

# Expert determination rules

*The Institute of Arbitrators & Mediators Australia*

## **Authority for rules**

The Council of The Institute of Arbitrators & Mediators Australia resolved at a meeting on 22 November 2001 that, where any two or more parties have agreed between them that a dispute arising or having arisen between them shall be submitted to expert determination in accordance with The Institute of Arbitrators & Mediators Australia Expert Determination Rules, the rules numbered 1 to 17 hereafter shall apply.

## **Part 1: Preliminary**

### **Rule 1: Definitions**

In these Rules:

‘The Institute’ is the Institute of Arbitrators & Mediators Australia.

‘Agreement’ is any agreement between the parties embodying a submission of present or future disputes to expert determination.

‘The costs of the process’ includes the fees and expenses of an expert or nominee, any nomination fee or other fee payable to the Institute of Arbitrators & Mediators Australia or other nominating body, and costs for such things as room hire and transcript.

‘Days’ means normal working days and shall exclude Saturdays, Sundays and public holidays.

‘The dispute’ means the disputed issues for expert determination in accordance with these rules.

‘Expert’ means a person who has accepted appointment to determine the dispute in accordance with these rules.

‘Nominee’ means a person who has been nominated by the Institute or agreed by the parties as Expert but who has not accepted appointment as expert.

‘Preliminary conference’ means a meeting appointed to deal with procedural or administrative matters in connection with expert determination of the dispute.

‘The process’ means expert determination of the dispute in accordance with these rules.

***Rule 2: Appointment of the expert***

1. Unless otherwise agreed in writing by the parties, the process shall be conducted:
  - a. by a person agreed between the parties; or
  - b. if the parties are unable to agree on the identity of the person to be appointed, by a person nominated by the Institute, who accepts appointment as expert.
2. Subject to any written agreement of the parties to the contrary, the provisions of Schedule A shall apply.
3. The nominee shall, within seven (7) days of receiving advice of his or her nomination or agreed appointment, give written notice to the parties of the time and place of a preliminary conference to be held in accordance with rule 8, which the parties or their duly authorised representatives shall attend.
4. Prior to that preliminary conference, the nominee may advise any conditions he or she wishes to impose (including provision of security for the fees and expenses of the nominee) and request the agreement of the parties to such conditions.
5. On the parties agreeing to any such conditions, the nominee shall accept appointment and shall then be deemed to have entered on the reference as Expert.

***Rule 3: Agreement to be bound***

1. The parties agree that the expert is an expert in the subject matter of the dispute.
2. Unless otherwise agreed in writing by the parties, the determination of the dispute by the expert shall be final and binding between the parties.

***Rule 4: Application of rules***

1. These rules are subject to any law which governs expert determination in the place where the process is held, and to any agreement between the parties in relation to the process.
2. Otherwise, where the parties to a dispute have agreed to expert determination in accordance with these rules, they are thereby bound to comply with these rules unless:
  - (a) any part thereof is held to be void or voidable, in which case that part shall be severed from the remainder of the agreement; or
  - (b) the parties agree in writing to modify the application of these rules.

**Part II: The procedure**

***Rule 5: Role of the expert***

1. The expert shall determine the dispute as an expert in accordance with these rules and according to law.
2. The parties agree that:
  - (a) the expert is not an arbitrator of the matters in dispute and is deemed not to be acting in an arbitral capacity;
  - (b) the process is not an arbitration within the meaning of any statute.
3. The expert shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide an expeditious cost effective and fair means of determining the dispute.
4. The expert shall be independent of, and act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of any opposing party, and a reasonable opportunity to make submissions on the conduct of the process.
5. Any dispute arising between the parties in respect of any matter concerning these rules or the process, (including the expert's jurisdiction) shall be submitted to and determined by the expert.

***Rule 6: General duty of parties***

1. The parties shall do all things reasonably necessary for the proper, expeditious and cost effective conduct of the process.
2. Without limiting the generality of the foregoing, the parties shall:
  - (a) be represented at any preliminary conference or meeting convened by the expert by a person or persons with authority to agree on procedural matters;
  - (b) comply without delay with any direction or ruling by the expert as to procedural or evidentiary matters; and
  - (c) where appropriate, take without delay any necessary steps to obtain a decision of a court on a preliminary question of jurisdiction or law.

