Expert Determination – Ten Years On

Max Tonkin [1]

Introduction

This paper outlines the view of a consumer of expert determination services. My employer, the Department of Commerce[2] ('the Department') has been involved as a respondent in many expert determinations in which disputes for many millions of dollars have been decided.

This paper deals essentially with two issues: legal challenges to expert determinations and practical lessons that the Department has learned.

Before dealing with these issues a definition of expert determination will be helpful, as will some background to the Department's involvement in the process.

Expert determination

In *The Heart Research Institute Limited and Anor v Psiron Limited*,[3] Einstein J provided a very good summary of expert determination.

> *[16] As the plaintiffs point out, in practice, Expert Determination is a process where an independent Expert decides an issue or issues between the parties. The disputants agree beforehand whether or not they will be bound by the decisions of the Expert. Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind.*
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> *[17] Unlike arbitration, Expert Determination is not governed by legislation, the adoption of Expert Determination is a consensual process by which the parties agree to take defined steps in resolving disputes. I accept that Expert Determination clauses have become commonplace, particularly in the construction industry, and frequently incorporate terms by reference to standards such as the rules laid down by the Institute of Arbitrators and Mediators of Australia, the Institute of Engineers Australia or model agreements such as that proposed by Sir Laurence Street in 1992. Although the precise terms of these rules and guidelines may vary, they have in common that they provide a contractual process by which Expert Determination is conducted.*

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2. The Department of Commerce was created in 2004 by combining the Department of Public Works and Services, the Department of Fair Trading and the Office of Industrial Realations. The Department of Public Works and Services was created in 1995 by amalgamating the Department of Public Works, NSW Supply and elements of State Properties.
3. [2002] NSWSC 646.

Background

The Department has been involved in construction projects for many decades and, as an organisation, has had a great deal of experience in the resolution of contractual disputes.

There is little doubt that the introduction of expert determination has had a significant effect on the Department's approach to dispute resolution. Prior to the introduction of expert determination, the Department's construction contracts provided for disputes that were not resolved by the administrative procedures set out in the contract to be referred to arbitration. This approach had the effect of placing dispute resolution in the hands of arbitrators and lawyers with the result that, in many cases, costs were extremely high and disputes took a long time to resolve.

The introduction of expert determination in about 1994 created the opportunity for speedy and relatively low cost dispute resolution.

Speed and low cost, flowing from the expedited procedure and the limited right of appeal in expert determination, were advantageous but there were also perceived disadvantages.

Firstly, there was the perceived risk that, because expert determination avoided the rigors of the rules of evidence and was based on a simple defined process, it ran the risk of resulting in perverse findings by experts who would not have the benefit of examining witnesses and a formal hearing procedure. Secondly, there was the perceived risk that the expert's findings could be challenged legally and, as a result, finality would not be achieved.

The Department's approach in dealing with the risk of perverse outcomes has been to place a financial limit on determinations that are binding.[4] Findings above the financial limit are of no effect if either party exercises a right to reject the result. The claimant then has the right to proceed to litigation.

The risk of challenges to the process is essentially a legal issue that, whilst possibly a problem in 1994, seems to be now essentially resolved.

Legal issues

In his excellent article,[5] Robert Hunt dealt with a number of legal issues going to the question of whether an expert determination can be challenged.

Mr Hunt examined three challenges that might void an agreement to refer matters to expert determination:

- one based on the proposition that the process ousts the jurisdiction of the courts;
- one based on the argument that some issues are not susceptible to expert determination; and
- one based on the argument that the process is uncertain.

4. The Department's construction contracts provide for the expert determination to be final and binding if the expert finds less than $0.5 million is owed by one party to the other. In consultancies the limit is $100,000.
5. Robert Hunt, 'The Law Relating to Expert Determination' (2001) *The Arbitrator & Mediator*, December, pp. 39-60.

