SPECIAL REFERENCES – A RENAISSANCE?[1]

by THE HON. MR JUSTICE DAVID BYRNE
Supreme Court of Victoria

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The judicial practice of ducking complicated and technical issues of fact is a very ancient and respectable art. Indeed, the very beginnings of arbitration are to be found in the efforts of the 17th century courts in England to refer issues or whole causes to non-lawyers.[2]

Making a swift leap to the end of the 20th century, there are at the disposal of the courts a range of procedures to refer issues out of court to arbitration, to mediation and to special referees. The first is rarely used. The second I pass over as not relevant for present purposes. The third is the subject of this paper.

References out of court are authorised by the legislation establishing both the Supreme Court[3] and the County Court.[4] In each case the procedure is laid down in 0.50 of the Rules of Court.

THE NATURE OF THE REFERENCE

The power conferred on the County Court is "to refer the whole or any part of the proceeding to a special referee for enquiry and report".[5] This expression is to be contrasted with the terms of the rule making powers for each court[6] which empower judges to make rules with respect to "the reference of any question arising in a proceeding to a special referee or office of the court for decision or opinion."

It will be seen that these provisions draw distinction between an enquiry and report on the one hand; and a decision or opinion on the other. The expression "enquiry and report" presumably derives from the Arbitration Act 1958 s.14 which in turn can be traced back at least to the Judicature Act 1873 s.56. In this context it refers to an enquiry made for the purpose of providing information to the court. The court is free to act upon this information or not. The referee in no sense decides any question. This should be contrasted with Arbitration Act 1958 s.15 which permits a question or issue to be tried by the special referee, for in such a case the award or report produced by the special referee was the equivalent of a jury verdict.[7]

This brief historical survey is necessary because the rule making power in each court and 0.50 draw a similar distinction between a reference to a special referee for him or her to decide the question and a reference to

give his or her opinion with respect to it: R.50.01(1). It is evident that the two processes are fundamentally different, and different considerations are likely to arise in determining whether a reference should be made and what procedure is to be followed by the special referee. Whatever the procedure, the special referee's response to the court is by a report[8]. Let me say at the outset that I would not lightly consider a reference to a special referee for trial and decision and have not yet done so. What follows is concerned with the other procedure – that permitted by R.50.01 (b).

SHOULD AN ORDER FOR REFERENCE BE MADE?

The readiness which judges in Building Cases Lists have shown to make orders for reference should not cause us to overlook criticisms of such an order which have been made.

1. It involves the severance of issues. In most cases certain questions only will be referred out. This immediately raises the question whether it is practical, desirable or even legitimate to deal with certain questions before others. The law reports abound with judicial statements of high authority warning of the dangers of trying certain issues in court before others pursuant to R.47.04.[9] This is because experience shows that two issues in a case are rarely discrete and, even if they are, questions of credit may arise in each. Nevertheless, commercial judges in more recent times, particularly in New South Wales, have been more adventurous in their pursuit of seeking to isolate in advance a point of law or issues which if determined in advance of the main hearing may resolve or abbreviate that hearing with a consequential saving in costs and time.[10] One solution to this difficulty may be to send out all of the issues.[11]
2. It involves a rejection of jurisdiction. It has been said that a plaintiff who commences a proceeding in the court has a right to have its case determined in that court, particularly as the State provides this facility for the purpose. However attractive such an argument may be in theory, it has foundered on the rocks of practicality. The court has limited resources to deal with litigation and, by its own process, contemplates that certain questions are appropriately determined by persons other than judges. In these circumstances this aspect of a reference will not cause difficulties.[12]
3. It is costly. The forum for litigation in court is provided by the State gratis.[13] Before a special referee the parties must, at the outset, bear the cost of reference including the remuneration of the special referee.[14] This may be seen as a burden by an impecunious plaintiff and and outrage by a reluctant defendant for whom this is yet a further cost incurred as a result of an unwarranted legal demand. A number of answers to the difficulty suggest themselves. They range from the robust: parties in the Supreme Court Building Cases List must expect

