

# Resolution Institute

A guide to expert determination



Resolution  
Institute

Excellence in dispute resolution  
across Australia and Aotearoa

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# Background

## Who is Resolution Institute?

Resolution Institute is the leading and renowned membership body dedicated to promoting excellence in the field of dispute resolution. As a one-stop-shop for professional development, we offer education, training, accreditation, networking, and support to equip you with the skills and recognition you need to succeed.

Resolution Institute members engage in arbitration, mediation, adjudication, expert determination, facilitation, conflict coaching, conciliation and restorative justice. The membership base includes over 3,000 professionals, across a diverse range of industry sectors, including building and construction, finance, commercial, community, technology, mining, local government, insurance, environmental and family.

Resolution Institute is committed to promoting and supporting the pursuit of dispute resolution through education, training, and accreditation of professionals, to contribute to the provision of quality dispute resolution services.



## Who is this guide for?

This guide gives business people and those in commercial contracts, a basic understanding of the expert determination process and how it can be used for the efficient resolution of contract disputes.

It will also be helpful for anyone seeking accreditation as an expert determiner.

## What is the scope?

This guide discusses expert determination processes arising from:

- a dispute resolution clause in a contract
- from a separate agreement between parties, or
- as directed by a court.

This guide is not intended as legal advice. For legal advice please speak to your solicitor or legal representative.

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***The Resolution Institute: A guide to expert determination* assists business people, those in commercial contracts and future expert determiners in navigating the expert determination process.**

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# About expert determination

## What is expert determination?

Expert determination is a determinative process of dispute resolution by which parties to a contract, agreement, or under a court order, jointly engage an independent person to decide an issue between them. Determinations can be binding or non-binding – as determined by the process or by agreement between the parties.

The process can be specifically tailored to provide the most appropriate and efficient means to resolve many types of disputes.

Expert determiners are chosen for their expertise in the issue or subject matter in dispute between the parties.

Expert determination has been a feature of commercial law and practice for at least 250 years. It is usually conducted in private and therefore maintains confidentiality. It is found in a wide range of commercial applications, including in areas of accounting, construction, engineering, finance, industrial, legal and valuation disputes. It is relatively quick and cost-effective in comparison to other processes and is used to resolve issues of varying scale.

Unlike litigation and arbitration, it has no statutory underpinning to support the process or the enforceability of a binding determination through the court system. Consequently, published determinations are enforceable by way of separate legal proceedings, based on contract law.

## What does an expert determiner do?

Expert determiners decide a technical or specialised matter. They base their decisions on evidence and submissions presented by the parties, using their expertise to do so.

The expert determiner receives documents, evidence and submissions from all parties to reach a decision.

At the start, the expert determiner confirms with the parties:

- whether or not the decision will be legally binding
- the extent of confidentiality
- the steps that the parties will take
- the timeframe for submissions
- the documents and other evidentiary information to be provided and relied upon
- whether and when meetings will be held, and who will attend.

This allows for customisation of the process to suit the parties while ensuring the necessary evidence is available to make a decision.

Why choose expert determination?

Choose expert determination when you want an independent third party with specific expertise in the area of a dispute to decide a technical or specialised issue between two or more parties.

Expert determination is a relatively informal, quick and efficient process that can be used to resolve a wide range of accounting, commercial, construction, engineering, finance, industrial, legal and valuation disputes. In essence, it can be used to resolve any form of contract or agreement-based dispute between two or more parties.

Expert determination is a popular dispute resolution option for parties wanting to tailor a process to their specific needs.

With the expert’s help, the parties can agree on almost all aspects of process and costs.

Parties can agree and customise a number of elements in expert determination, including the rules to be used, the expert determiner selected, as well as timeframes. In contrast, this is not at the discretion of the parties in litigation.

On the spectrum of dispute resolution in terms of formality, effectiveness and cost, expert determination sits at the mid-point being widely applicable to a broad range of disputes (see Table 1 below).

Expert determination is sometimes initiated after negotiation has failed and as an alternative to litigation or arbitration.