Ouster of the jurisdiction of the courts

Mr Hunt noted that, although contrary to the indications of other authorities, Heenan J, in *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*,[6] found an agreement to refer disputes to an expert was void to the extent that it operated to oust the jurisdiction of the court. Mr Hunt said he did not believe the decision of his Honour will be followed in other states and it may even be distinguished by other judges at first instance in Western Australia.

The issue of ouster of the jurisdiction of the courts was considered by Einstein J in *The Heart Research Institute*.[7] Einstein J seems to have reached the same conclusion as Mr Hunt. He did not follow *Baulderstone Hornibrook*.[8] He reviewed a number of authorities and found that the agreement to refer disputes to expert determination was not an ouster of the courts.

Matters not susceptible to expert determination

In respect of this proposition, Mr Hunt cited Barret J's decision in *Savcor Pty Ltd v State of New South Wales (Savcor)*,[9] and concluded that the courts will allow an expert to determine matters that legislation has expressly empowered a court to decide, provided the parties have either expressly or by implication, agreed that that is what the expert is to decide.

Einstein J, in *The Heart Research Institute*,[10] came to a similar view. He said:

> *In the recent NSW Supreme Court decision* Savcor Pty Limited v New South Wales *(2001) 52 NSWLR 587, Barrett J summarised the present state of the law as follows:*
> *"In the absence of factors such as fraud and collusion, an expert determination declared by contract to be final and binding is open to challenge only to the extent that it is not in conformity with the enabling contract, including such implied terms as there may be as to the conduct and procedures of the expert." (para 35)*
> *It is quite conceivable that parties may refer issues such as in IBM*[11] *for determination by an Expert and "agree to abide by the expert's decision on that question as if it were an order made by a court." (para 37)*
> *"where parties have by contract agreed to follow a particular dispute resolution procedure, they should be required to adhere to that procedure unless the party wishing to abandon it in favour of resort to the courts can show good reason for that course." (para 42)*

Lack of certainty in the procedure

With regard to the issue of lack of certainty in the procedure to be followed by the expert being sufficient ground for the process to be challenged, Mr Hunt's view, based on *Triarno Pty*

6. [1998] 14 BCL 277.
7. [2002] NSWSC 646.
8. [1998] 14 BCL 277.
9. [2001] NSWSC 596.
10. [2002] NSWSC 646.
11. [1991] 22 NSWLR 466.

Ltd v Triden Contractors Ltd,[12] and *Fletcher Construction Australia Ltd v MPN Group Pty Ltd*,[13] was that this is a matter for the expert not the courts to resolve. However, it seems that Einstein J in *The Heart Research Institute*[14] came to a different view. He said:

> *36 The central issue raised by the defendant concerns the well-established proposition that agreements to participate in alternative dispute resolution procedures are enforceable in principle provided the conduct required of the parties for participation in the process is sufficiently certain. See* Hooper Bailie Associated Ltd. v Natcon Group Pty. Ltd. *(1992) 28 NSWLR 194;* Elizabeth Bay Developments Pty. Limited v Boral Building Services Pty. Limited *(1995) 35 NSWLR 709;* Aiton Australia Pty. Limited v Transfield Pty. Limited *(1999) 153 FLR 236;* Morrow v Chinadotcom *[2001] NSWSC 209;* Banabelle Electrical Pty. Limited *[2002] NSWSC 178.*

Mr Hunt also discussed enforcement of an expert determination as a possible avenue for a challenge to the process. He indicated that, in defending proceedings to enforce an expert determination, a party may seek to challenge the result of the expert determination. However, it seems his view is that expert determinations are not subject to appeal other than on the very narrow ground that the expert has acted beyond the terms of his or her appointment. He indicated a party will not be able to challenge an expert determination on the ground that the expert made a mistake, referring to *Fletcher Constructions*,[15] *Fermentation Industries (Aust) Pty Ltd v Burns Philp & Co Ltd*,[16] and *Legal and General Life of Australia Ltd v A Hudson Pty Ltd*,[17] as authority.

