

## Rules for Expert Determination

### INTRODUCTION

Expert determination is an alternative dispute resolution (**ADR**) process whereby an independent third party, with recognised expertise in the subject matter in dispute between the parties, assists the parties to find a resolution to their dispute. This process avoids the parties having to go to a Court or Arbitration, to have the dispute resolved. Under the Expert Determination process, the Expert conducts the procedure under the Rules and makes a determination which is binding on the parties to the dispute.

The Law Society of New South Wales has developed these Rules for Expert Determination, to be used where agreed between the parties to a dispute, or where the President of the Law Society of New South Wales is requested to nominate an Expert. If these Rules are nominated or invoked, the parties to the dispute will be deemed to have agreed to be bound by these Rules.

### RULE ONE - DEFINITIONS

In these Rules, except where the context otherwise requires –

- 1.1 'Agreement' means the agreement (whether an expert determination clause in a contract, or a separate agreement), between the parties to submit the Dispute to the Expert Determination Process.
- 1.2 'days' means calendar days.
- 1.3 'Determination' means the determination made by the Expert in accordance with Rule 4 of these Rules.
- 1.4 'Dispute' means the issues in dispute between the parties which are required to be determined in accordance with these Rules.
- 1.5 'Expert' means the person who has accepted appointment to act as Expert in accordance with these Rules and who is to determine the Dispute.
- 1.6 'Expert Determination Agreement' means the agreement entered into between the parties and the Expert, substantially in the form set out as Schedule 1 to these Rules.
- 1.7 'Expert Determination Process' means the process to determine the Dispute as set out in these Rules.
- 1.8 'Law Society' means the Law Society of New South Wales ACN 000 000 699, Law Society Building, 170 Phillip Street, Sydney NSW 2000.
- 1.9 'Nominee' means the person who has been nominated by the President, or agreed between the parties, to act as Expert, but who has not yet accepted the appointment as Expert.

1.10 'President' means the President for the time being of the Law Society, or in the President's absence, the President's nominee.

1.11 'Rules' means these Rules for Expert Determination.

1.12 Words used in the singular include the plural and vice versa.

## **RULE TWO – NOMINATION, APPOINTMENT AND COMMENCING EXPERT DETERMINATION PROCESS**

2.1 Unless an Expert is agreed between the parties, a party to an Agreement must request in writing the President to nominate an expert. With such request, the party must provide the following:

2.1.1 the names, addresses and other contact details of the parties, including their authorised representatives and legal representatives (if any);

2.1.2 a copy of the Agreement;

2.1.3 a description of the Dispute;

2.1.4 the applicable application fee payable under Rule 6.5.

2.2 Upon receipt of the request under Rule 2.1 the President shall notify the parties (or their authorised representatives) of the President's nomination to be the Nominee. The President will also notify the Nominee.

2.3 Within seven days of the Nominee being notified of their nomination, the Nominee must give written notice to the parties (or their authorised representatives) of a proposed preliminary conference and the Nominee's conditions with respect to any Expert Determination process (including the Nominee's fees and security deposit requirements).

2.4 The parties (or their authorised representatives) must attend any preliminary conference convened. At the preliminary conference the Nominee must inform the parties if the Nominee accepts the nomination to act as Expert. If so, the parties and the Expert must then enter into the Expert Determination Agreement. If the Nominee does not accept the nomination, the Nominee must inform the parties and the President.

2.5 The parties agree that the Expert is an expert in the subject matter of the Dispute.

2.6 The Expert shall act as expert and shall determine the Dispute in accordance with these Rules. The Expert shall not act as arbitrator, adjudicator or as expert witness. The parties agree that the Expert Determination Process is not an arbitration or adjudication within the meaning of any statute or common law.

2.7 The Expert must act impartially, free of bias and with no vested interest in the outcome of the Dispute. If the Expert becomes aware of any circumstance which might reasonably be considered to affect the Expert's ability to act impartially, free of bias or becomes aware of any vested interest, the Expert must inform the parties immediately, giving reasonable details. The Expert must then immediately terminate the Expert Determination Process, unless the parties agree otherwise.

- 2.8 If the Expert Determination Process is terminated under Rule 2.7, or the Nominee does not accept the nomination, then the party who made the original request under Rule 2.1 must, unless otherwise agreed between the parties, again request the President to nominate an expert.