substantial expense; to the economic: litigation, like other government services, should be subject to the "user pays" principle. In general, the costs of the reference in the first instance are imposed upon all participating parties equally.[15] But there is no reason, where this is appropriate, why this should not be modified to reflect the differing interests of the parties in the questions referred. In this context it must be steadily borne in mind that the justification for an order for reference out is that it is a more speedy, efficient and economical way of determining complex issues than by trial in court. If this objective is not achievable in all the circumstances, including the cost to the parties of the reference itself, the procedure will not survive.

The considerations which I have summarised above, and perhaps others, have lead judges in the past to state that, where all parties are not consenting, an order for reference will be made only in cases of an exceptional nature.[16] But the trend in recent years in Victoria is for there to be a greater readiness to refer questions to a special referee.

THE QUESTIONS REFERRED

The formulation of the questions for reference requires particular care. Under 0.50 it is legitimate to refer a question arising in a proceeding. The issues therefore should arise in the proceeding itself. "Question" includes issues of fact or law[17] or mixed fact and law.[18] The issue in a given case should be sufficiently precise to ensure that a useful answer will be obtained. In this respect the order is unlike a Notice of Dispute under an arbitration clause where the prime concern is to ensure that anything that might conceivably arise in the arbitration will fall within the jurisdiction of the arbitrator. It is always possible for the parties to a special reference to return to the court to enlarge or vary the question where this is desirable.

It is often sufficient to identify the issue to be referred by reference to the paragraphs in the pleadings, and this may be preferable to formulating it in terms of an abstract question, for the question cannot go beyond the pleadings.[19]

THE SPECIAL REFEREE

It is preferable for the special referee to be agreed upon by the parties, although the court may itself select an appropriate person.[20]

It is not necessary for me to say anything to a group of building dispute practitioners as to the need for care to select an appropriate person as special referee. This is a familiar task for any person concerned with arbitration.

Regard must be had, not only to the technical background of the nominee, but also to his or her relevant experience as an arbitrator or as a person able to manage the particular type of reference which is to be made. Is the enquiry to be in the nature of a formal hearing with witnesses, or an assessment of quality, or some other purely technical

investigation? Is the nominee to be a legal practitioner? In the appropriate case I would suppose that a legal practitioner with experience with building disputes might be appropriate. The procedure is sufficiently flexible for one question to be referred to one special referee and another question in the same proceeding to another. Equally, there is no reason why a question or questions should not be referred to joint special referees each with differing expertise.

It is desirable that, where a person is agreed upon, the parties also agree upon the appropriate rate of remuneration and have some idea of what time is required. This is because the order for reference will provide for the lodging of sufficient security to cover the costs of the reference. Again, it is always possible to return to the court where the security proves to be insufficient. The referee also should ensure that the costs of the reference including remuneration are adequately covered by the security for, where this security is inadequate or has been exhausted, the reference may stop until further security is lodged.

PROCEDURE UPON THE REFERENCE

It is necessary at the outset to say something of the relationship of the special referee to the court. In a real sense, the special referee is a delegate of the court[21] – a collaborator in its work. The court has requested him or her to perform a task and, for the purpose, has entrusted him or her with certain powers and functions. So long as the special referee acts in accordance with this mandate he or she is entitled to expect that the court will provide support in the performance of this task. It is for this reason that the usual order for reference and the rules[22] give to the special referee the right to approach the court for directions or assistance. I have encouraged special referees to exercise this right where special difficulty arises in the reference. The experienced special referee will, of course, be able to cope with the usual matters which may arise. But it is preferable where a matter of real difficulty exists, that it be resolved at the outset rather than await argument after the report has been completed and submitted with the possible consequence that the whole reference might wholly or partly have to be done again or abandoned. A special referee who seeks assistance of the court may, in the normal case, expect that the matter will be dealt with by me expeditiously and without the need for legal representation or the risk of costs. I have suggested to special referees that they may communicate with my associate by letter or fax or even by telephone, setting out the problem so that, upon notice to the parties, it may be resolved as soon as I am free to do so. In one case this has been achieved by telephone during the luncheon adjournment. In other cases, of course, it may be necessary to set aside a time for the parties to appear before me at some convenient time. Upon the hearing of such an application, provided the special referee has set out insufficient particularity the problem which has arisen, there should be no necessity