Mr Hunt's view is entirely consistent with Einstein J's in *The Heart Research Institute*,[18] where he said:

> *32 The result of this line of authority is, I accept that a decision will be overturned if, as in* Fermentation Industries (Aust) Pty Ltd v Burns Philp & Co Ltd *NSWSC, Rolfe J, 12 February 1998 (unreported), it is outside the terms of the agreement. The authorities are usefully gathered by Palmer J in* Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd *[2001] NSWSC 405, 21 May (unreported), where Palmer J states, with reference to Legal and General that "these principles are now well settled." (para 48) Where parties to an agreement have determined:*
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> *"that a rent review dispute is to be resolved by the determination of a valuer, acting as an expert, and not as an arbitrator and that the determination is to be final and binding, then the determination may be successfully impeached as invalid only if it is shown to be tainted by fraud or collusion, or if it is shown not to have been made in*

12. [1992] 8 BCL 305.
13. Unreported, NSW Supreme Court, 14 July 1997.
14. [2002] NSWSC 646.
15. Unreported, NSW Supreme Court, 14 July 1997.
16. Unreported NSW Supreme Court , 12 February 1998.
17. [1985] 1 NSWLR 314.
18. [2002] NSWSC 646.

> *accordance with the determination process, if any, specified in the lease. In either case, this is so because the determination is not one for which the parties have contractually stipulated." (para 47)*
> *33 These principles are entirely consistent with, and were recently applied in* Aiton Australia Pty Ltd v Transfield Pty Ltd *(1999) 153 FLR 236 and* State of New South Wales & 3 Ors v Banabelle Electrical Pty Limited*, [2002] NSWSC 178.*

Finally, Mr Hunt dealt with the issue of the differences between expert determination and arbitration. An example of how this may be the basis of a challenge to an expert determination is that a party may seek to appeal an expert determination on the ground that the expert has made a manifest error of law. Manifest error of law on the face of an award is a valid ground for appeal in an arbitration but not in an expert determination. It could also be important in situations where, for tactical reasons, a party contends that an expert determination is an arbitration so as to be able to obtain discovery or try to obtain a hearing or simply to attract a larger offer of compromise.

The question was addressed and decided on appeal in *Age Old Builders Pty Ltd v Swinton's Pty Ltd*.[19] Two worthy journal articles by David Levin QC[20] and Robert Hunt[21] outline the background to this case and the initial findings of the Victorian Civil and Administrative Tribunal (VCAT).

The Tribunal was asked whether 'the expert determination agreement alleged to exist between the parties and made in or about September 2000 is or is not void in law having regard to the provisions of the *Domestic Building Contracts Act 1995* and in particular to ss 14 and 132 thereof'. The sections of the Act referred to by the VCAT prohibit the reference of disputes to arbitration and prohibit the contracting out of the Act respectively. The Tribunal found that the expert determination agreement, which was based on the expert determination procedures of the Institute of Arbitrators and Mediators, Australia, was an agreement to refer disputes to arbitration and, accordingly, found in the affirmative to the above question.

The Tribunal's decision was overturned on appeal[22] in a very well reasoned decision by Osborne J handed down on 21 August 2003.

His Honour discussed in detail the point that was illlustrated in the Canadian case *Sports Maska Inc v Zitter*,[23] in which Canadian, United States and French law was argued, that the more a process is like a court process the more likely it will be determined to be arbitration as opposed to expert determination.

Osborne J found the process he examined did not have sufficient of the characteristics of a judicial inquiry for it to be an arbitration. He said:

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19. [2002] VCAT 1489.
20. David Levin QC 'The End of Expert Determination?'(2003) *The Arbitrator & Mediator*, August,p. 67.
21. Robert Hunt 'Age Old Builders Pty Ltd v Swintons Limited' (2003) *The Arbitrator & Mediator*, August, p. 81.
22. [2003] VSC 307 (21 August 2003).
23. [1998] 1 SCR 564.