### **RULE THREE – PROCEDURE**

- 3.1 Unless otherwise agreed between the parties, the Expert shall adopt procedures for the Expert Determination suitable to the circumstances of the Dispute, so as to provide for an expeditious, cost effective and fair means for the determination of the Dispute. Those procedures may include:
- 3.1.1 the party claiming a dispute (Party One) within the time agreed between the parties and the Expert, or failing agreement, within 21 days or such other time as the Expert may direct, provide to the other party (Party Two) and the Expert:
- .1 a written statement which details the nature of the Dispute, the issues involved, including the basis of the Dispute and claim, its contentions in relation to the issues and the quantum claimed;
  - .2 copies of all documents and material upon which Party One relies;
  - .3 its written submissions on the Dispute and the quantum claimed.
- 3.1.2 Party Two, within the time agreed between the parties and the Expert, or failing agreement, within 21 days or such other time as the Expert may direct, provide to the other party and the Expert:
- .1 a written statement in response to Party One's written statement, including if Party Two has any cross claim, a written statement which details the nature of the cross claim, the issues involved, including the basis of the cross claim, its contentions in relation to the issues and the quantum claimed;
  - .2 copies of all documents and material upon which Party Two relies, including with respect to any cross claim (if any);
  - .3 its written submissions in response to Party One's written submissions, including if Party Two has any cross claim, its written submissions on the cross claim and the quantum claimed;
- 3.1.3 Any party may reply to the information served in accordance with Rule 3.1.2 within the time agreed between the parties and the Expert, or failing agreement, within 21 days or such other time as the Expert may direct.
- 3.2 Rule 3.1 does not limit the procedure which the Expert may require for the conduct of the Expert Determination process and the Expert may make other directions or rulings as appropriate, including convening further meetings, conferences or expert conclaves.
- 3.3 If the parties have engaged experts and served expert reports in the Expert Determination Process, if the Expert considers it appropriate the Expert may convene expert conclaves between the parties' experts at a time and at a venue directed by the Expert. The Expert may also direct

that the parties' experts prepare a joint expert report to record matters upon which they agree and on those which they disagree, and provide reasons for such disagreement.

- 3.4 Each party is entitled to be represented at any preliminary conference or meeting before the Expert by its legal representative and other authorised representatives, with information and knowledge of the issues in connection with the Dispute.
- 3.5 The Expert is not bound by the rules of evidence and may receive information in any manner the Expert sees fit, but must observe the requirements of procedural fairness. Consultation between the Expert and a party must only take place in the presence of the other party, unless a party fails to attend a conference or meeting which has been convened by the Expert and of which prior notice has been given. Any party providing information to the Expert must provide that information to the other party.
- 3.6 The parties shall do everything necessary to ensure the proper, expeditious and cost effective conduct of the Expert Determination process.
- 3.7 If prior to the Expert making a determination the parties settle the Dispute, they must inform the Expert and the Expert will conclude the Expert Determination process without making a determination. The parties will still be liable for the Expert's fee up to that time.

#### **RULE FOUR – THE DETERMINATION**

- 4.1 Within a reasonable time after receipt of the final submissions provided by a party under Rule 3, and in any event, no longer than 3 months, the Expert shall determine the Dispute and issue the Expert's determination to the parties.
- 4.2 The Expert's determination of the Dispute shall be in writing, signed and dated by the Expert and shall contain a statement of reasons for the determination in such a form determined to be appropriate by the Expert.
- 4.3 The Expert has the discretion to award interest at such a rate and for such a period as the Expert thinks fit on any amount in dispute or any part of it and the Expert may also award interest for any late payment of any amount the subject of the Expert's determination.
- 4.4 Unless otherwise agreed between the parties the determination by the Expert of the Dispute shall be final and binding upon the parties.
- 4.5 The Expert may correct:
- 4.5.1 a clerical mistake
  - 4.5.2 an error arising from an accidental slip or omission
  - 4.5.3 a material miscalculation of figures
  - 4.5.4 a material mistake in the description of any person, thing or matter;
  - 4.5.5 a defect of form,
- which is in the Expert's determination, and give notice to the parties of such correction.

