, claimant, respondent and claimant in reply. Alternatively, both parties may make submissions at the same time (not having seen the other's submission) with both parties replying on the same basis. It is desirable for the arbitrator to reserve the right to require further oral or written submissions at any time to ensure all relevant matters are properly dealt with and to ensure the parties 'join issue'.

6.4 Sub-paragraph 3(c)(iii) of the agenda/minutes in Practice Note 3B (Form 3) is a reference to section 27 of the Act which provides for the possibility of a mediation conference between the parties, or some other technique of alternative dispute resolution requiring a conference and not utilising third party adjudication (for a brief summary of the nature of alternative dispute resolution techniques, see *Report of the Attorney-General's Working Party on Alternative Dispute Resolution* (1990) p.4-5; set out in Croft, *Retail Tenancies* (2nd ed., Leo Cussen Institute, 1994) p.164-5). The question is one which, in my view, should be asked and is essential if regard is had to the position of the parties and the need to assist them in every way possible in their dispute resolution process. Under amendments made to section 27 of the Act by the *Commercial Arbitration (Amendment) Act* 1990 (NSW) [1993 (Vic.)] the arbitrator himself or herself may act as a mediator, conciliator or other non-arbitral intermediary between the parties (see section 27(1)(2)). Although the Act now permits this position regard should be had to reasonable perceptions of the parties in relation to impartiality. In certain circumstances it may be quite unrealistic to think that an arbitrator could enter into the conciliation or mediation process. In some instances the arbitrator may discover or be likely to discover a variety of prejudicial or compromising matters which would not be relevant, strictly, to the arbitration process and which would not have come

to his or her attention as an arbitrator. Also the process of conciliating or mediating may involve the arbitrator indicating views and, further, witnesses expressing views which compromise their evidence. In these circumstances it may not be possible for the arbitrator to then proceed impartially to resolve the dispute as an arbitrator if the conciliation, mediation or other process does not succeed in resolving the matter. Even if the arbitrator thinks it is possible to proceed with the arbitration the perceptions of the parties as to his or her then impartiality or lack of it is of critical importance (see paras 1.3 and 1.4). Hence the question whether the arbitrator himself or herself embarks on section 27 proceedings is a question for the arbitrator to consider in all the circumstances. In this respect it is noted that recent amendments to the Victorian *Retail Tenancies Act* which contemplate a compulsory conciliation procedure provide that a conciliator shall not subsequently arbitrate the dispute if the matter does not settle by conciliation (*Retail Tenancies (Amendment) Act* 1995, sub-section 22C(1)).

In accordance with the provisions of the amended section 27 of the Act the question is included in the agenda/minutes – do the parties agree that the arbitrator is not bound by the rules of natural justice when seeking a settlement under sub-section 27(1) (see section 27(3)). This is relevant to any proceedings under section 27 but does not avoid any of the difficulties in an arbitrator continuing with the arbitration having himself or herself conducted failed proceedings under section 27, as indicated above.*

6.6 The agenda/minutes in Practice Note 3B (Form 3) raise the question whether a transcript is required for the hearing (see paragraphs 4(n) to (o); in the context of costs see also the *Fitch Agenda*, para. 14). In circumstances where there is no transcript it may be useful as a means of shortening the hearing time to require the parties to provide evidence by affidavit or witness statements (see para 3(d) of the agenda/minutes). If evidence in chief is to be obtained principally by the use of affidavits or witness statements it needs to be settled whether any further oral evidence is to be given, hence the question in paragraph 3(e) of the agenda/minutes. Generally evidence by way of affidavits or witness statements is intended to be facilitative rather than restrictive. If evidence is given by affidavits or witness statements consideration needs to be given as to whether there are to be affidavits or witness statements in reply or whether affidavits or statements are to be delivered by both parties on a certain date under a procedure which does not enable either party to see the affidavits or witness statements of the other party before filing their own affidavits or witness statements (as to the timetable for

* For further discussion of these and other issues in relation to section 27, see B.J. O'Mara, 'The Arbitration Act and Criticisms of Section 27' (1996) *the arbitrator*, 5.

filing affidavits or witness statements see paragraph 8(m)). Under the latter arrangements the delivery of affidavits or witness statements in reply may be permitted on the same basis (i.e., without prior knowledge of the contents of the affidavits or witness statements of the other party in reply).