for him or her to attend and participate.

This said, it is convenient to deal with the topic of procedure before a special referee by reference to particular paragraphs in schedule 2 of the standard form of order which I have adopted in the Building Cases List.

> "Subject to the requirements of the rules of natural justice and the following directions and any further directions which may be given by the Court, the special referee may conduct the reference in such manner as is appropriate for the efficient and economic implementation of this Order."

The fundamental direction is that the special referee have a free hand in the conduct of the reference[23] subject to any specific direction of the court, and provided that the conduct of the reference complies with the rules of natural justice. In their barest form these rules require that the referee approach the task without bias[24], actual or apprehended[25], and that the parties be given a fair hearing. The first requirement is a familiar one to arbitrators. It involves the disclosure of any potential conflict of interest and that the parties be dealt with in an even handed way. The requirement of a fair hearing will depend upon the nature of the enquiry itself.[26] In the absence of a specific direction to the contrary, the referee normally must not receive material from one party in the absence of another;[27] each party must be able to know what case is put against it; the referee must give each party the opportunity to bring forward such material as it wishes in support of its case or against the case of the opposing party.

> "Within 21 days after the date of appointment the special referee must conduct a preliminary conference with the parties or their legal representatives to determine the manner of conducting the reference."

The order will normally direct the special referee to convene a preliminary meeting within a specified time. This is to get the parties together and to set the reference in motion. At this meeting the special referee should agree with the parties or lay down the ground rules for the reference. The nature of the issues referred should be explored so that the ambit of the reference is understood by all involved. The procedures to be adopted should be determined – whether there is to be a formal hearing or not; where the hearing is to take place; what is the timetable necessary to ensure that the report may be delivered within the time frame stipulated by the court. the special referee may give directions to implement the reference, such as the delivery of material, expert reports or inspection of the works where appropriate. These are the sort of matters which are usually dealt with at the preliminary conference in an arbitration, although it will not be normal for the delivery of points of claim or defence or for discovery of documents[28] for these will have been dealt with by the court at directions hearings before the order for reference is made.

The special referee should, as a matter of good administration, publish to the parties and keep minutes of all meetings, of decisions made and agreements reached at such meetings.

> "The special referee is authorised for the purpose of the reference to have and use the following material in addition to any material which may be received in the reference... A copy of each of the above, must be delivered to the special referee by the plaintiff within 14 days after the date of appointment."

The plaintiff is required to deliver to the special referee before the preliminary meeting the basic documents specified in the order to enable the special referee to understand the issues in the litigation and the contentions of the parties on the reference. The special referee is, of course, entitled to require that further material be provided and will normally receive further material as the reference proceeds. Unlike an arbitrator, the special referee cannot permit amendment of the pleadings or particulars filed in the court nor can the questions referred by the court order be amended by the special referee, even with the consent of the parties. These are matters for the court.

> "The special referee make such enquiry and inspection of any document or thing and use such personal knowledge and expertise as is reasonably necessary for the purpose of the reference."