Table 1: Spectrum of dispute resolution in terms of formality, effectiveness and cost

	Negotiation	Expert Determination	Litigation
Formality	Low	Practical / appropriate	High
Effect	No decision	Expert decision	Judicial decision
Speed	Quick	Practical / appropriate	Slow
Cost	Low	Appropriate	High



### Similarities to litigation

- Parties present their cases to an impartial person (expert determiner) who considers the evidence and submissions and makes a decision.
- Can include hearings where parties present evidence.
- Can deal with complex issues that may take time to resolve.
- Governed by an agreed set of rules.
- Process is directed and managed by a trained process expert.
- All evidence is considered before the determination is made.
- The determination can be a binding decision, enforceable in court.

### Differences from litigation

- Less formal and more flexible. The timing, location, format and conduct of the process is usually agreed between the parties and the expert. It can be conducted wholly or partly online by agreement.
- The expert determiner and the parties agree a timetable for the process, including setting a deadline for completion, where appropriate.
- The process can be agreed between the parties prior to the dispute arising via a dispute resolution clause in their contract.
- Documents and evidence provided in an expert determination are confidential and disclosure is limited. The proceedings are not on the public record, like litigation, which is important when confidentiality is a concern.

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**All dispute resolution processes measure structure, predictability, formality and finality against commercial and practical appropriateness, cost, and speed.**

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### When do disputes go to expert determination?

The expert determination process often begins well before the parties are in dispute. The parties may have a commercial relationship that includes a dispute resolution clause in a contract (see [page 8 'Model clauses'](#)).

Once a dispute arises, depending on the relationship, the nature of the dispute and any prior agreement, other methods of resolving the dispute may be attempted (see Table 2 below).

If there is no pre-existing contractual obligation to use expert determination, parties can agree to initiate the process to resolve a dispute after it has arisen (in addition to or substitution for other forms of dispute resolution).

Expert determination can also be initiated by court order.

### How does expert determination work?

The process can vary depending on what was agreed upon between the parties and the expert determiner. The summary on [page 9](#) outlines the process under the Resolution Institute Expert Determination Rules.

#### Resolution Institute Expert Determination Rules

The Resolution Institute Expert Determination Rules are a standard set of rules that can be applied by an expert determiner. They are designed to ensure impartiality, confidentiality and procedural fairness. They also determine the general duties of the parties in the conduct of the determination and the directions the expert determiner can make about submissions and the types of evidence, confidentiality undertakings, meetings, timing of the determination and what it is to contain.

**Table 2: Dispute resolution situations and processes**

Situation	Dispute initiation	Process
1. Parties have existing commercial and/or contractual relationship (no expert determination ('ED') clause)	Dispute arises	Parties attempt to resolve dispute through private communication and negotiation
2. Parties' contract includes an ED clause	Dispute referred to preliminary processes	Dispute resolution processes are attempted and exhausted
3. ED is initiated and conducted by an expert determiner	Dispute referred into ED process	ED process commences
4. The expert determiner considers arguments, evidence, and submissions	ED process completion	Decision handed down by the expert determiner

## About expert determination

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As agreed or directed by the expert determiner, the process may involve an hearing or may be confined to written evidence and submissions.

The rules can be accessed on the [Resolution Institute website](#).

**View Resolution Institute Expert Determination Rules**

### Model clauses

Model clauses may be inserted into the contracts of parties wishing to proceed to expert determination under the Resolution Institute Expert Determination model. Sample model clauses can be found on the [Resolution Institute website](#).

#### Inserting an expert determination clause into a contract

When you enter into a contract, make sure you include a dispute resolution clause. Consider referring any dispute that may arise to expert determination, or to a series of dispute resolution types depending on the circumstances and seriousness of the dispute. If applicable, ensure that the clause refers to the appropriate Resolution Institute Dispute Resolution Rules and to Resolution Institute as the nominating body. You can access templates of dispute resolution clauses on the [Resolution Institute website](#).