6.6 The general position is that unless the parties otherwise agree in writing any question that arises for determination in the course of the proceedings is to be determined according to law (see section 22(1) of the Act). However, if the parties to an arbitration agreement so agree in writing an arbitrator may 'determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness' (see sub-section 22(2) of the Act). Sub-section 22(2) brings into the Act provisions similar to UNCITRAL Arbitration Rules Article 33, paragraph 2. The nature of the dispute between the parties generally determines whether there is likely to be agreement to depart from strict application of the law. If agreement is reached under sub-section 22(2) of the Act to apply considerations of general justice and fairness it seems that by reason of the obligation of an arbitrator to provide a reasoned award (unless the parties otherwise agree in writing) under section 29 of the Act, an arbitrator should state the position according to a strict application of the law and then indicate why, on the basis of general justice and fairness, the strict rules of law should be departed from and to what extent they are to be departed from. The view has been expressed that agreement under sub-section 22(2) of the Act has the effect of removing rights of appeal under sections 38 to 41 of the Act by reason of the fact that it is not possible to appeal a matter not decided according to law to a court which can only apply the law (see Mustill and Boyd, *Commercial Arbitration*, p.616-7).

There seems no reason why the same position would not apply with respect to arbitrations under the Act provided for in another act (e.g., *Retail Tenancies Act* 1986 (Vic.) sections 21 and 22 (sections 20 and 22C of the 1995 amending legislation) by reason of the provisions of sub-section 3(4) of the Act (see para. 5.1), but subject to the provisions of the referring act.

7. *Costs, fees and expenses*

7.1 As has been mentioned section 29 of the Act imposes an obligation on an arbitrator to provide a reasoned award unless the parties to the arbitration agreement agree otherwise. Section 29 provides:

"29. Form of Award

(1) Unless otherwise agreed in writing by the parties to an arbitration agreement, the arbitrator or umpire shall –

(a) make the award in writing;
(b) sign the award;
(c) include in the award a statement of the reasons for making the award.

(2) Where an arbitrator or umpire makes an award otherwise than in writing, the arbitrator or umpire shall, upon request by a party within seven days after the making of the award, give to the party a statement in writing signed by the arbitrator or umpire of the date, the terms of the award and the reasons for making the award."

Clearly the question whether or not a written award is to be provided affects the question of costs, fees and expenses.* Nevertheless, the question whether a written award is to be provided or not may or may not have been dealt with in the appointment letter or Preliminary Conference notice, so the matter may need to be raised and discussed at the Preliminary Conference.

The manner in which the fees and expenses question is to be dealt with generally depends, to some extent, on whether the notice of the Preliminary Conference has indicated the arbitrator's fees and manner of charging for his or her time and other matters. As has been seen, the Provisional Preliminary Conference notice contained in *Fitch*, Appendix VII (set out at para. 2.3) is quite comprehensive in this respect which means that at the Preliminary Conference the parties need only be asked whether or not they accept the terms of the appointment as set out in that notice (see *Fitch*, 48 – paragraph 7 of the Appendix VII Agenda; and see paragraphs 2.3 and 3.2, above).

7.2 The approach of the agenda/minutes in Practice Note 3B (Form 3) is to deal with costs, fees and expenses issues in the form of particular questions. It is first established whether or not the parties require a written award (paragraph 4(a)); whether the parties agree usual fees and room hire charge by nominating bodies (see paragraph 4(b) and as to room hire by other institutions or bodies, see the agreement as to out of pocket expenses in paragraph 4(h)); and then the question of the arbitrator's hourly or daily fee is to be determined together with questions as to a minimum charge and/or a cancellation fee (see paragraphs 4(c) to (g)). These questions and answers may be adapted to produce a result similar to that contained in *Fitch*, Appendix VII (see paragraphs 7.1 and 2.3) or any other position satisfactory to the parties and the arbitrator.