***Rule 7: Confidentiality***

1. The expert the parties and all advisors and representatives of the parties shall:
  - (a) except as provided in paragraph 2 of this rule, keep all information

- disclosed during the process confidential;
  - (b) sign confidentiality agreements in the terms of this rule.
2. The obligation of confidentiality under sub-paragraph a of paragraph 1 above shall apply except:
- (a) if disclosure is compelled by law;
  - (b) to the extent necessary to give effect to the agreement or to enforce any determination of the expert.

***Rule 8: Preliminary conference***

1. Unless otherwise agreed by the parties, the expert shall convene a preliminary conference with the parties, in person or by teleconference, to be held as soon as practicable after reference of the dispute to the process.
2. The purpose of the preliminary conference is to:
  - (a) discuss and agree on the issues in dispute, or formulate a procedure by which those issues can be clarified and agreed;
  - (b) plan and agree on how the process should proceed, including a timetable for provision of submissions, documents and any other evidentiary material;
  - (c) make arrangements for confidentiality agreements to be signed by all persons taking part in the Process, in accordance with rule 7;
  - (d) make such other planning and administrative arrangements as may be required in relation to the process, including in respect of the terms of appointment of the expert.

***Rule 9: Conduct of the process***

1. Subject to any rule of law or equity or written agreement of the parties to the contrary, and the requirements of rule 5, the expert shall make such directions or rulings in relation to the process as he or she sees fit.
2. Subject to any written agreement of the parties to the contrary, and without limiting the generality of paragraph 1 of this rule, the directions and rulings made by the expert may include directions or rulings in relation to:
  - (a) identifying or clarifying the issues in dispute, by preparation of a joint statement of issues or otherwise;
  - (b) provision of submissions, documents and any other evidentiary material relied upon by the parties;

- (c) provision of any further submissions and evidentiary material which the expert considers appropriate;
  - (d) meetings between the parties, their representatives and/or experts engaged by the parties, whether or not such meetings are attended by the expert,  
including the times by which any such steps shall be taken.
3. If the parties agree in writing (in the agreement or otherwise), the procedure in Schedule B shall apply.

***Rule 10: The expert's determination***

- 1. As soon as reasonably practicable after receiving the submissions and evidentiary material from the parties pursuant to rule 9, the expert shall determine the dispute between the parties and notify such determination in writing to the parties.
- 2. Unless otherwise agreed between the parties, the expert's determination shall contain a statement of reasons in such form as the expert considers reasonably appropriate, having regard to the amount and complexity of the dispute.
- 3. Unless otherwise agreed between the parties, the expert's determination may include for the payment of interest on any monetary sum determined, in such amount as the expert considers reasonable.
- 4. Where the expert's determination contains:
  - (a) a clerical mistake;
  - (b) an error arising from an accidental slip or omission;
  - (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
  - (d) a defect of form,the expert may correct the determination.

**Part III: General**

***Rule 11: Contractual obligations***

Where the dispute arises out of or in connection with a contract between the parties, the parties shall continue to perform their contractual obligations notwithstanding the existence of the process.

**Rule 12: Waiver of right to object**

1. Subject to any rule of law or equity or written agreement of the parties to the contrary, if a party to the process takes part, or continues to take part, in the process without making within a reasonable time thereafter any objection:
  - (a) that the expert lacks substantive jurisdiction;
  - (b) that the process has been improperly conducted,
  - (c) that there has been any other irregularity affecting the expert or the process,then that party shall be deemed to have waived its right to make such objection later, before a court, unless it shows that, at the time it took part or continued to take part in the process, it did not know and could not with reasonable diligence have discovered the grounds for the objection.
2. Subject to any statute law or principle of common law or equity, or written agreement of the parties to the contrary, where the expert rules that he or she has substantive jurisdiction and a party to the process who could have questioned that ruling in a court does not do so within any time fixed by the expert (or if no time is fixed, within a reasonable time), then that party shall be deemed to have waived any right it may otherwise have had to later object to the expert's substantive jurisdiction on any ground which was the subject of that ruling, and shall be deemed to have submitted to the expert's jurisdiction.

**Rule 13: Costs**

1. Unless otherwise agreed by the parties, each party shall pay its own costs of or incidental to the process.
2. Unless otherwise agreed by the parties, the parties shall be jointly and severally liable for the costs of the process, and shall pay those costs in equal shares.

**Rule 14: Extension of limitation period**

1. If, during the process, a limitation period for bringing any proceedings in relation to the dispute expires, the parties agree that:
  - (a) the limitation period will be extended by the number of days from the date of reference of the dispute to the process to the date of the expert's determination in accordance with these rules;

- (b) they will not rely, in any arbitral or judicial proceedings on the expiry of a limitation period other than as calculated in accordance with this rule.