> *[70(c)] ... Once again none of these matters in my view govern the fundamental character of the expert's role which was not that of an arbitrator simply because it did not have at its heart an inquiry in the nature of a judicial inquiry.*

Finally, Mr Hunt dealt with the liability of an expert saying that, as there is no statutory protection for the expert, as there is for an arbitrator, it is important for an expert to obtain a suitable release and indemnity from the parties so as to avoid any claims. It is also important for the release and indemnity for the expert to be included in the agreement between the parties to refer disputes to expert determination, so that one of the parties cannot later refuse to provide the release and indemnity, as happened in *Triarno*,[24] leading to a breakdown in the process.

Experience of the Department of Commerce

The Department introduced expert determination into construction contracts about 10 years ago. The process has been successful overall.

The Department has been respondent in some 50 expert determinations involving claims totaling $35 million. The total amount determined has been less than 19% of the amount claimed.

Initially, there were challenges to the process. These essentially concerned the issue to be determined by the expert. The early drafts of the expert determination clause in the Department's contracts provided for the parties to each sign an agreement to be forwarded to and signed by the agreed, or nominated expert. A summary of the dispute was to be appended to the agreement. On a number of occasions the Department disagreed with contractors as to the drafting of the summary. The Department was concerned that claimants were drafting the summary narrowly and, because expert determination does not give rise to *res judicata* or issue *estoppel*, claimants were positioning themselves so they could make another claim based on the same events if they were not successful in the first expert determination.

To reduce the risk of claims being re-run, in other words, to improve the chance of finality, the Department now includes broadly framed questions for the expert to answer in respect of each issue.

The questions are:

1 The *Expert* must determine for each *Issue* the following questions (to the extent that they are applicable to the *Issue*):

  .1 Is there an event, act or omission which gives the claimant a right to compensation, or otherwise assists in resolving the Issue if no compensation is claimed:

    (1) under the Contract

    (2) for damages for breach of the Contract, or

    (3) otherwise in law?

24. [1992] 8 BCL 305.

.2 If so:
(1) what is the event, act or omission?
(2) on what date did the event, act or omission occur?
(3) what is the legal right which gives rise to the liability to compensation or resolution otherwise of the *Issue*?
(4) is that right extinguished, barred or reduced by any provision of the Contract, *estoppel*, waiver, accord and satisfaction, set-off, cross-claim, or other legal right?

.3 In the light of the answers to clauses 1.1.1 and 1.1.2 of this Expert Determination Procedure:
(1) what compensation, if any, is payable from one party to the other and when did it become payable?
(2) applying the rate of interest specified in the Contract, what interest, if any, is payable when the *Expert* determines that compensation?
(3) if compensation is not claimed, what otherwise is the resolution of the Issue?

2 The *Expert* must determine for each *Issue* any other questions identified or required by the parties, having regard to the nature of the *Issue*.

Not only are these questions framed broadly to cover every possible angle, they clearly require the expert to make decisions according to the law.

As indicated above the primary reasons for moving away from arbitration to expert determination were to reduce costs and improve the speed of dispute resolution.

Timely dispute resolution is important in managing government capital works programs. Unresolved disputes mean agencies cannot confidently forecast the end costs of projects. Unresolved disputes create uncertainties in allocating scarce resources. In extreme cases, unresolved disputes can delay other projects within a portfolio.

The situation is no different in the private sector. Developers and owners do not want costly disputes dragging on. They want to know the final cost of their projects as soon as they can. I suspect the private sector is as naturally drawn to low cost dispute resolution as is the public sector and that this is the primary reason for the increase in the use of expert determination over the past decade.