The special referee is usually selected as a person possessing expertise which is to be brought to bear on the reference. In this respect, like an arbitrator with expertise, a distinction is drawn between general expertise and special knowledge of the matters referred. If the special referee has special knowledge, this should be disclosed to the parties so that they may address it by material or argument.[29] The distinction between general expertise and special knowledge may in the given case be difficult to make. In general terms it is illustrated by the fact that, where an engineer is engaged to report upon the cause of the failure of a structure, the court and the parties will assume that the engineer has a knowledge of the fundamental principles of structural engineering, but they should not assume that he knows anything about the particular site upon which the structure was erected. Where the special referee is in doubt as to whether the expertise which he or she possesses falls into one or other of these categories the prudent course is to disclose the matter to the parties so that they may address it. Where the special referee inspects the works in accordance with this direction, the observations and inferences drawn by him or her may be used as part of the material upon which the opinion is based.[30] But in so doing particular regard should be had to the demands of the rules of natural justice. These may require the special referee to disclose to the parties the substance of the observations made so that they may address them.

> "The Special Referee is not bound by the Rules of Evidence."

In the absence of such an order it is likely that a special referee is bound by the rules of evidence.[31] The order therefore will normally provide that the special referee is at liberty to receive material which does not meet the requirements of these rules. This does not mean that the special referee might ignore these rules in their entirety, for many of the rules of

evidence are directed at ensuring a fair trial as is required by the rules of natural justice.[32] For example, where a fact is seriously in issue, the proper conduct of the reference may require that the special referee insist that hearsay evidence by given little or no weight or that it be rejected altogether where eye-witness evidence is available and appropriate.

> "The attendance of witnesses and the production of documents may be compelled by the issue of subpoena in accordance with Ch I 0.42 of the Rules of Procedure of the Supreme Court of Victoria.[33]

A special referee has no power to issue a subpoena. Where the attendance of a stranger to the reference is required the party wishing to call that witness must use the normal court process.

> "Each party must comply with a lawful direction of the special referee.
>
> If a party refuses or fails to attend before the special referee for examination or otherwise for the purposes of the reference, the special referee may, providing he or she is satisfied that the party has had proper notice in writing and that there is no sufficient cause for the refusal or failure, continue with the reference in the absence of that party. If the special referee exercises this power he or she must record this fact and the circumstances in the report."

For practical purposes there is usually no difficulty in requiring the parties to comply with the directions of the special referee notwithstanding that the special referee has no powers to compel compliance.[34] If however this occurs, the assistance of the court should be sought. The second of the orders set out above may be appropriate where there is a risk that a party for reason of impecuniosity, lack of interest or otherwise may refuse to attend. Like an arbitrator, a special referee should be very careful about proceeding in the absence of a party less there be good reason for this absence.

> "The parties may be represented on the reference by legal practitioners."

The order for reference will normally deal with the right of legal representation. In the case where the task of the special referee is to assess the condition of work or to perform a purely technical task or experiment, an order may be made denying the parties this right.[35]

> "The special referee may take evidence 35A and for the purpose may administer an oath or take an affirmation for the purpose of the reference."

Without such an order, a special referee, unlike an arbitrator,[36] may not administer an oath or take an affirmation.

OTHER DIRECTIONS

The court has very extensive powers under R.50.02 to give further directions as to procedural matters and will do so to accommodate the special requirements of the case in order to ensure that the objective of the order – the efficient and economical implementation of the reference – is achieved. By way of illustration the following order was made recently with the approval of the parties:

"The special referee may, where he considers it appropriate to do so in respect of specific questions, but subject always to paragraph 1 [the paragraph dealing with the obligation to comply with the rules of natural justice]:

(a) conduct the reference in the absence of a party who has indicated that it is not interested in that question;

(b) conduct the reference in an investigative manner rather than an adversarial manner;

(c) consider any documents, submission or thing including the works the subject of this proceeding or any part of them and apply his professional expertise to the consideration thereof as is reasonably necessary for the conduct of the reference;

(d) direct that there be no opening or final address by a party or that it be limited in subject or in time.

If the special referee exercises any of these powers he must record this fact and the circumstances in his report."