***Rule 15: Subsequent proceedings***

1. The expert shall not, without the written consent of the parties, accept an appointment to act as arbitrator, or act as advocate or adviser to any party, in any subsequent arbitral or judicial proceedings arising out of or in connection with the Dispute.
2. The parties agree that:
  - (a) the expert will not be called upon to give evidence or produce documents in any subsequent arbitral or judicial proceedings arising out of or in connection with the dispute, by subpoena or otherwise;
  - (b) with the exception of the expert's determination, the expert's papers will not be the subject of a subpoena to give evidence or produce documents in any subsequent arbitral or judicial proceedings arising out of or in connection with the dispute.

***Rule 16: Counting of days***

1. For the purpose of counting days under these rules, such period shall begin to run on the day following the day when notice, notification, communication or proposal is actually received or deemed to be received under paragraph 2 of this rule, whichever is earlier. If the last day of such period is a public or official holiday or a non-business day at the residence or place of business of the addressee, then the period is extended until the first business day which follows.
2. Any such notice, notification, communication or proposal which is posted is deemed to have been received on the second day following the day of posting. Any such notice, notification, communication or proposal which is sent by facsimile or other means of telecommunication or electronic transmission is deemed to have been received on the day of transmission.

***Rule 17: Liability for acts or omissions***

The parties agree that the expert, the Institute and its officers and employees are not liable to any party for or in respect of any act or omission in the

discharge or purported discharge of their respective functions under these rules unless such act or omission is shown to have been fraudulent.

## Schedule A

### ***Rule A1: Inability to agree on person to be appointed***

1. This rule applies to the extent that it is not inconsistent with the Agreement.
2. Any party may, by notice in writing (hereafter called the notice of dispute), give notice that it requires a dispute to be referred to expert determination, and call on the other parties to the dispute to agree on the identity of the person to be appointed as Expert.
3. The notice of dispute shall be served at the address for such party or parties specified in the agreement. Unless otherwise provided in the agreement, service may be effected personally, by mail, or by facsimile or other means of telecommunication or electronic transmission.
4. Unless otherwise agreed between the parties, if no agreement has been reached on the identity of the person to be appointed as Expert within ten (10) days after service of the notice of dispute or deemed receipt of same, then the dispute, unless settled, shall be and is hereby referred to expert determination by an expert nominated by the Institute in accordance with this schedule.
5. If the parties agree in writing that the giving of notice under this rule shall not be required, then the parties may jointly call for nomination of an expert by the Institute in accordance with this schedule.

### ***Rule A2: Exercise of power of nomination by the Institute***

1. Where the Institute is to exercise powers to nominate persons to act as Experts, those powers shall be exercised by:
  - (a) the President of the Institute; or
  - (b) the Senior Vice-President of the Institute or the Chair of any Chapter, to which the power of appointment is delegated in any particular case or cases.
2. Where the Institute is to nominate an expert:
  - (a) the party giving a notice of dispute shall also provide evidence that it has deposited with the Institute of Arbitrators & Mediators Australia the prescribed nomination fee; or



## THE ARBITRATOR & MEDIATOR DECEMBER 2001

- (b) if the parties agree in writing that the giving of notice under rule A1 shall not be required then, unless the parties otherwise agree, they shall jointly deposit with the Institute of Arbitrators & Mediators Australia the prescribed nomination fee.
- 3. The nomination fee shall be the sum of \$330.00 or such other sum as prescribed by the Institute from time to time.
- 4. Lodgement of the prescribed nomination fee shall be a prerequisite to the nomination of an expert by the Institute.

### ***Rule A3: Call for nomination***

- 1. This rule applies to the extent that it is not inconsistent with the agreement.
- 2. Where a notice of dispute has been given pursuant to the Agreement or pursuant to rule A1, and such dispute has not been settled within the time provided, any party may thereafter request the Institute in writing to nominate an expert and, in so doing, shall submit the following to the Institute:
  - (a) a copy of the notice of dispute;
  - (b) a copy of the agreement containing the submission to expert determination;
  - (c) the names and addresses of the parties to the dispute;
  - (d) a brief description of the nature of the dispute containing such particulars of the dispute as will permit the Institute to nominate an appropriate expert.
- 3. If the parties agree in writing that the giving of notice under rule A1 shall not be required then, in addition to the material referred to in paragraph 2 of this rule, they shall provide to the Institute of Arbitrators & Mediators Australia a copy of their written agreement to that effect.
- 4. Within ten (10) days after receipt of the material submitted pursuant to paragraphs 2 or 3 of this rule, or such further information as to the nature of the dispute as the Institute may reasonably require for the purposes of nomination, the Institute shall nominate an expert, and shall advise the parties and the nominee accordingly.