Mention has already been made of the agreement for out of pocket expenses (paragraph 4(h)), which presumably includes secretarial services, facsimile

* As to the requirements of the Act with respect to the form and content of awards and costs issues generally, see Croft, *Awards and Costs* (1995, Leo Cussen Institute, Seminar Paper; previously delivered at an Institute of Arbitrators Australia Master Class).

transmission fees and the like (cf *Fitch*, Appendix VII, para. (e)). Reference has also been made to the issue of costs of the transcript (see paragraphs 4(m) to (o) of the agenda/minutes).

7.3 An arbitrator should not, in the absence of agreement between the parties, obtain any technical or other assistance from any other person and, in any event, must not delegate the role of arbitrator (see *R.V. Smith; ex parte Cougnale* [1970] WAR 43; and note the warning of the Privy Council in *Louis Dreyfus & Co. v. Arunachala Ayya* (1930) LR (PC) 58 (Imd. App. 381 at 391): "the precise lengths to which an arbitrator may go in seeking outside advice upon matters of law may be difficult to prescribe in general terms"). If an arbitrator is to obtain technical advice or assistance of any kind apart from the necessity for agreement as part of the proper conduct of the arbitration, it is also necessary to obtain agreement as to the payment of the costs of any other assistance or advice. It is to this that the question contained in paragraph 4(k) of the agenda/minutes in Practice Note 3B (Form 3) is directed.

7.4 Some further matters with respect to fees and expenses which are of great importance to the arbitrator and the parties in the running of the proceedings are agreement between the parties as to whether the fees and expenses are to be borne jointly and severally between them (see paragraph 4(i) of the agenda/minutes in Practice Note 3B (Form 3)), whether the parties agree that the arbitrator is entitled to progress payments for fees and expenses (see paragraph 4(j)), and whether the parties agree, in the absence of a provision in the arbitration agreement, that the arbitrator has power from time to time to order further security for the cost of the award (see paragraph 4(l)).

If the parties are not jointly and severally liable for the payment of the arbitrator's fees and expenses it will be necessary for the arbitrator to order that moneys be paid into a security deposit by the parties equally and that the parties have paid in to the security deposit as ordered before the matter proceeds. If one party in the absence of agreement as to joint several liability for fees and expenses refuses or omits to pay money into the security deposit, the arbitrator has the choice of not proceeding; seeking agreement from the other party who wishes the arbitration to proceed to pay all fees and expenses from that point; or to proceed in any event and subsequently sue for fees and expenses and, further, to rely upon the arbitrator's lien and not release the award to the party who has not paid moneys by way of security until all fees and expenses are paid. The latter course is, naturally, quite a risky one as a party will not be very interested in paying for an award if he or she has not been successful and, in any event, the party will discover (and knows that it

will discover) the contents of the award when the party who has paid all the fees and expenses and obtained release of the award serves the unsuccessful party with a copy as part of enforcement proceedings.

An agreement that the arbitrator is entitled to progress payments is also prudent (particularly coupled with the agreement that the arbitrator may from time to time order further security for the costs of the award) because it is often difficult to predict how long arbitration proceedings will take and in the absence of such agreement the arbitrator may find himself or herself unable to recover any fees or expenses until the conclusion of long, drawn-out proceedings. On the basis of the agreements with respect to the security deposit, the arbitrator should also make appropriate directions as to the sum of money to be deposited by each party with a nominated person as the holder of the security deposit. The persons commonly nominated are the relevant Chapter Administrator of the Institute of Arbitrators Australia or the Secretary-General of Australian Centre for International Commercial Arbitration. Barristers also sometimes use their clerks' trust accounts and solicitors their firms' trust accounts as the repository of security deposit payments. The direction for deposit of money by way of security deposit is dealt with in paragraph 9(a) of the agenda/minutes and is coupled with a further agreement in paragraph 9(b) that the parties agree that the holder of the security deposit is entitled to disburse the same in accordance with the written directions of the arbitrator.