THE SPECIAL REFEREE'S REPORT

The special referee is required by the order for reference and by R.50.02 to answer the questions referred and to provide reasons. Since it is the whole report, not only the answers to the questions, which is to be adopted or not adopted, the special referee should set out the factual basis for the opinion and the logical steps which lead to this result.[37] If a question referred turns out to be difficult to answer by reason of its terms or otherwise, the special referee may in the reasons set out why this is so and how the intent of the question should be achieved. This will then enable the court to reach its own conclusions[38] or, in the appropriate case to remit the question or some modification of it to the special referee for further opinion.[39]

The opinion of the special referee and the report is not binding upon the parties until adopted by the court.[40] The court may adopt the report.[41] Alternatively, it may require the referee to provide a further report, explaining some matters mentioned or not mentioned in the report,[42] or may remit the whole or part of the question for further consideration by the special referee,[43] or it may vary the report.[44] Finally, the court may decline to adopt the report in whole or in part.[45]

When asked to adopt a report, the court will normally do so providing it is satisfied that the interests of justice require. This confers a very broad power on the court which is doubtless intended to deal with the great variety of circumstances in which the application is made and opposed. It is probably not helpful in advance to attempt to set out in detail the circumstances in which this discretion will or will not be exercised. Furthermore, for the Victorian practitioner, it is relevant to note that most of the authorities which have considered this question have been decided under the New South Wales Rules which were relevantly amended in 1989

and which are not identical to those in Victoria. Nevertheless, there is sufficient similarity between part 72 of the New South Wales Rules and our 0.50 to enable me to venture some views as to the approach which may be expected upon an application to adopt a report of the special referee:

1. Unlike an arbitrator, a special referee has no authority to make an error of law.[46] This means that the judge may re-examine the reasoning of the special referee where there is an erroneous application of legal principle[47] or, presumably, the application of an erroneous legal principle.
2. Consistent with the principle that it is an error of law to reach a conclusion of fact where there is no material in support of that fact, the court may investigate such an allegation where it is made upon good grounds.[48]
3. Where there is evidence to support the conclusion of the special referee but the complaint is that it was erroneous, the court will not undertake a re-examination of the evidence provided it is satisfied that the special referee had applied his or her mind to the task of fact finding required by the reference carefully and in a manner consistent with legal principle. In such a case the role of the court is normally to do not more than ensure that the appropriate questions had been addressed and that there was evidence capable of being accepted which, if accepted, supported the finding of facts made.[49]
4. The role of the court is not to rubber stamp the report without more.[50] Notwithstanding that it does so with the assistance of a report of the special referee containing an opinion on the questions referred, it is the function of the court to determine the dispute between the parties to the proceeding. But the court may, in justice to the parties, refuse to permit them to re-open an issue of fact properly argued and investigated before or by a special referee in accordance with the reference.[51] The court, then, must examine the report and, if satisfied that the interests of justice require, may adopt it in whole or in part.

   > "On the other hand, if the special referee's report reveals some error of principle, or some patent misapprehension of the evidence, that would ordinarily be a reason for rejecting it. So also would be perversity or manifest unreasonableness in fact finding."[52]

   The consequence of an adoption of the report is that the opinion of the special referee expressed in the report becomes the opinion of the court[53]. The court will, of course, not be comfortable in forming such an opinion if it is not persuasive. The court may be so persuaded by a rational and reasoned opinion of the special referee notwithstanding that it is possible that, upon a full re-examination of the material before the special referee, the court might have reached a different opinion itself.[54] Acceptance of another view would entirely negate the utility of the procedure under 0.50.
5. Adoption of a report may be refused where there has been serious

procedural irregularity which vitiates the legitimacy of the opinion of the special referee.[55]

From a practical point of view, then, it follows, that, even where the questions referred include questions of law, the court will approach a report which demonstrates a careful review of the issues properly explored and considered with a strong disposition to adopt it.[56]