### ***Rule A4: Further nomination***

- 1. Where any party does not agree with the conditions advised by the nominee, then the nominee shall notify the parties in writing within two

## THE ARBITRATOR & MEDIATOR DECEMBER 2001

- (2) days as to whether he or she accepts appointment as expert notwithstanding that disagreement. On acceptance of appointment, the nominee shall be deemed to have entered on the reference as expert.
2. Unless the parties otherwise agree in writing, the Institute shall nominate a replacement expert, within ten (10) days of being called on to do so by a party, if:
    - (a) appointment is declined by a nominee pursuant to paragraph 1 of this rule;
    - (b) a nominee nominated by the Institute does not enter upon the reference as expert within one (1) month of the date of his or her nomination; or
    - (c) after entering on the reference, an expert shall die or shall otherwise become incapable by reason of ill health or otherwise, or be debarred in law, from continuing on the reference.
  3. Where the Institute nominates a replacement expert pursuant to paragraph 2(a) of this rule, then any dispute as to the reasonableness of the conditions notified by the replacement expert shall be determined by the President of the Institute or his or her nominee, which determination shall be final and binding.

### Schedule B

The Process shall be conducted in the following manner:

1. The claimant shall, within twenty one (21) days of the date on which the expert accepts appointment, provide the following to each other party and to the expert:
  - (a) a statement in writing detailing the nature of the dispute, the legal and factual issues involved, its contentions in relation to those issues, and the quantum of its claim;
  - (b) all documents and other evidentiary material on which it relies;
  - (c) its written submissions on the legal and factual issues involved in its claim.
2. Thereafter, each party other than the claimant shall, within a further period of twenty one (21) days, provide the following to each other party and to the expert:
  - (a) a statement in writing indicating whether or not it agrees with the claimant's written statement pursuant to paragraph 1a and, if not, its statement of the nature of the dispute (including any cross claim), the legal and factual issues involved in the claimant's claim and any such

- cross claim, its contentions in relation to those issues, and the quantum of any such cross claim;
- (b) all documents and other evidentiary material on which it relies; and
  - (c) its written submissions on the legal and factual issues involved in the claimant's claim and any cross claim brought by it.
3. Thereafter, any party may reply to written material served pursuant to paragraph 2, within a further period of twenty one (21) days, by providing the following to each other party and to the expert:
    - (a) a statement in writing in reply indicating whether or not it agrees with the written statement pursuant to paragraph 2(a) and, if not, its reply as to the nature of the dispute, the issues likely to arise and its contentions in relation to same;
    - (b) all documents and other evidentiary material in reply to material served pursuant to paragraph 2(b); and
    - (c) its written submissions in reply on the legal and factual issues involved.
  4. If a cross claim is made in accordance with paragraph 2, then the cross claimant may reply, in the same manner as set out in paragraph 3, to written material served in respect of such cross claim pursuant to paragraph 3.
  5. If the expert considers it appropriate, he or she may direct that expert reports not be served in accordance with paragraphs 1(b), 2(b), 3(b) and 4 above and that, instead, the experts retained by the parties are to be each provided with the material otherwise served pursuant to paragraphs 1(b), 2(b), 3(b) and 4, and then jointly confer (by a time fixed by the expert) and produce a joint report or reports (by a time fixed by the expert) recording the matters on which they agree, the matters on which they disagree, and identifying the reasons for any such disagreement and their respective contentions in relation to same.
  6. If the expert considers it appropriate, he or she may direct that the experts retained by the parties attend one or more experts' conclaves chaired by the expert, so as to narrow issues in dispute, which conclaves are to be held at a time and are to be conducted and recorded in a manner directed by the expert.
  7. The expert may make such other directions or rulings as he or she considers reasonably appropriate, including directions or rulings for further material or meetings pursuant to sub-paragraphs 2(c) and 2(d) of rule 9.

**THE ARBITRATOR & MEDIATOR DECEMBER 2001**

8. Any times fixed pursuant to this Schedule B may be varied by agreement of the parties. In the absence of such agreement, on proper cause being shown by a party, the expert may vary the times fixed on such terms as he or she considers reasonable in the circumstances. ✂