8. *Matters to expediate or facilitate hearing*

8.1 Various procedural or substantive matters which may assist in expediating or facilitating the hearing are the subject of paragraph 5 of the agenda/minutes in Practice Note 3B (Form 3). An important matter upon which it is desirable to have agreement in any proceedings is that the parties will admit matters not in dispute. The same result should be achieved by proper 'pleadings' but it is nevertheless desirable to obtain this agreement and if 'pleadings' are not used in the conventional sense then there may be no other basis for the parties to admit matters not in dispute other than with respect to the issue dealt with in paragraph 5(b). The potential for savings in costs, fees and expenses as a result of agreements of this nature at an early stage in the proceedings is clear.

The possibility of 'splitting' proceedings as between liability and quantum is the reason for paragraph 5(c) of the agenda/minutes. It may in certain circumstances be possible to agree quantum and leave the arbitration to deal with liability only. However, care should be taken in any splitting of proceedings to ensure that the issues are really discrete and that disposal of a matter or aspect of a matter will lead to some final result that will not require further proceedings.

8.2 It is suggested in paragraph 5(d) of the agenda/minutes that the parties may agree to eliminate pleadings or particulars; an agreement which may serve to expedite proceedings (see Justice de Jersey, 'Expediting Arbitrations' (1989) *the arbitrator* 158; and G.R. Masel, 'Expediting Arbitration Procedures' (1992) 11 *the arbitrator* 27). As to pleadings Mr Justice de Jersey commented (at p.160-161):

> THE PRELIMINARY CONFERENCE
>
> "Questions should arise at the preliminary meeting as to which interlocutory steps need to be gone through. Are pleadings required? There is a predisposition towards having pleadings on the basis that they define the issues which may otherwise remain unclear. However pleadings frequently obfuscate the issue. They are often too long, repetitive and non-responsive. The tendency of a respondent is to put everything into issue from the start. Rarely when parties subsequently agree on matters in issue are the pleadings appropriate amended to reflect the change in position. In the result, the arbitrator will often gain more assistance from the opening than from the pleadings. Now if parties are asked at the preliminary meeting whether pleadings are necessary, they will usually automatically reply yes. But the reference itself will often sufficiently identify the matter in dispute, and the better course may sometimes be to dispense with pleadings, and to adopt some alternative method of securing any further necessary definition of the issues. The parties could be directed to lodge a joint statement of issues after discovery has been completed. There could be discussion at the preliminary hearing of what issues were really in dispute, with the result being recorded. Another alternative is to direct the parties to exchange brief normal letters setting out the parties' respective cases. Another possibility sometimes used in southern litigation is ordering the parties to deliver full written statements of their cases, including the facts and legal argument, and annexing copies of relevant documents. I think it is wrong to approach arbitrations with a firm conviction towards pleadings. A cleverly drawn pleading can conceal more than it reveals. Utilising such other methods – the joint statement of issues, the exchange of informal letters, the determination orally of what is in issue with its being recorded at the preliminary conference, and the exchange of comprehensive written cases – may more successfully define and limit the scope of the arbitration and result in the presentation of the issues in a more candid and informative way than would be the position with pleadings. This is a matter for the arbitrator's discretion. Subject to the arbitration agreement, he is not bound to require pleadings, and would be a liberty to direct the parties to participate in one or other of these alternative approaches. It is worth remembering that under s.18(1) of the Queensland Act, the parties are obliged to do all things which the arbitrator may require during the proceedings on the reference."