CONCLUSION

I return now to the topic as I have reformulated it. I speak of the renaissance of the special referee procedure because it is now more frequently used than before. It has evident attractions for a court which is burdened with large numbers of cases of increasing complexity and length. This has led for orders for reference being made in circumstances which would have been unthinkable 20 years ago. The success of the procedure will, however, depend upon the skill and cooperation of the Building Dispute practitioners. These provide a supply of special referees with the necessary skill both in technical areas and in the management of enquiries. They provide also legal practitioners, barristers and solicitors, who are sufficiently confident in their expertise and flexible in their approach to imagine that proper results can be obtained by techniques other than full blooded litigation. Above all, as I have already mentioned, the success of the procedure must depend upon its being able to produce a result which satisfies the public – the litigants themselves – at a cost which is less than that of a conventional trial in court. Therein lies the challenge for us all. With a lot of good will and a little luck I am confident that we will succeed.

FOOTNOTES

1. A useful and recent discussion of aspects of this topic is contained in Cohen and Duthie, "The Role of the Special Referee" (1993) 67 *Law Institute Journal* 1056.
2. See Mustill and Boyd, Commercial Arbitration (2nd ed.) ch.29.
3. Supreme Court Act 1986 s.25(e).
4. County Court Act 1958 ss.48, 78(1) (hc).
5. County Court Act 1958 s.48.
6. Supreme Court Act 1986 s.25(e), County Court Act 1958 s.78(1) (hc).
7. *Buckley v. Bennell Design and Construction P/L* (1978) 140 C.L.R. 1 at 15-18, per Stephen, J. and at 27-35, per Jacobs, J. and see the useful discussion of this whole topic in the context of (Vic) Arbitration Act 1958 by Brooking, J. in *Nicholls v. Stamer* [1980] V.R. 479 at 484-7 and by Cole, J. in *Astor Properties Pty. Ltd. v. L'Union des Assurance de Paris* (1989) 17 N.S.W.L.R. 483.
8. R.50.01 (2)(b)
9. *Allen v. Gulf Oil Refining Co. Ltd.* [1981] A.C. 1001; *Dunstan v. Simmie & Co. Pty. Ltd.* [1978] V.R. 669 at 671; Compare *Dunn v. State Electricity Trust of South Australia* (unreported, SC (SA), Olsson, J., 3233/1983, 3 September 1987). Compare *George Wimpy and Co. Pty. Ltd. v. Territory Enterprises Pty. Ltd.* [1966] V.R. 312 (Building Case in which the existence of an alleged warranty was ordered to be determined before other issues).
10. *Capita Financial Group Ltd., v. Triden Properties* (unreported, SC (NSW), Cole, J., 55046/1991, 25 January 1993) at p.6.

