

Referrals Out to Experts in Queensland: A Limited Practice

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Introduction

The use of referrals out of court is becoming increasingly common, particularly in construction-related cases requiring technical or specialised knowledge. The rules governing the availability of referrals out vary between Australian state jurisdictions. This article aims to outline the current situation in relation to referrals out of court to special referees and experts in jurisdictions across Australia. It is argued that Queensland legislation is deficient in relation to referrals out of court to special referees in comparison to equivalent legislation in other jurisdictions. As a result, cases which would otherwise be heard in Queensland are being heard in other jurisdictions.

It is submitted that legislative reform is required to bring Queensland into line with other state jurisdictions and, more importantly, to ensure that Queensland has an efficient and cost effective referral out process. Without such reform, Queensland will continue to lose cases to other jurisdictions and will continue to be regarded as an inflexible and expensive jurisdiction in which to litigate.

Referral process

The term 'referral out' refers to a practice by which Courts are able to refer questions or certain parts of a matter to an expert or other special referee for determination or to otherwise assist the Court in determining that question or part of the matter. Questions are usually referred to experts because they relate to complex or technical matters which the judiciary does not have the requisite knowledge to decide. Such situations frequently arise in the context of construction law, given the technical nature of construction-related industries.

In *Dalgety Farmers Ltd v Westpac Banking Corporation*³ the reasons for referring matters to special referees were explained as follows:

'Experts in the particular field, be they builders, engineers, accountants, scientists of various descriptions, are regularly appointed as referees to report to the Court on the myriad of technical questions regularly thrown up for decision. This is done basically

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3 Butterworths unreported judgments BC 9102323.

for 2 reasons. First it is believed that an expert in the particular field under investigation is able to resolve the question more speedily, inexpensively, and indeed accurately than would a Judge. This is simply by reason of the fact that the expert does not have to be tutored in the particular science, or matter of expertise, as a Judge would require to be.

Second, there are simply not sufficient Judges available to determine matters which, strictly speaking, do not call for the application of such commercial expertise as Judges of the Commercial Division are assumed to have.'

The practice of referring out exists to enable the Court to take advantage of any special skill or knowledge that the special referee might possess. This enables particularly complex or technical matter to be decided with the necessary expertise. Additionally, other benefits of referrals out include reducing the expense and duration of litigation. Use of referees may also enable Judges to expedite case lists.

The use of special referees varies between States according to legislation and court-specific rules. The referral process in other jurisdictions is outlined below.

Other jurisdictions

New South Wales

Arguably, the broadest scope for referral out to special referees exists in New South Wales. Under part 72 of the Supreme Court Rules, an entire matter or part thereof may be referred out to a special referee without consent of the parties.

Rule 13 of the New South Wales Supreme Court Rules allows the Court either of its own motion or upon application by any party to adopt, vary or reject the referee's report in whole or in part. The Court may also require an explanation from the referee in relation to the report and may also remit for further consideration whole or part of the matter for a further report.

Although the Court has a predisposition to adopt the referee's report, it will not automatically do so.⁴ It is generally accepted that in order to be adopted, the referees report must show an analytical and scientific approach to the assessment of the subject matter.⁵ The decision of the Court to adopt, reject or vary a report must be determined in accordance with notions of justice. Reasons for the rejection of a referee's report may include a manifest unreasonableness, error in a principle of law or misapprehension of the evidence.⁶

In referring any matter to a special referee, the rules of natural justice are of paramount consideration. The Court is able to hear arguments and consider evidence in order to ensure the proceedings before special referees are conducted fairly and in accordance with the rules of natural justice.

4 Dawson, P (1992) 'The Court Appointed Referee's Report' 3 *Australian Dispute Resolution Journal* 184 at 185.

5 *Chloride Batteries Australia Limited v Glendale Chemical Products Pty Ltd* (1988) 17 NSWLR 60 at 67 per Cole J.

6 Laycock, S (1996) 'What is the most appropriate form of dispute resolution' 8(6) *ACLB* 41 at 43.

Generally the reference system is regarded as having greatly reduced the backlog of disputes awaiting resolution in the Court. Use of this system has been particularly popular in relation to construction list matters, due to the prevalence of technical issues associated with these matters and the need for technical expertise.