See also C.Hackett, 'Expedited ADR Rules and Mediation in the Context of the Arbitration Process' (1995) *the arbitrator* 173, where it is noted that in the absence of agreement between the parties large complex arbitrations may require pleadings in the traditional format (referring to *Superannuation Fund Investment Trust v. Leighton Contractors Pty Ltd* (1990) 55 SASR 327); but comparing the more flexible approach of Rogers J. in *Imperial Leatherware Co.*

Pty Ltd v. Macri and Marcellimo Pty Ltd (1991) 22 NSWLR 653; and see Justice de Jersey, 'Reform of the Arbitration Process – Interlocutory and Hearing Steps: Problems and Situations' (1996) *the arbitrator*, 181 esp. at 191,2.

It certainly seems desirable in most cases to avoid elaborate pleadings and particulars but it should be remembered that pleadings serve a purpose both in arbitration and litigation in that they are to define the issues to be arbitrated or determined by a court and provide a sufficiently particularised statement of the case a party has to meet to enable a party to put its position properly and not be 'ambushed'. In this sense pleadings are an aspect of procedural fairness and the application of the rules of natural justice. If they are to be dispensed with this should be kept in mind in establishing an alternative form of procedure. An alternative which may be useful in a number of cases is to have the parties agree specific questions to be determined by the arbitrator which quickly achieves the same result as pleadings in the sense of isolating questions between the parties which require determination (see *Fitch Agenda*, paragraph 12). However, agreed questions do not, except in circumstances where the facts and legal issues are clear, provide information by way of particulars as to the nature of the case a party will meet. This difficulty may be addressed by an agreement in terms of paragraph 5(f) that each party give to the arbitrator and to each other party a brief statement of the findings of fact and law for which the party contends within a time fixed by the arbitrator. The only potential negative feature of this procedure is that any procedure that involves significant written statements or submissions by the parties may involved the parties in significant costs in the preparation of that written material. This is a matter which should be borne in mind in this respect.

8.3 Paragraph 5(e) of the agenda/minutes raises the question whether any issue of law is likely to arise and this will assist in relation to the ordering of pleadings or particulars or, alternatively, agreed questions and possible statements of fact or law. It is also relevant to question whether appeals are to be excluded in relation to any question of law arising out of the award or in the course of the arbitration for the purposes of sections 38-41 of the Act (in this respect see paragraph 5(j)).

8.4 Some evidentiary matters are dealt within paragraphs 5(h), (i), (k), (l) and (m) of the agenda/minutes. It is desirable to obtain agreement between the parties to provide an agreed bundle of documents as this helps to organise the material and allow the parties and the arbitrator to consider this evidentiary material, properly organised, at the commencement of the proceedings. Similarly, Scott Schedules which summarise details of claims and evidence with respect to matters in dispute and provide a summary of arbitrator's reasons and decisions

on particular matters in dispute. They are a particularly convenient way of organising questions and evidence in building cases; but the same could be said of any 'multi-questioned' arbitration. An example is Scott Schedule* contained in *Fitch*, Appendix XVII, page 195; and see the discussion on pages 71,2. *Fitch*, at page 72, comments that "a Scott Schedule is the means of summarising the parties' allegations into a single document".

8.5 The question whether the parties have retained any experts to give evidence in the proceedings is dealt with in paragraphs 5(k), (l) and (m) of the agenda/minutes. It is desirable in order to assist the parties meet each other's case to obtain an indication (at least) of the names and expertise of the proposed experts and also to have an agreement that experts' reports are to be exchanged at an agreed time before the hearing. The *Expedited Commercial Arbitration Rules* provide for the exchange of experts' reports at least seven days before the commencement of the hearing (see Rule 18; and see para. 6.3).

9. *Disclaimer*

9.1 The disclaimer provision contained in paragraph 6 of the agenda/minutes in Practice Note 3B (Form 3) is particularly important given the limited protection given to arbitrators under section 51 of the Act. Section 51 provides:

> "51. *Liability of Arbitrator or Umpire*
>
> An arbitrator or umpire is not liable for negligence in respect of anything done or omitted to be done by the arbitrator or umpire in the capacity of arbitrator or umpire but is liable for fraud in respect of anything done or omitted to be done in that capacity."