11. This is a practice favoured in the Building and Construction list in New South Wales. See *Super Pty. Ltd. v. SJP Formwork (Aust.) Pty. Ltd* (1992) 29 N.S.W.L.R. 549.
12. See *Super Pty. Ltd. v. SJP Formwork (Australia) Pty. Ltd.* (1992) 29 N.S.W.L.R. 549; *Hooker Cockram Ltd. v. Block Management Ltd.* (unreported, SC (Vic), Nathan J., 3246/90, 5 November 1990). Contrast the view expressed in Queensland: *Honeywell Pty. Ltd. v. Austral Motors Holdings Ltd.* [1980] Qd R 355.
13. Subject now to payment of the cost of judge's transcript. See Practice Note 3 of 1993 (Williams, *Civil Procedure Victoria* [12, 315[)
14. In *A.T. & N.R. Taylor & Sons Pty. Ltd. v. Brival Pty. Ltd.* [1982] V.R. 762 this was a factor which militated against the making of an order for reference.
15. Subject to adjustment when orders for costs are finally made: R.50.06.
16. *AT & NR Taylor and Sons Pty. Ltd. v. Brival Pty. Ltd.* [1982] V.R. 762.
17. This is permitted by the Rules. Compare *Minnesota Mining and Manufacturing Co. v. Beiersdorf (Aust.) Ltd.* (1980) 144 C.L.R. 253 at 270, per Aikin, J.
18. R.1.13.
19. The rule making power is limited to "any question of arising in a proceeding".
20. As in *Rules Stores Pty. Ltd. v. Boles* (unreported, SC (NSW), Needham, J., 4935/1988, 23 July 1990) where the judge preferred a person with experience of the judicial process where issues of credit were involved.
21. *Kallis v. Cellante* (unreported, SC (Vic), Ormiston, J., C.L. 592/1989, 15 November 1990).
22. R.50.03(1).
23. In *State Authority Superannuation Board v. Property Estates (Qld) Pty. Ltd.* (unreported, SC (NSW), Cole, J., 13956/1989, 8 February 1991). The special referee with the approval of the parties convened a conclave of experts without lawyers to resolve technical issues.
24. Where there is a serious allegation of bias raised upon an application for adoption of the special referee's report, Rogers, CJ., (Comm.D.) directed that a special referee be given notice so that an answer may be made. But his Honour made it clear that this was not to be regarded as a precedent: *Telecomputing PCS Ltd., v. Bridge Wholesale Acceptance Corporation (Aust) Ltd.* (1991) 24 N.S.W.L.R. 513; 8 B.C.L. 286 at 289 per Rogers, CJ. (Comm.D.). It is thought that this is nevertheless a prudent course. See *Stannard v. Sperway Construction Pty. Ltd.* [1990] V.R. 673.
25. In *Pflieger v. Sparks* (1989) 6 B.C.L. 188, SC (NSW) it was accepted that the normal test for apprehended bias applied. "Where the parties or the public might entertain a reasonable apprehension that he might not bring an impartial or unprejudiced mind to the resolution of the question": *Livesey v. NSW Bar Association* (1983) 151 C.L.R. 288 at 293-4. But see also re *Polites; Ex Parte Hoytes Corporation Pty. Ltd.* (1991) 173 C.L.R. 78 at 86-7.
26. *Telecomputing PCS Ltd. v. Bridge Wholesale Acceptance Corporation (Aust) Ltd.* (1991) 24 N.S.W.L.R. 513; 8 B.C.L. 286 at 294, per Rogers, CJ. (Comm.D.). In *Pflieger v. Sparks* (1989) 6 B.C.L. 188, SC (NSW) at 195, Giles, J. took into account in rejecting an application to remove a special referee for irregular conduct of the reference, the fact that the Rules of Court in New South Wales gave the special referee wide discretion in the conduct of the reference and the parties had acquiesced in the procedures he adopted. But note that the breadth of the discretion referred to in that case is conferred in Victoria not by the Rules but by the terms of the order.
27. *Xuereb v. Viola* (1989) 18 N.S.W.L.R. 453 at 470, per Cole, J.; *Telecomputing PCS Ltd., v. Bridge Wholesale Acceptance Corporation (Aust) Ltd.* (1991) 24 N.S.W.L.R. 513; 8 B.C.L. 286 at 295 per Rogers, CJ. (Comm.D.).
28. The court may, in the appropriate case, direct that the special referee orders for discovery or for the delivery of interrogatories: R.50.02(a).
29. See *Cross on Evidence* (Aust. Ed) [3135].
30. *Hanna v. Richmond Properties* (unreported, CA (NSW), Mahoney, Clarke, Meagher JJA, CA 40361/1990, 15 November 1991).