- 4.6 Subject to any correction of the Expert's determination under Rule 4.5, the Expert Determination process shall conclude upon the Expert issuing the Expert's determination.

#### **RULE FIVE – RELEASE OF THE EXPERT AND SOCIETY**

- 5.1 Except in respect of any fraud, the parties release the Society, its officers, employees and agents, and the Expert from any liability of any kind whatsoever arising out of or in connection with the Expert's nomination, appointment, Expert Determination Process or the Expert's determination.

#### **RULE SIX – FEES, SECURITY AND COSTS OF PROCESS**

- 6.1 The parties shall bear their own costs associated with the Expert Determination Process.
- 6.2 The parties shall share equally the costs of the Expert and any other costs associated with the process, including room hire expenses, transcript expenses and the like.
- 6.3 The Expert may from time to time make directions with respect to the lodgement of security deposits for the Expert's fee and if so the parties must lodge such security deposits as directed. If the parties do not comply with a direction to lodge security deposits, the Expert may suspend the Expert Determination Process until the parties comply with such directions.
- 6.4 The Expert may from time to time submit invoices to the parties and may draw down from any security deposit with respect to the payment of such invoices.
- 6.5 The Society may from time to time charge an application fee for its services in making the nomination. The application fee will be shown on the Society's website, or available through making enquiries directly with the Society. The parties shall share equally the costs of the Society's application fee. The application fee as at February 2010 is \$550 ( inclusive of GST) to be split equally between the parties.

#### **RULE SEVEN – CONFIDENTIALITY**

- 7.1 Each party involved in the Expert Determination process, including the Expert, the parties, their advisors and representatives, shall maintain the confidentiality of the Expert Determination Process and may not use or disclose to anyone outside of the Expert Determination Process, the Expert's determination, or any information received or obtained, in the course of the Expert Determination Process, including the existence of that information, except to the extent:
- 7.1.1 the parties have otherwise agreed in writing;
  - 7.1.2 the information is in the public domain already;
  - 7.1.3 disclosure is required for the purposes of any legal proceedings relating to the Dispute or the Expert's determination;
  - 7.1.4 disclosure is otherwise required by law.

#### **RULE EIGHT – GENERAL**

- 8.1 Subject to the terms of any agreement between the parties, where the Dispute arises out of a contract between the parties, the parties shall continue to perform their obligations thereunder.

- 8.2 Subject to any rule of law or equity or the Agreement to the contrary, if a party:
- 8.2.1 knows of any provision or requirement under these Rules, including any directions given by the Expert, which has not been complied with, or some other irregularity affecting the Expert Determination Process;
  - 8.2.2 considers the Expert lacks substantive jurisdiction;
  - 8.2.3 considers that the Expert Determination Process has been improperly conducted,
- then that party shall be deemed to have waived any rights to make such objection or claim later, whether before a Court or otherwise, unless that party can show that at the time it took part or continued to participate in the Expert Determination Process, that it did not know, or could not have known upon making of reasonable enquiries, the grounds of such objection.
- 8.3 The parties agree that, to the extent permitted by law, if during the Expert Determination Process a limitation period for bringing any proceedings in relation to the Dispute expires, that limitation period shall be so extended by the number of days from the referral of the Dispute to this Expert Determination Process to the date of the Expert's determination, and that the parties will not take objection to or rely upon such expiration of the limitation period in any subsequent proceedings (including Arbitration) concerning the Dispute.

**SCHEDULE ONE**

**(Expert Determination Agreement)**

This Expert Determination Agreement made \_\_\_\_\_ between:

Party One: \_\_\_\_\_

Party Two: \_\_\_\_\_

Other party: \_\_\_\_\_

Expert: \_\_\_\_\_

1. The parties have requested the appointment of the Expert to determine the Dispute.
2. The Expert has accepted the nomination.
3. The Parties and the Expert agree that the Expert will determine the Dispute in accordance with the Rules of Expert Determination and the parties agree to be bound by the Rules of Expert Determination.

Executed by:

**Party One:** \_\_\_\_\_

Name: \_\_\_\_\_

**Party Two:** \_\_\_\_\_

Name: \_\_\_\_\_

**Other party** \_\_\_\_\_

Name: \_\_\_\_\_

**Expert:** \_\_\_\_\_

Name: \_\_\_\_\_