The protection afforded by section 51 of the Act is limited to liability for negligence. The particular circumstances will determine what is negligent in each case (see *Sinclair v. Bayly* SC (Vic.), Nathan J., 19 October 1994, unreported; listed (1995) 14 *the arbitrator*, 20; and see *Jacobs*, [48.20]). However, it seems that this protection would not extend to any claim against an arbitrator with respect to misconduct which, as has been mentioned (see para. 1.4), is defined very broadly in section 4 of the Act to include "corruption, fraud, partiality, bias and a breach of the rules of natural justice". In view of the fact that the rules of natural justice can be breached relatively easily and innocently this is a serious limitation in the protection provided by section 51. The limitations of section 51 have been recognised and addressed with respect to arbitrations under the *Retail Tenancies Act* 1986 in Victoria by

* The name derives from the practice of G.A. Scott, an official referee in England between 1920 and 1933, in organising building cases (see *Sharkey and Dorter*, p.137-8).

recent amending legislation in the *Retail Tenancies (Amendment) Act* 1995 which inserted a new section 22E in that act as follows:

> "22E. *Liability panel members*
>
> A member of the panel is not personally liable for anything done or omitted to be done by the member in good faith –
> (a) in the capacity of conciliator or arbitrator under this Act; or
> (b) in the reasonable belief that the thing was done or omitted to be done in the capacity of conciliator or arbitrator under this Act."

It is for these reasons that the disclaimer in terms of paragraph 6 should generally be obtained. However, it will not be necessary to obtain such a disclaimer where an arbitration is conducted under a statutory reference or order of a court where the arbitrator enjoys the protection of a provision such as section 22E, above. Care should be taken with 'mixed' arbitrations which are the result of consolidation of a consensual arbitration under the Act (to which only the section 51 protection applies) and an arbitration under a statutory reference or order of a court which enjoys the protection of a provision such as section 22E, above. In these circumstances a disclaimer in terms of paragraph 6 of the agenda/minutes should be obtained with respect of the arbitration conducted solely under the Act.

10. *Entering on the reference*

10.1 It is necessary for some objective event to indicate quite clearly the point at which a nominee enters upon the reference to arbitration and thereby takes on the capacity of arbitrator. Paragraph 7 of the agenda/minutes in Practice Note 3B (Form 3) provides this event. Also, importantly, it obtains the agreement of the parties that everything done by the nominee in the capacity of nominee is taken to be done by that person in the capacity of arbitrator and consequently forms part of the agreement for the purpose of the arbitration as recorded in the Preliminary Conference minutes.

11. *Timetable*

11.1 Paragraph 8 of the agenda/minutes in Practice Note 3B (Form 3) provides for a timetable for the hearing and preliminary matters, including 'pleadings' and discovery and inspection. The parties should provide an indication of the estimated time for the hearing of the matter. This is relevant to arrangements generally and may be relevant to the question of cancellation fees depending upon the formula agreed on in this respect by the parties (see para. 7.2).

11.2 Assuming that pleadings and particulars are to be used as a means of establishing matters in dispute between the parties (in this respect see

alternatives discussed at para. 8.2) a timetable needs to be established (in this respect see paragraphs 8(b) to (i) of the agenda/minutes). It may, in many cases, be desirable to truncate the timetable by eliminating specific allowance for requests for further and better particulars or particulars generally and simply direct the parties to properly particularise points of claim and points of defence, counterclaim, defence to counterclaim and reply and deal with any difficulties by the reservation of liberty to apply in a new paragraph 10(d) as indicated previously (see para. 3.3; and see the alternative pleading timetables set out in *Fitch Agenda* p.48-9 set out at para. 3.2). Finally, the likelihood of a rejoinder and reply to counterclaim being required (see paragraph 8(i)) seems remote.

