

Rules For Expert Determination

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Expert Determination or Appraisal is a process which is gaining in popularity within Australia. Some organisations or entities have provided in their commercial contracts for expert determination as a means of resolving disputes or differences.

Together with arbitration, mini-trial, mediation and conciliation, expert appraisal is another tool in the box of available processes for the resolution of disputes. To date there has been promulgated in Australia only one set of rules intended for general application. These are the Rules for Expert Determination/Appraisal of the Institute of Arbitrators & Mediators Australia (“IAMA” - previously The Institute of Arbitrators Australia).

Whilst the IAMA Rules have yet to be tested their character and terms closely resemble the provisions of an arbitration and to that extent might ultimately be seen as being an arbitration with all of the statutory consequences that flow. One of the rationales for the advancing of expert determination has been the alleged cost and time of arbitral proceedings.

The Model Rules proposed in this article represent a fundamental philosophical and practical divergence from the rules of IAMA.

The Model Rules are presently under consideration for adoption by The Institution of Engineers Australia.

MODEL RULES FOR EXPERT DETERMINATION (Institution / Organisation)

Effective as at (date)

ART 1 Preamble

These Rules provide for the application of expertise to decide or make findings in respect of disputes, differences between or requests from Parties to a wide range of relationships.

The Rules are not limited only to transactions of a commercial nature but may be applied wherever reliance on expertise is perceived as being appropriate.

ART 2 Definitions

In these Rules:

“*Applicant*” means the Party initiating the process.

“*Appointing Authority*” means the person, organisation or institution agreed by the Parties as having the power of appointment of the Expert in the absence of agreement by the Parties.

“*Determination*” means a decision, finding or answer made or given by the Expert to the matter referred or part of it.

“*days*” means calendar days and excludes weekends and holidays.

“*document(s)*” means writings, photographs, films, drawings, information or the like and in any form.

“*Expert*” means the person, firm, partnership, organisation or corporation appointed to act as the expert pursuant to these Rules.

“*(Institution/organisation)*” means (organisation or institution).

“*Law*” means the law of Australia and as relevant the laws of its States or Territories.

“*matter referred*” means the dispute, difference or question submitted to the Expert for Determination.

“*Party*” means any person being an Applicant or Respondent in proceedings governed by the Rules.

“*person*” means a natural person, firm, organisation, partnership or a corporation.

“*(President/Chairman)*” means the (President/Chairman) for the time being of (institution or organisation) or any person duly authorised by the (President/Chairman) to act in respect of these Rules.

“*Proceedings*” means all of the steps or requirements of the Process leading to the Determination.

“*Process*” means all aspects of referring and deciding a matter by expert Determination.

“*Respondent*” means the Party answering the initiation of the process.

“*Rules*” means these rules and any change, revision or amendment in effect prior to the date of initiation of the Process.

“*submissions*” means any documentary or oral presentation or material put before the Expert pursuant to the Rules and includes supporting documents.

Words imputing male gender shall be read as including the female gender and vice versa.

Unless the context of their use does not allow words imputing the singular shall be read as including the plural and vice versa.

ART 3 Scope of Rules

The proceedings and the process shall be governed by these Rules and where the Rules are silent any rules which the Parties agree or failing agreement those determined by the Expert pursuant to Art 31.

ART 4 Notification

- (a) All notifications shall be made to the last known address of a Party.
- (b) Notification shall be by facsimile transmission or mail or any other means that provides a record of transmission.
- (c) A notification shall be deemed to have been made on the day it was received by a Party or would have been received if made in accordance with (b) above.

ART 5 Effect of Agreement

By adopting or submitting to these Rules the Parties jointly and severally agree and covenant without further endorsement to be bound by and implement all of the terms and conditions of the Rules.

ART 6 Initiating Procedures

A Party seeking to initiate an Expert Determination under these Rules shall give written notice to the other Party. Such notice shall:

- (i) identify the dispute, difference, or question to be referred for Determination;
- (ii) propose one or more persons, firms, partnerships, or corporations as suitable for appointment as Expert;
- (iii) request that within 7 days the other Party agree to an appointee drawn from the proposals given in accordance with (ii) above or to propose other prospective appointees.

ART 7 Appointment in Default of Agreement

- (1) Where the Parties have failed to agree upon an Expert within 14 days of the written notice of referral to the Expert Determination process, by written request to the (organisation/institution) by one or more of the Parties the (President/Chairman) shall appoint an Expert. The written request shall include:
 - (a) a copy of written notice of referral to the process given pursuant to Art 6(i);
 - (b) copy of the agreement of the Parties empowering the (President/Chairman) to appoint;
 - (c) a statement of any particular qualifications or requirements agreed or perceived by the Parties or one or more of them as being required of the Expert;

- (d) the names of those persons or entities upon whom agreement has not been reached;
- (e) the names and addresses of all Parties;
- (g) payment in the sum as set forth in the schedule attached as a non-refundable appointment fee.