Victoria

In Victoria, the Supreme Court Rules 50.01 to 50.06 enable special referees to be appointed to provide an opinion or decision. The consent of any party is not required in order to refer a question. An interested party may apply for an order requiring the special referee to provide a further report explaining some aspect of the initial report, requiring that the report be remitted to the special referee for further consideration or to vary the report.

In the County Court of Victoria, rule 34A.22 enables referees to be appointed to provide an opinion or decision with the consent of the parties.

Tasmania

The Tasmanian Supreme Court Rules part 22 division 5 provide for the reference of questions to special referees for enquiry or report. The Court is unable to refer the entire matter to a special referee. There is no obligation to obtain the consent of any party before referring the question, and indeed parties are permitted to apply to the Court for a referee's report to be adopted or varied where consideration of the report has been adjourned.

South Australia

Section 67 of the *Supreme Court Act 1935* enables civil matters to be referred to an expert referee. Under this Act, the Court is able to refer any question arising out of a civil proceeding but is unable to refer the entire matter. The Court is permitted to adopt the referee's report in whole or in part. Supreme Court rule 76.07 allows broad powers to referees including all powers given to an arbitrator under the *Commercial Arbitration Act 1986*. There is no requirement that the consent of any party be obtained prior to referring the question.

Section 34 of the *District Court Act 1991* allows a Court to refer any question arising in an action for investigation and report by an expert in the relevant field. This provision mirrors that of the *Supreme Court Act 1935*.

South Australia is the only jurisdiction to allow referral out in the Magistrates Court. Section 29 of the *Magistrates Court Act 1991* also enables the Court to refer any question to expert determination. Again, this provision mirrors that of the *Supreme Court Act 1935*.

Western Australia

Order 36 of Supreme Court Rules enables any party to apply for the appointment of an independent expert to enquire into and report upon any question of fact or opinion.

Order 35 of the Supreme Court Rules enables the Supreme Court to appoint a referee. The Court may also appoint a specially qualified assessor.

The Practice and Procedure Rules of the District Court of Western Australia mirror those of the Supreme Court. Therefore it is possible to appoint an independent expert, referee or assessor in the District Court.

Northern Territory

Section 16 of the *Supreme Court Act 1979* enables the Court to refer any question in a civil proceeding to the Master or to a referee. Section 27 of that Act requires that the consent of all interested parties before the question may be referred, except where the jurisdiction of the Court is exercisable only by the Full Court. A party to a proceeding affected by a judgment given by a special referee may apply to the Court to have the judgment affirmed, varied or reversed (in whole or in part), or remitted to the referee for further consideration. Rule 50 of the Supreme Court Rules mirrors these provisions.

Australian Capital Territory

Division 88.3 of the Supreme Court Rules provides the Court with a general discretion to appoint referees and refer to them either the whole of the proceedings or any questions arising out of the proceedings. There is no obligation to obtain the consent of any party and a party may apply to the Court to have the entire matter or a question referred to a special referee. A party may also apply to the Court to have an order made by a referee set aside or varied. The Rules stipulate that proceedings under a reference are to be conducted as if the reference were an arbitration agreement within the meaning of the *Arbitration Act*. Importantly, a referee is not bound by the rules of evidence but may inform himself or herself in relation to any matter pertaining to the proceedings as the referee thinks fit.

The Court may give interlocutory directions in respect of any matter arising from the proceedings under reference, on the application of either the referee or an interested party. The Court may, either on its own initiative or upon application by a party, adopt, vary or reject the report in whole or in part, on a matter of fact or law or both. An explanation by way of a further report from the referee may also be ordered or applied for.

The Australian Capital Territory provisions pertaining to referrals out of court are virtually identical to those of New South Wales. The provisions of both the Australian Capital Territory and New South Wales are the broadest of any Australian jurisdiction, in that:

- (a) There is no requirement to obtain the consent of any party before referring out of court;
- (b) A party may apply for referral out of court;
- (c) A matter may be referred out in its entirety; therefore the use of referrals out is not confined to merely a question or part of a matter; and
- (d) Special referees are not bound by the rules of evidence and are able to conduct proceedings in a manner the referee thinks fit, subject to a few restrictions.