The cost of a dispute resolution process is important on its own and it is important also from the point of view of negotiation of disputes. Before the introduction of expert determination, a claimant could make a claim and threaten to commence arbitration, if this was an option in the contract,[25] or litigation if arbitration was not an option. Respondents had to assess, in addition to the risk of an adverse award and its *quantum*, the potential cost of arbitration or litigation, and the risks of unfavourable costs orders.

A claimant with a weak but seemingly complex case, was able to entice a large offer of compromise from a respondent simply because the respondent did not want to incur the

25. Department of Commerce current contracts based on GC 21 and Minor Works general conditions and consultancy agreements do not have provisions for disputes to be referred to arbitration.

costs and delays of arbitration or litigation. The high cost and delays in arbitration created an environment in which claims could be made simply to entice large offers of compromise.

The negotiation climate has changed markedly with the advent of expert determination. Adverse costs orders are not now an issue as each party meets its own costs and the costs of the process are significantly less than in arbitration. Respondents can be more rational in their negotiation strategies and can formulate their offers of compromise having made genuine assessments of the merit and *quantum* of claims. Where a claim appears to lack merit, it might be that no offer of compromise is made at all, leaving a claimant with the decision to either run the expert determination or abandon the claim.

The lower costs, improved timeliness and the improved negotiation climate of expert determination have been positive outcomes for the Department. However, the road has not always been smooth. Specific issues that the Department has dealt with are set out below.

1. Parties have avoided the contractual obligation to refer disputes to expert determination and have commenced litigation.

Over the past ten years, the Department has been involved in four cases in which plaintiffs commenced litigation proceedings rather than follow the expert determination provisions of their contracts. Three of the cases were closely related. The Department unsuccessfully sought orders to stay the litigation proceedings. Details of these cases are on the public record and I will give an outline of each case.

The Department applied for a stay of litigation proceedings commenced by Savcor Pty Limited in relation to a construction contract. The proceedings[26] commenced by Savcor named the State of New South Wales as the first defendant and one of Savcor's subcontractors as second defendant. The Department, for the State, was unsuccessful in the stay application because the Court found that it would not be in the parties' interests to have claims based on common material decided in more than one forum. Barret J said:

> *50 In my judgment, the proceedings against the first and second defendants should be heard and determined together. Because no basis has been shown on which the claims the plaintiff has against the second defendant can effectively be brought within the contractual dispute resolution process applicable as between the plaintiff and the first defendant, the way of ensuring that the proceedings are heard and determined together in an appropriate forum best able to deal with all matters in issue is for the action in this Court to proceed as presently constituted.*

The State of New South Wales was the first defendant in proceedings[27] brought by three

26. *Savcor v State of NSW* [2001] NSWSC 596.

27. *State of New South Wales & 3 Ors v Banabelle Electrical Pty Limited, Banabelle Electrical Pty Limited v State of New South Wales & 3 Ors, State of New South Wales & 2 Ors v Fugen Holdings Pty Limited, Fugen Holdings Pty Limited v State of New South Wales & 2 Ors, State of New South Wales & Ors v Automatic Fire Protection Design Pty Limited, Automatic Fire Protection Design Pty Limited v State of New South Wales & Ors* [2002] NSWSC 178.

trade contractors involved in the construction of the Conservatorium of Music redevelopment project. The contractors were Banabelle Electrical Pty Limited, Fugen Pty Limited and Automatic Fire Protection Design Pty Limited. The defendants, including the State, brought separate proceedings seeking declarations and orders restraining the contractors from continuing their proceedings and compelling them to pursue any of their claims by way expert determination in accordance with clause 1.46 of the contract.

Clause 1.46.5 of the contract stated (*inter alia*):

The Expert shall be a person agreed between the parties or, if they fail to agree, a person nominated by the person prescribed in the Annexure.

However, the relevant part of the Annexure that identified the person to nominate the expert was missing from each contract.

In rejecting the defendants' application Einstein J said (paragraph 70):

In my view clause 46.5 is uncertain and the uncertainty infects the entire clause.

