

The Law Society of New South Wales Rules for Expert Determination and Model Clause

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THE LAW SOCIETY OF NEW SOUTH WALES

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 AND INTERPRETATION

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 normal working days and excludes Saturdays, Sundays, and public holidays in NSW.
- 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 an 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 administration fee payable under Rule 6.1.
- 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 an expert and shall determine the Dispute in accordance with these Rules. The Expert shall not act as arbitrator, adjudicator, or as an 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 LAW SOCIETY

- 5.1 Except in respect of any fraud, the parties release the Law Society, its officers, employees, and agents 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 deposit with the Law Society the prescribed administration fee, which will be shown on the Law Society's website, or available through making enquiries directly with the Law Society. The administration fee shall be such sum as prescribed by the Law Society at the relevant time.
- 6.2 The parties shall bear their own costs associated with the Expert Determination Process.
- 6.3 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.
- 6.4 The Expert may from time to time make directions with respect to the lodgment 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.
- 6.5 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.

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 Expert's fee is \$_____ and the parties will share the cost equally between them.
4. The Parties and the Expert agree that the Expert will determine the Dispute in accordance with the Rules for Expert Determination and the parties agree to be bound by the Rules for Expert Determination.

Executed by:

Party One: _____

Name: _____

Party Two: _____

Name: _____

Other party _____

Name: _____

Expert: _____

Name: _____

The Law Society of New South Wales
Model Clause – Expert Determination

1. If a dispute arises in relation to or is in any way connected with this contract ("**the Dispute**"), it must be determined in accordance with paragraphs 2, 3 and 4 of this clause. This paragraph does not prevent a party from making an application to a court for urgent interlocutory relief.
2. A party to this contract claiming that a Dispute has arisen must give written notice specifying the nature of the Dispute ("**the Notice**") to the other party or parties to the contract. If the parties are unable to resolve the Dispute within ten business days following the giving of the Notice, they must then have the Dispute determined by expert determination in accordance with this clause.
3. If the parties do not agree, within a further seven days (or within a longer period agreed to in writing by them) on:
 - 3.1 the procedures to be adopted in an expert determination of the Dispute; and
 - 3.2 the timetable for all the steps in those procedures; and
 - 3.3 the identity and fees of the expert; then
 - 3.4 any party may request the President of The Law Society of New South Wales to appoint the expert; and
 - 3.5 the parties must participate in the expert determination of the Dispute in accordance with the Rules for Expert Determination of The Law Society of New South Wales.
4. The expert who has been agreed upon by the parties, or appointed by the President, and who has agreed to the terms of his or her appointment, will act as an expert and not as an arbitrator, and the expert's decision, including any costs decision, will be final and binding on the parties.
5. If a party:
 - 5.1 refuses to participate in an expert determination of the Dispute to which the party earlier agreed; or
 - 5.2 refuses to comply with paragraph 3.5 of this clause, a Notice having been served in accordance with paragraph 2; then
 - 5.3 that party is not entitled to recover the party's costs in any court proceedings relating to the Dispute, even if that party is successful; and
 - 5.4 that party consents to an order of the Supreme Court of New South Wales that it will specifically perform and carry into execution paragraph 3.5 of this clause.