11.3 In some cases it may be possible for the parties to agree to deliver a statement of agreed issues. Comment has already been made for the need for care in imposing cost burdens on the parties in producing written statements of this kind (see para. 8.2) so this procedure should only be used where it is likely to be useful.

11.4 In some cases it may be desirable to leave the timetable for a subsequent directions hearing or later agreement by reason of the fact that there is some preliminary question, in relation to jurisdiction or otherwise, which needs to be determined before the matter proceeds to full determination. If this is the case the preliminary question or questions to be determined should be stated very clearly whether it or they are stated by order of the arbitrator or agreed between the parties.

11.5 Depending on the nature of the matters in dispute discovery and inspection may be required. If so provision should be made for it together with provision of a list or affidavit of documents (see para. 8(k) and (l) of the agenda/minutes).

11.6 The delivery of affidavits or witness statements has been discussed (see para. 6.5). Consideration needs to be given to whether the affidavits or witness statements are to be delivered by all parties at the same time without any party having the benefit of seeing the other's affidavits or witness statements before producing their own affidavit or witness statement or whether the affidavits or witness statements are to be delivered in the same general order as the course of submissions – i.e., the claimant's evidence, respondent's evidence and claimant's evidence in reply. An alternative is for the parties to deliver affidavits or witness statements and both be permitted to file simultaneously a reply to each other's affidavits or witness statements (without having first seen each other's reply). The procedure chosen will depend upon the nature of the matters in dispute and the magnitude of the

claim. As to the timetable for affidavits or witness statements see paragraph 8(m) of the agenda/minutes.

11.7 Finally, it will be necessary to settle the place of the hearing and the dates and hours of hearing. With respect to hearing hours it is useful to bear in mind the comments of Lord Roskill in delivering the Alexander Lecture, comments which are repeated by *Fitch* at p.50:

> "I know well how great is the demand for your services and rightly so. I understand that the London Maritime Arbitrators Association have to work sometimes by night as well as by day as well as at weekends. I sometimes see those working the night shift in the Temple when I go home in the evening. There is nothing new in this but do remember the wisdom of the judicial five hour day. Exhaustion can all too easily lead to error by advocates, arbitrators and judges alike."

11.8 If a view is required it is desirable to agree upon this as soon as possible and to specify any arrangements in relation to the view. When it comes to the view itself, or at a convenient time beforehand (including at the Preliminary Conference), it should be clearly established with the parties the purpose of the view, the parties to be present at the view, and whether or not the parties are to be allowed to make any submissions at the view or simply point out things that they wish the arbitrator to see (see generally, *Fitch*, p.77 and following, and as to the purpose of a view p.79-80).

Jurisdiction

12. In the context of the present discussion I do not propose to say a great deal in relation to jurisdictional matters save that the question of jurisdiction is a matter to be considered at the Preliminary Conference and may be a matter which is usefully disposed of at a preliminary hearing. Generally, as to jurisdiction *Sharkey and Dorter* comment (at p.80):

> "Accordingly a nominee/arbitrator is entitled to consider a question going to his jurisdiction to the point of investigating and satisfying himself that there is a dispute and that it is worthwhile proceeding further. Indeed generally the courts will not grant an injunction to stop him going that far (*Bremer Vulkan Schiffbau and Maschinen Fabrik v. South India Shipping Corp. Ltd* [1981] AC 909). But there the nominee/arbitrator should draw the line. He cannot pull himself up by his own boot straps in order to give himself jurisdiction which he may not have had. Matters going to the very root of his jurisdiction are generally better decided by the court (*Heyman v. Darwins Ltd* [1942] AC 356 at 393); although the modern tendency is for the court to expect to define such primary facts as its can on that legal question."