The broadness of the referral out provisions provides a flexible, efficient and cost-effective alternative to litigation, whilst enabling parties to take advantage of the special expertise of the referee. This is particularly attractive to parties to construction-related proceedings, as it offers the opportunity not only to save time and expense, but also to ensure that the proceedings are heard and decided by an adjudicator with the appropriate level of specialised knowledge and expertise. The fact that parties are entitled to apply for a referee's order to be set aside, varied or remitted also makes referral out an attractive option as it provides a 'safety net' in the event that a party feels that the decision was made inappropriately or unfairly.

Queensland

In Queensland the ability of the Court to refer matters to special referees is extremely limited particularly in comparison to other jurisdictions such as New South Wales. Rule 501 of the *Uniform Civil Procedure Rules 1999* provides:

'501 Special referee

- (1) *The court may in a proceeding, except a trial by jury, refer a question of fact to a special referee-*
 - (a) *to decide the question; or*
 - (b) *to give a written opinion on the question to the court.*
- (2) *If an order is made under subrule (1), the court may direct the special referee to make a report in writing to the court on the question referred to the special referee stating with reasons the referee's decision or opinion.*

502 Procedure before special referee

- (1) *The court may order a special referee to hold a trial or to make an inquiry to enable the special referee to decide the question or to give the opinion.*
- (2) *The court may, either in the reference or from time to time, give directions as to the conduct of the trial or inquiry.*
- (3) *Unless the court otherwise orders, a trial before a special referee must be conducted as nearly as possible in the same way as a trial before a judge sitting alone.*
- (4) *A special referee has the same authority as a judge, but may not deal with a person for contempt.'*

It can be seen that the Court has the ability to refer a question of fact to a special referee to decide the question but is unable to refer the whole matter to the special referee. Also of particular importance is rule 502(3) which stipulates that a trial before a special referee must be conducted in the same way as a trial before a Judge sitting alone. This means that the special referee is bound by the same rules of evidence etcetera as though the trial was conducted before a Judge.

Rule 504 enables the Court to order the special referee to provide a further report or provide an explanation. The Court is also able to remit whole or part of the question originally referred to the special referee for further consideration.

The Court is permitted to accept or reject all or part of the special referee's opinion, decision or findings in a report under rule 505(1)(a). Rule 501(1)(b) enables the Court to make an order or give judgment upon the special referee's opinion, decision or findings in the report.

Part 13 of the *Supreme Court Act 1995* also contains provisions in relation to referrals to special referees. Section 255 enables the Court to refer any question or part of a matter to the special referee, the report of whom may be adopted wholly or partially by the Court and if so adopted, may be enforced as judgment by the Court.

Section 256(1) stipulates that in order for a matter or question to be referred by the Court to a special referee, consent of all parties interested must be obtained. Section 256(2) provides that all trials before referees must be conducted in the same manner as prescribed by rules of the Court.

In summary, under Queensland law it is much more difficult to refer a matter to a special referee than it is in other States.

Implications

As a result, parties in Queensland are subject to delays in achieving resolution of litigation and also potentially increased costs as a result of prolonged litigation. Referral out of court is not a viable option for many proceedings in Queensland due to the inflexibility of the rules governing the practice. This inflexibility is caused in particular by:

- (a) The inability to refer an entire matter to a special referee;
- (b) The requirement that the consent of all parties must be obtained prior to referral out, as this may allow a party to deliberately delay the progress of proceedings, or to withhold consent as a means of exercising influence over the other party or parties;
- (c) The requirement that proceedings under a special referee be conducted in the same manner as a trial under a judge, and the fact that the special referee is bound by the rules of evidence; and
- (d) The lack of provisions entitling parties to apply to the Court to have a referee's report varied, rejected or remitted for further consideration.