Banabelle, Fugen and *Autofire* [see footnote 27] reflects a document control problem in those contracts and, it is to be hoped, will not be repeated. *Savcor*, on the other hand, indicates that it is open to claimants to seek to avoid expert determination by the simple expedient of joining another party.

2. Arbitral limit is exceeded

The Department has been involved in many expert determinations in which the amount claimed exceeded the limit of $500,000. Two examples of where the determination exceeded the limit serve to illustrate how this works.

Details of these cases are not on the public record and must be kept confidential in accordance with the expert determination provisions of the relevant contracts. Nevertheless, without revealing the claimants' identities, the general situations were as follows:

Case 1.

The claimant made claims for extras for a little over $800,000. The claims were rejected and the dispute was referred to expert determination. The expert found almost entirely in favour of the claimant finding that the Principal owed a little under $800,000.

The Department formed the view that the expert had not properly considered some aspects of the matter and, as the limit of $500,000 had been exceeded and the determination was not, as a consequence, binding, the Department refused to pay the amount determined. The claimant immediately referred the dispute to arbitration.

Fortunately, the dispute was settled shortly thereafter for a sum considerably less than that determined by the expert and a little less than the arbitral limit. Had the contractor

28. The standard expert determination provision in our construction contracts is for each party to make two submissions (claimant first, then respondent, then claimant and then respondent). In our consultancy agreements, the provision is for one submission by each party (similar to the single submission by each party prescribed in the NSW *Building and Construction Industry Security of Payment Act 1999*).

refused to settle for an amount that the Department was prepared to pay, and had the matter proceeded to arbitration, the costs of the arbitration could easily have exceeded the final value of an award. In this case, the expert determination, although not final and binding, provided a valuable insight for the parties and assisted them to settle the dispute.

Case 2.

The claimant made claims for extra for more than $11 million excluding GST. The claims were rejected. The matter was referred to expert determination and the expert, in a very well reasoned determination, found the contractor to be entitled to a little under $3.0 million plus GST.

Clearly the expert determination was of no effect and not binding on the parties, however, having considered the risks and costs of litigation, the Department formed the view that it would not get a better outcome if the matter were not resolved. The Department offered to pay the amount determined by the expert subject to the contractor releasing the Principal from further claims. The matter settled on that basis. It seems that the contractor was similarly impressed by the expert's reasoning and, although possibly not entirely happy with the outcome, decided that the risks and costs of litigation did not justify proceeding down that path.

3. Preliminary conferences

Expert determinations have become routine. The procedure is fully prescribed in the Department's contracts and the parties usually obtain professional assistance to prepare their cases. The submissions are always supported by necessary documentary evidence and the process usually progresses without fuss. However, some experts and some claimants request preliminary conferences. The Department, in most cases, resists. The Department believes that there is little to be gained from a preliminary conference.

Matters such as security for the expert's fees and modifications, or mechanisms to modify the prescribed timetable, can be conveniently resolved by corresepondance

I can recall only three preliminary conferences in the 50 expert determinations over the past decade and the outcome from these could have been achieved by the exchange of a few emails.

4. Conferences during the process

The prescribed process for a conference is as follows:

1. The expert may request a conference with both parties to the Contract. The request must be in writing, setting out the matters to be discussed.
2. The parties agree that such a conference is not to be a hearing which would give anything under this Expert Determination Procedure the character of an arbitration.

Conferences during the process have occurred on fewer than about six occasions and did not seem to be necessary. Experience indicates that experts can and do arrive at decisions based on written submissions and their own expertise without the need for conferences.

When an expert does call a conference it is usually about procedural matters or because the expert wishes to discuss a point raised in the submissions. To avoid the process becoming a hearing the Department finds it convenient to send its legal representative with instructions rather than a staff member or anyone who was involved with the project. Any questions that the representative cannot answer can be taken on notice and a written submission made to ensure there is no misunderstanding about something that is said.