Following on from that position I note two relatively recent decisions of the Victorian Supreme Court in *Robertson v. Asva Holdings Pty Ltd* (1990) V ConvR ¶54-370 and *Thirteenth Talfeb Pty Ltd v. Dowsett Pty Ltd* (1990) V ConvR

¶54-366. Both decisions concern the jurisdiction of arbitrators under the *Retail Tenancies Act* but are of general application having regard to the fact that arbitrations under that Act are conducted under the provisions of the *Commercial Arbitration Act*.

In *Robertson v. Asva Holdings* Fullagar J. said (at p.64,601-2):

> "... the person nominated as arbitrator in the present case... has power to decide in the first instance whether the plaintiffs or their duly authorised agent signed the lease agreement and to decide all other questions of fact on which his alleged authority to proceed as an arbitrator must depend."

His Honour went further and after citing a number of authorities said (at p.64,602):

> "Those cases also show, I think, that the attitude of the supervising court will normally lean strongly in favour of requiring the arbitrator to decide those questions."

The matter was considered further in *Thirteenth Talfeb Pty Ltd v Dowsett Pty Ltd*. After considering the authorities (including *Robertson v. Asva Holdings*) JD Phillips J. expressed the view that they supported the following four submissions (at p.64,576):

> "(1) Where an arbitrator or inferior tribunal is faced with a challenge to jurisdiction, it (or he) has power to decide the questions upon which jurisdiction depends.
>
> (2) A decision by such a tribunal or arbitrator as to jurisdiction is reviewable for error.
>
> (3) It is preferable that a supervising court normally exercise its discretion in favour of allowing, or if necessary, requiring an arbitrator to determine jurisdictional facts.
>
> (4) Once an arbitrator intends to conduct a jurisdictional inquiry and the party seeks to restrain him therefrom, that party must show a real likelihood or danger of the wrongful assumption of jurisdiction."

Clearly it is desirable that a jurisdictional question be resolved as soon as possible and the tribunal decide whether to act or not (see *Halsbury's Laws of England* (4th ed.) Vol. 1: Administrative Law: para. 55). In *Metal Scrap Trade Corp. Ltd v. Kate Shipping Co. Ltd (The Gladys)* [1990] 1 All ER 397 (HL), the Lord Chancellor, Lord Mackay, said (at 399):

> "I believe it is highly desirable that the question whether or not there was a concluded contract and if there was whether or not there was an arbitration clause included in it should be decided before costs are incurred in that arbitration."

It follows that if a jurisdictional question is raised – which is generally at the Preliminary Conference – arrangements should be made for its determination as soon as possible in all the circumstances of the particular matter or matters

in dispute. Where possible a preliminary question should be stated which covers all aspects of the jurisdictional objection raised – by agreement between the parties, or by the arbitrator if agreement is not reached. This preliminary question should then be disposed of as soon as possible, subject to necessary preliminaries which may include provision for written submissions (as to alternative timetables and arrangements with respect to written submissions see generally para. 6.3). Unfortunately not all jurisdictional questions neatly separate themselves from the substance of the matters in dispute. It follows that where matters of jurisdiction and substance are inseparable the whole arbitration must proceed. The only opportunity for costs savings then is for the arbitrator in writing the award, having heard all evidence and submissions, to attend first to jurisdictional matters if possible. This means that at least the parties may be saved some fees and expenses if the arbitrator finds he or she has no jurisdiction before preparing the award on all matters in dispute. In these circumstances the parties may consider overcoming the jurisdictional problem by entering with a new, supplemental, arbitration agreement under the Act to refer all matters in dispute to the particular arbitrator (and see paras 5.1 and 9.1).

Expedited procedures

13. As to expedited procedures reference should be made to the preceding discussion, including in relation to agreement as to facts, bundles of documents, stated questions or documents only arbitrations. The provisions of the Act, particularly sections 14 and 19, allow considerable flexibility in arbitration procedures (see para. 6.2 and, generally, paras 6 and 8, above). Reference should also be made to the articles by the Hon. Mr Justice de Jersey, G.R. Masel and C. Hackett to which reference is made in paragraph 8.2.