Under the current Queensland system, cases which would otherwise be decided in Queensland are being heard in other jurisdictions. For example, *Concrete Constructions Group Ltd v Litevale Pty Ltd & Ors*⁷ involved a dispute over the construction of a shopping centre in New South Wales. The defendants had applied to the Supreme Court of New South Wales to have the proceedings transferred to Queensland pursuant to the *Jurisdiction of Courts (Cross-Vesting) Act 1987*. The defendants were seeking this transfer to Queensland as many of the witnesses involved in the proceedings were resident in Queensland and the respective parties were represented by Queensland solicitors.

Giles CJ concluded that it would be advantageous to the parties involved to transfer the matter from New South Wales to the Supreme Court of Queensland for the reasons argued by the defendants. Giles CJ also concluded that there was no substantive difference between the applicable laws of Queensland compared to those of New South Wales. However, Giles CJ was unable to order that the proceedings be transferred to Queensland as the plaintiff to the matter had applied for the entire matter to be referred to a special referee under part 72 of the New South Wales Rules.

The cross-vesting application was refused because Giles CJ was of the opinion that it would be unjust to refuse the plaintiff the opportunity to have the matter referred to a special referee under the New South Wales system. Giles CJ noted that if the proceedings were referred to a special referee, they would be disposed of more expeditiously and with less formality and expense than if constrained by the procedures available in the Supreme Court of Queensland. Giles CJ noted that considerations such as time, delay and expense were

⁷ Butterworths unreported judgments BC 9800859.

relevant to deciding where justice lies. Given that referral out under the New South Wales system would have resulted in the proceedings being resolved expeditiously and with less expense, it would have been unjust to deny the plaintiff the opportunity to refer the matter under the New South Wales system.

Indeed in the earlier decision of *Netanya Noosa Pty Ltd v Evans Harch Constructions Pty Ltd*⁸, Lee J noted that there was no comparison between the Queensland and New South Wales systems in relation to referrals to special referees. Lee J also noted that if delays in the Court system were to be reduced, new procedures would have to be adopted.

It is evident from the above that proceedings which would ordinarily be heard in Queensland are being heard in other States. Similarly, parties to proceedings in Queensland are reluctant for proceedings to remain in Queensland if it is at all possible to transfer them to other States and take advantage of broader powers in relation to referrals to special referees.

Potential reforms

It is submitted that the Queensland system of referring matters out of court is in need of reform so as to provide the process with greater flexibility. This will enhance the reputation of Queensland as a suitable jurisdiction to conduct litigation, particularly complex cases. The following measures are suggested:

- (a) Abolishing the requirement that the consent of the parties be obtained prior to referring out;
- (b) Allowing the entirety of a matter to be referred to a special referee, in addition to the current allowance for part of a matter to be referred out;
- (c) Allowing parties the ability to apply to the Court for a special referee's report to be set aside, varied or remitted for further consideration, in addition to the current powers of the Court to do so; and
- (d) Abolishing the requirement that proceedings conducted under a special referee be conducted as though under a judge, thus removing the requirement that the referee be bound by the rules of evidence.

Any reforms would necessarily entail amending relevant provisions of both the *Supreme Court Act 1995* and the *Uniform Civil Procedure Rules 1999*.

As discussed above, bringing Queensland into line with other jurisdictions will ensure that referring out is a more viable option than at present. Referring out has the potential to reduce the time and expense usually involved with litigation, whilst affording the requisite special expertise to deal with matters of a technical or industry-specific nature. This in turn means that court lists will be expedited, and proceedings that should be heard in Queensland will more likely be heard in Queensland rather than in other jurisdictions.

8 (1995) QdR 650.

Conclusion

Currently, the availability of referrals out of court is extremely limited in Queensland. In comparison to other state jurisdictions, Queensland legislation is deficient in that it serves to constrain and limit the use and availability of referrals out to experts and special referees. The major constraints are the requirements in relation to consent, the inability to refer the entirety of a matter out of court and the requirement that special referees be bound by the rules of evidence.

As a direct result of these legislative deficiencies, cases which would otherwise be heard in Queensland are being heard elsewhere. This is particularly so in relation to construction cases due to the technical nature of the subject-matter involved. Unless the Queensland system is reformed so as to bring it into line with other jurisdictions, Queensland courts will continue to lose cases to other jurisdictions and the Queensland system will remain both inflexible and expensive for parties involved in litigation.