- (2) Notwithstanding the provisions of sub-paragraph (1) above the Parties may, by mutual agreement in writing, extend the time for agreement between them upon the Expert.
- (3) The (President/Chairman) shall, within 7 days or such longer period as may be reasonably necessary, advise the Parties of the person appointed as Expert.

ART 8 Notification of Appointment

Where the Parties have agreed upon appointment of the Expert or where appointment is made under the provisions of Art 7 respectively the Parties or the (organisation/institution) as relevant shall as soon as possible notify the Expert so appointed.

Such notification shall include:

- (i) the full names and addresses of the Parties;
- (ii) a copy of the agreement between the Parties making the appointment of the Expert; or a copy of the appointment made by the appointing authority;
- (iii) a copy of these Rules;
- (iv) a copy of the notice given pursuant to Art 6(i).

ART 9 Acknowledgment of Appointment

Within 7 days of receipt of notification of appointment the Expert shall acknowledge in writing such notification and accept or reject appointment.

ART 10 Nature of Appointment

The appointment of the Expert, whether by agreement of the Parties or by the (organisation/institution), shall be presumed to be a joint appointment by all of the Parties.

ART 11 Independence and impartiality of Expert

The Expert shall be independent of the Parties and act impartially. If the Expert becomes or is made aware of any circumstance that effects, or may effect, such independence and impartiality, such circumstance shall be disclosed to the Parties and the Expert shall, if requested by any Party, withdraw.

ART 12 Replacement of Expert

- (a) Where the Expert rejects appointment, subsequently withdraws, or cannot or does not conclude the process, whether by death, illness or any other cause, unless the Parties otherwise agree, the Expert shall be replaced in the manner prescribed in Art 6 or Art 7 hereof.
- (b) Where an Expert withdraws or cannot or does not conclude the process the Expert shall not be liable to repay any fees, costs or expenses previously drawn by the Expert pursuant to Art 26, or the Parties' costs or expenses.

ART 13 Conduct of Proceedings

- (a) Other than as provided in these Rules, in conducting the proceedings the Expert is not bound to:
 - (i) apply the Law;
 - (ii) apply principles of procedural fairness.
- (b) The Expert may:
 - (i) direct or receive submissions, documents, or information from a Party independent of the other Party and whether oral or otherwise;
 - (ii) make enquiries or seek opinions of the Parties or third Parties;
 - (iii) conduct or direct investigations, tests, experiments, calculations or other procedures of his own initiative;
 - (iv) if requested by one or more of the Parties or of his own volition make an interim Determination on a discrete or separable issue of the matter referred.
- (c) In arriving at a Determination the Expert may place such weight upon any or all material, information, opinions or submissions before him, including his own investigations, experiments, tests, or calculations (including no weight) as the Expert thinks fit.
- (d) Unless otherwise agreed by the Parties in writing, the Expert shall make available to the other Party all submissions, documents, or information received from a Party pursuant to Art 20 and allow a reasonable time for comment or rebuttal.
- (e) A replacement Expert may adopt or rely upon any Determination made by an Expert that is replaced.

ART 14 Service of Notices

All notices or communications shall be made to the last notified address of a Party. Such notices or communications shall be made by any means of delivery that provides a record of sending.

ART 15 Periods of Time

Periods of time provided in these Rules shall start to run on the day following the date a notification or communication is deemed to have been made.

ART 16 Agreed Facts

With their submissions to the Expert the Parties shall, where relevant, include a statement of agreed facts (if any).

ART 17 Competing Allegations of Fact

Where for Determination of the matter referred the Expert is required or perceives the need to rely or have regard to facts which are in contention as between the Parties, the Expert may require the Parties or one or other of them to provide in support of the alleged facts such evidence and in such form as the Expert may direct.

ART 18 Representation

A Party may be represented for any purpose in relation to the process.

ART 19 Conference

The Expert may convene and conduct a conference for the purposes of the process. Failure by a properly notified Party to attend a conference will not of itself be grounds for the conference not proceeding.

ART 20 Party Submissions

- (1) Unless otherwise agreed by the Parties in writing or directed otherwise by the Expert:
 - (a) Within 14 days of acknowledgment by the Expert to the Parties of the lodgement of the full amount of initial security directed pursuant to Art 26 or advice to the Parties from the Expert that no initial security is required:
 - (i) the Applicant shall submit to the Expert and the other Party a statement in writing setting out details of the matter referred and the alleged or agreed facts relied upon; or
 - (ii) the Applicant and the Respondent shall submit to the Expert a statement setting out details of the matter referred and the Parties' respective positions, the contended facts and the agreed facts relied upon if any.
 - (b) Within 14 days of the submission made by the Applicant pursuant to (a)(i) above the Respondent shall submit to the Applicant and the Expert a statement in writing responding to the Applicant's submission and the alleged facts relied upon.
 - (c) Within 7 days of the response of the Respondent as made pursuant to (b) above the Applicant may provide a further submission in rebuttal.
- (2) The Parties shall make further submissions in the form and as may be directed by the Expert.