On one occasion an expert wanted to discuss some issues with the parties respective programming experts. In this case, the Department proposed that the discussions be held with each of the parties' experts separately and this was done.

5. More than two submissions

In a number of cases claimants have requested permission to make a third[28] submission based often on a contention that the Department introduced new material in its second response. This is usually agreed to by the expert subject to agreement between the parties. The Department normally does not refuse although the Department would refuse if the Department thought the request was an abuse of process. When additional submissions are agreed it is inevitably necessary to agree to an amended timetable to accommodate the further submissions and for the expert to make his or her decision.

6. Costs

Costs of the process can be divided into five parts: salary costs of internal personnel to manage the process and prepare submissions; costs of external legal advisers to assist in preparation of submissions or to prepare submissions with internal personnel assisting; costs of technical experts such as quantity surveyors and programmers to prepare expert reports to support submissions; costs of project personnel who may have to prepare witness statements or assist in preparing submissions; and costs of the expert.

The costs of the process have generally been found to be satisfactory although there are some rules the Department applies to keep costs to reasonable levels.

Costs will rise markedly if external legal advisers take control of preparation of submissions. The Department has found that, although lawyers have, by their training, the skills for preparing submissions, there is a tendency to want to deal with every issue, even unimportant ones. Lawyers seem to also want to undertake significant legal research and attach to submissions copies of past cases, whilst experts, bound as they are to make decisions according to the law, seem to focus on common sense, logic and facts. They seem not to require voluminous legal submissions.

The best solution the Department has found to this problem is to have a lawyer prepare drafts of the submissions setting out logical arguments with the inclusion of facts based on research and analysis by in house architects and engineers. The Department finds it a challenge to develop teamwork between lawyers and internal technical staff because of their different training and in some cases different personalities, but when the teamwork is achieved, it is very powerful.

The Department has found less chance of teamwork occurring if the legal team takes control of the submissions compared with when the Department's officers are fully involved.

7. Rigor of the process

Whilst in theory expert determination is less rigorous than arbitration, there being no discovery and no opportunity for examination and cross-examination of witnesses, the Department's experience indicates that issues are thoroughly argued in expert determination and experts deal with the submissions fairly and competently.

The Department has rarely been disappointed with the process. Even when an adverse outcome (from the Department's perspective) has occurred in expert determination, the Department has never been of the view that arbitration or litigation, with its expense and delay and risks, would have resulted in a better outcome.

8. Separating liability and quantum

On two occasions the Department adopted a strategy of separating liability and *quantum*, asking an expert to determine liability without, at the same time, determining *quantum*. This was done with the intention of saving time and cost as on both occasions the Department considered it had a good position on liability. However, on each occasion, the expert found against the Department on liability and the parties had to instigate a new process to determine *quantum*. With the experience of these two examples, it is most unlikely that the Department will agree to an expert deciding liability without deciding *quantum* at the same time.

Conclusion

Whilst it would be preferable to avoid disputes altogether, the Department's experience of expert determination has been positive. Expert determination has proven to be a cost effective and speedy dispute resolution process. Because of its low cost and effectiveness, it helps create a rational environment for negotiation, the process by which most disputes are resolved.

The legal position is also positive. The courts accept that parties to a contract can agree to refer disputes to a third party expert and can agree to be bound by the expert's opinion.

Even though the process does not provide for issues to be ventilated as rigorously as arbitration or litigation because it does not provide for discovery and oral evidence, the Department's experience is that the parties are given a fair opportunity to put their cases and are not disadvantaged by any lack of rigor.

Whilst it remains to be seen whether the commencement of the *Building and Construction Industry Security of Payment Act 1999* will reduce the occurrence of disputes, I believe it can be safely predicted that expert determination will remain a fundamental feature of the Department's contracts for the foreseeable future.

*This paper was delivered at the IAMA 2004 National Conference, 'New Directions in ADR', Sydney 22 May 2004.