31. Compare Commercial Arbitration Act 1984 s.19(3).
32. See Giles, "Dispensing with the Rules of Evidence" (1991) 7 *Aust. Bar Review* 233; Donohue, "Dispensing with the Rules of Evidence – A Commentary (1991) 7 *Aust. Bar Review* 252.
33. See R.50.02(b).
34. Compare Commercial Arbitration Act 1984 ss.18, 34(7).
35. Such an order was upheld by the Court of Appeal in New South Wales in *Capita Investments Pty. Ltd., v. Triden Properties Pty. Ltd.* (unreported, CA NSW, Mahoney AP, Priestley, Sheller JJA, CA 40585/92, 1 June 1993).

35A. Rule 52.02 (b).

36. Commercial Arbitration Act 1984 s.19.
37. As to the requirement of adequate reasons, se *Xuereb v. Viola* (1989) 18 N.S.W.L.R. 453; *Najjar v. Haines* (1991) 25 N.S.W.L.R. 224; 7 B.C.L. 145 at 155, per Giles, J.
38. Pursuant to R.50.03(1) and 50.04.
39. Pursuant to R.50.03(2)(b).
40. *Nicholls v. Stamer* [1980] V.R. 479.
41. Pursuant to R.50.04. See *Astor Properties Pty. Ltd. v. L'Union Des Assurance de Paris* (1989) 17 N.S.W.L.R. 483 at 490, per Cole, J.
42. Pursuant to R.50.03(2)(b)(i).
43. Pursuant to R.50.03(2)(b)(ii).
44. Pursuant to R.50.03(2)(b)(iii).
45. Pursuant to R.50.04.
46. *Homebush Abattoir Corporation v. Bermria Pty. Ltd.* (1991) 22 N.S.W.R.L.R. 605 at 609.
47. *Homebush Abbattoir Corporation v. Bermria Pty. Ltd.* (above); *Skinner & Edwards (Builders) Pty. Ltd. v Australian Telecommunications Corporation* (1992) 27 N.S.W.L.R. 567; 8 B.C.L. 276 at 280, per Cole, J. This is the duty of the court notwithstanding that the special referee is a lawyer of some eminence: *Cape v. Maidment* (1991) 98 A.C.T.R. 1; 8 B.C.L. 66.
48. *Skinner & Edwards Builders Pty. Ltd. v. Australian Telecommunications Corporation* (above).
49. *Super Pty. Ltd. v. SJP Formwork (Australia) Pty. Ltd.* (1992) 29 N.S.W.L.R. 549 at 555, 564, per Gleeson, CJ.
50. *Chloride Batteries Australia Ltd. v. Glendale Chemical Products Pty. Ltd.* (1988) 17 N.S.W.L.R. 60 at 67, per Cole. J.; *Astor Properties Pty. Ltd. v. L'Union des Assurance de Paris* (1989) 17 N.S.W.L.R. 483 at 491, per Cole, J. (the court must review the report).
51. *Integer Computing Pty. Ltd. v. Facom Australia Ltd.* (unreported, SC (Vic), Marks. KSJ, 10 April 1987) approved in *Chloride Batteries Australia Ltd. v. Glendale Chemical Products Pty. Ltd.* (above) at 68.
52. *Super Pty. Ltd. v. SJP Formwork Pty. Ltd.* (1992) 29 N.S.W.L.R. 549 at 563-4, per Gleeson, CJ.
53. *Skinner & Edwards (Builders) Pty. Ltd. v. Australian Telecommunications Corporation* (1992) 27 N.S.W.L.R. 567; 8 B.C.L. 276 at 282, per Cole, J.
54. *Skinner & Edwards (Builders) Pty. Ltd. v. Australian Telecommunications Corporation* (above).
55. *Telecomputing PCS Pty. Ltd. v. Bridge Wholesale Acceptance Corporation (Aust.) Ltd.* (1991) 24 N.S.W.L.R. 513; 8 B.C.L. 286. Compare *Nicholls v. Stamer* [1980] V.R. 479 at 495.
56. *Chloride Batteries Australia Ltd. v. Glendale Chemical Products Pty. Ltd.* (1988) 17 N.S.W.L.R. 60 at 67, per Cole, J.