ART 21 Refusal or Failure to Participate

Where a Party has agreed to submit to the process but refuses or fails to participate, the Expert may proceed to Determination.

ART 22 Determination of Legal Rights and Obligations

Other than as necessary by the obvious nature or express terms of the matter referred, the Expert shall not make any Determination purporting to establish the legal rights, duties and obligations of the Parties.

ART 23 Application of Law

Where the Expert is required by the obvious nature or express terms of the matter or referred to determine the duties, rights or obligations of one or other or all of the Parties, such Determination shall be consistent with the Law.

ART 24 Interest

Where a Determination is in whole or in part a money sum or sums payable as between the Parties, the Expert may include in such Determination an amount or rate of interest as may be the subject of prior agreement between the Parties or, absent such agreement, such amount or rate as the Expert deems appropriate.

ART 25 Form of Determination

Unless otherwise agreed in writing by the Parties a Determination by the Expert shall be in writing and give reasons.

ART 26 Costs of the Process

The Expert may direct the Parties to lodge monies in escrow with the (organisation/institution) as security for the fees and expenses of the Expert due or incurred by the Expert in the carrying out of this Process. The Expert may draw upon such security from time to time to the extent of such fees and expenses properly due at the time of drawing without further recourse to or approval of the Parties. Each Party will share equally the Expert's costs and expenses of the Process.

ART 27 Costs of the Parties

Each Party shall bear its own costs and expenses of the Process.

ART 28 Confidentiality

- (a) Other than as required by Law, or by direction of an authority having competent jurisdiction, or by release of the Parties, the Expert shall keep confidential both the existence of referral to the Process and the Determination.
- (b) The provisions of (a) above shall not act to prevent the Expert making at any time limited and relevant disclosures where issues of conflict or potential conflict arise.

ART 29 Power to Correct Determination

Where the Determination contains:

- (i) a material miscalculation of figures or a material mistake in the description of any person matter or thing;
- (ii) a clerical mistake;
- (iii) an error arising from accidental slip or omission,

the Expert may correct any Determination within 30 days of issue whether or not such matter requiring correction is identified by the Parties or one or other of them, or by the Expert.

ART 30 Contractual Obligations

Where implementation of the Process arises by virtue of direct or indirect incorporation of these Rules in a contract between the Parties and where absent a Determination of the matters referred, all or part of the respective duties and obligations of the Parties under the contract can be carried out, the Parties shall perform or continue to perform such duties and obligations.

ART 31 General Provisions

- (a) In all aspects not expressly covered by these Rules the Expert shall act in the spirit of the Rules to maintain integrity and outcome of the Process.
- (b) Where a dispute arises between the Parties as to any aspect of these Rules the Expert may incorporate such dispute as part of the matter referred.
- (c) The Expert shall act with due expedition in the conduct of the proceedings and the making of the Determination having regard to the nature and extent of the matter referred.

ART 32 Exclusion of Liability

Save where there is a finding of fraud or corruption against the Expert or the (organisation/institution) in respect of or touching upon the Process no liability whatsoever shall lie as between one or other or all of the Parties and the Expert or the (organisation/institution).

ART 33 Waiver

Where a Party becomes aware of circumstances where any of these Rules have been breached in the conduct of the proceedings and does not immediately raise this with the Expert and the other Party, that Party shall be deemed to have waived its right otherwise to object to or take further part in the proceedings or object to or avoid any Determination made.

ART 34 Indemnity

The Parties jointly and severally indemnify and shall forever keep indemnified the (organisation/institution) and the Expert against all and any claims, costs, expenses or damages for any matter arising out of or touching upon the Process.

ART 35 Enforcement

Without limitation any Party may take action for enforcement of a Determination made under these Rules by application to a court having competent jurisdiction under the Law.

Footnote

1. Past President, The Institute of Arbitrators Australia.
Past President, Australian Centre for International Commercial Arbitration.
Chairman, The Institution of Engineers Australia Standing Committee on Contracts and Dispute Resolution.
Member, Cours Europeene d'Arbitrage.

Editorial Note:

The NSW Government Construction Authorities' contracts provide for Expert Determination and contain Rules for the Conduct of Expert Determinations. The Australian Commercial Disputes Centre Ltd also has Expert Determination Rules and Agreements. □