

EXPERT DETERMINATION AGREEMENT

Expert determinations can occur in many different situations. Some contracts require parties to refer a dispute to expert determination before litigation is commenced. Further, many expert determinations are agreed upon by parties without being required to do so by underlying contracts. In some circumstances, a court may refer a dispute to expert determination or appraisal. Any order or direction of a Court referring a matter for expert determination or appraisal has precedence to the extent of any inconsistency with the agreement.

The agreement provides for a number of procedural matters, including the timing of submissions and the timing of implementation of the determination.

It permits the parties to agree upon whether or not the expert should give reasons for the determination and whether the determination should be confidential. It also provides that the determination will be binding on the parties

If the parties are unable to agree upon an expert, an expert from the BarADR list may be nominated by the President of the NSW Bar Association.

You are referred to the Bar Association of New South Wales web site at www.nswbar.asn.au and follow the link to “Alternate Dispute Resolution” where you will find further material to read.

EXPERT DETERMINATION AGREEMENT

Date of agreement

.....

Parties to the agreement

.....

(please print)

.....

(please print)

.....

(please print)

.....

(please print)

Dispute

1. The dispute that the parties have appointed the Expert to determine is set out in the Schedule (**Dispute**).

Role of Expert

2. The Expert will
 - (a) determine the Dispute in accordance with the terms of this Agreement; and
 - (b) act as an expert and not as an arbitrator.

Conflicts of interest

3. The Expert will disclose to the parties any prior dealings s/he has had with any of them and/or their representatives and any interest s/he has in the Dispute.
4. If, in the course of the Expert Determination, the Expert becomes aware of any circumstances that might reasonably be considered to

affect his/her capacity to act impartially, s/he will immediately inform the parties of those circumstances. The parties will then confer and, if agreed, continue with the Expert Determination before the Expert or terminate it in accordance with this agreement.

Submissions by the Parties

5. Subject to the terms of this agreement, the Expert is free to adopt any appropriate procedure for the Expert Determination which will assist the Expert in the efficient conduct and resolution of the Expert Determination.
6. There will be no examination or cross-examination of witnesses. Parties will submit to the Expert and to each other written submissions setting out their respective positions in relation to the dispute together with any supporting documents and will have the right to submit further written submissions with any supporting documents to the Expert and each other setting out their responses. All written submissions and documents will be submitted by the dates set out in the Schedule or otherwise as directed by the Expert after consultation with the parties.

7. The Expert may ask for further written submissions from the parties and may also ask for oral submissions from either party, which will be made to him/her only when the other party has been afforded the opportunity to be present and to make its own oral submissions.
8. The parties will use their best endeavours to comply with the Expert's reasonable requests and directions for the efficient conduct of the determination.

Expert Determination

9. The Expert will:
 - (a) consider any or all of the material (oral or written) put before him/her in the course of the expert determination;
 - (b) not be expected or required to obtain or refer to any other documents, information or material but may do so if the Expert so desires;
 - (c) proceed in such manner s/he thinks fit without being bound to observe the rules of natural justice or the rules of evidence;

- (d) make the Determination on the basis of information received from the parties and the Expert's own expertise and in accordance with the law;
- (e) make the Determination as expeditiously as possible after receiving the parties' submissions; and
- (f) record the Determination in writing.

Reasons for Determination

- 10. The Expert [will/will not] give reasons for the Determination
- 11. With 21 days of receipt of the Determination or as otherwise agreed by the parties, a party may, by notice to the Expert and any other party, request the Expert to correct any clerical, typographical or computational error in the Determination. If the Expert considers the request to be justified, the correction will be made within 21 days after receipt of the request. The Expert may make any such correction on his/her own initiative.

Representation

- 12. The parties may be legally represented at any time during the Expert Determination.

Effect of Determination

13. The Expert's determination is final and binding on the parties.
14. The parties agree to implement the Expert's determination within days of receiving the written determination or otherwise as agreed between the parties.
15. The parties will not challenge the determination in any legal proceedings or otherwise.

Enforcement of the Expert Determination

16. After expiry of the period referred to in clause 14, a party may enforce the determination by judicial proceedings. In any such proceedings, the Expert's determination and any written reasons shall be final and conclusive evidence of the terms of the determination.

Costs of the Expert Determination

17. The parties will be liable for the Expert's fees and expenses set out in the Schedule and the costs and disbursements of the Determination in the proportions set out in the Schedule and will indemnify the Expert in relation to same.

18. The Expert will render a tax invoice for his/her fees to each of the parties, and the fees will be payable within seven days of the issue of the tax invoice.

Release

19. The Expert will not be liable to a party, except in the case of fraud by the Expert, for any act or omission by the Expert in the performance or purported performance of the Expert's obligations under this agreement.
20. The parties jointly and severally release the Expert from and indemnify the Expert against all liability of any kind whatsoever (whether involving alleged negligence or not) arising out of or in any way referable to any act or omission by the Expert in the performance or purported performance of the Expert's obligations under this agreement.

Confidentiality

21. The expert determination is private and confidential.

22. The Expert and the parties will keep the expert determination confidential except to the extent necessary to implement or enforce the determination or to the extent required by law.
23. The Expert will not at any time, without the consent of parties, disclose to any other person:
 - (a) any details concerning the subject matter of any dispute or difference referred to her under this agreement; or
 - (b) any of the contents of the Agreement or this agreement, or any information disclosed by the parties in their submissions or in any meeting with the Expert.

Notices

24. All notices to be given to the Expert under this agreement will be deemed to be properly given if hand delivered to the Expert or if sent by mail or email to the Expert's addresses set out in the Schedule or to such other address as the Expert advises.

Signatures

This Expert Determination agreement is signed by the parties and the Expert:

.....
(Name of party) (please print)

.....
(signature)

.....
(Name of Expert) (please print)

.....
(signature)

Schedule

Expert

| | |
|------------------|--|
| Expert | |
| Expert's Address | |

Dispute

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|---|--|
| Set out brief description of subject matter of dispute, or | |
| The subject of Proceeding No [insert file number] in [insert Court] | |

Expert's Remuneration

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|--|---------------|
| Fees for Expert Determination | \$ (plus GST) |
| Fees per hour, including any conferences and preparation | \$ (plus GST) |

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|-----------------------------------|--|
| Proportions payable by each party | |
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Timing of submissions and provision of documents

| | |
|----------------------------|--|
| First round of submissions | |
| Submissions in response | |

Time and location of conference

| | |
|-------|--|
| Venue | |
| Date | |
| Time | |