**Download templates of dispute resolution clauses**

### Code of conduct

Expert determiners who conduct expert determinations under the Resolution Institute Expert Determination Rules shall at all times comply with the Rules, unless otherwise agreed with the parties.

In addition, all Resolution Institute members and staff are bound by the [Code of Ethics](#).

**View Resolution Institute Code of Ethics**



### Summary of the expert determination process under the Resolution Institute Rules

After being appointed the expert determiner normally gives notice of a time and place for a **preliminary conference** to which the parties and/or their duly authorised representatives are invited and to consider and resolve:

- (a) the issues to be determined
- (b) the conditions and basis upon which the determination is to proceed (i.e. do the Resolution Institute Expert Determination Rules 2016 or some other rules/process apply?)
- (c) effect of outcomes (final and binding, or not?)
- (d) timing and costs.

The **procedure to be adopted** is directed by the expert determiner, who may make directions and rulings as they see fit as the process progresses. This may include conducting sightings and inspections of documents, systems and sites, and interviewing relevant individuals.

The expert determiner is required to use their discretion to **manage the process efficiently**. This includes having authority to meet with and interview parties.

During the entire process, the expert determiner **keeps all parties reasonably well informed** about their activities and progress.

There are general **duties expected of the parties** in the conduct of the determination, including taking all reasonable steps necessary for the proper, expeditious and effective conduct of the process.

The **determination** is provided in writing, as soon as reasonably practicable after receiving all available and agreed evidentiary material and submissions. The determination includes reasons given in appropriate form, having regard to the amount and complexity of the dispute and especially the needs of the losing party to help them understand why they lost.

Usually, each party is responsible for their own **costs of participation** in the process. The parties are jointly and severally liable for the costs of the expert determiner (i.e. paying in equal shares), unless otherwise agreed.

There are usually preclusions about involving the expert determiner in any **subsequent proceedings and the use of any papers** produced by the expert determiner (other than the determination). This can all be modified by agreement at the start of the process.

# Looking for an expert determiner?

## Find your own expert determiner

### Resolution Institute dispute resolver directories

Resolution Institute has a wide range of trained and accredited expert determiners who can assist in the resolution of matters. A list of expert determiners operating in Australia and Aotearoa New Zealand is available on the [Resolution Institute website](#).

As the most renowned dispute resolution organisation in Australia and Aotearoa New Zealand, Resolution Institute dispute resolver directories help you select a professional expert determiner from a wide and diverse pool. You can filter your search by accreditation, additional skills, areas of practice and the specific regions where expert determiners operate.

There is no fee to search the directories.

**Search the Resolution Institute dispute resolution directories**

## Let us find an expert determiner for you

### Resolution Institute Nomination Service

Resolution Institute may act as an appointing body, similar to an Authorised Nominating Authority under various legislative regimes, or as provided in the contractual agreement of the parties.

Through these arrangements, we act as an independent, impartial and neutral third-party organisation required to nominate an appropriate expert determiner. In doing so, Resolution Institute draws on its broad and multidisciplinary member base, including expert determiners within the legal sector and those with technical or specialised expertise.

Resolution Institute will only appoint expert determiners from our accredited register. We carefully consider the type of dispute, experience and knowledge required, accreditations or qualifications, location, languages spoken, and other profession or experience to nominate an expert determiner to resolve your dispute – also see ‘Considerations when appointing an expert determiner’ on the [following page](#).

If you wish to use our nomination service, complete the [online form](#) on the Resolution Institute website and [submit your payment](#).

**Complete the online nomination form**



### Considerations when appointing an expert determiner

On receipt of a nomination application, Resolution Institute will appoint an expert determiner with consideration for:

- the provision of a high quality, timely, efficient, and cost-appropriate service
- the type and nature of the dispute
- the specific requirements of the parties to the dispute
- any legislative and/or contractual requirements
- the appointment of an expert determiner with appropriate experience, standing in the community, qualifications, current accreditation, professional membership of Resolution Institute and standing within the relevant peer group
- availability of the expert determiner to conduct and complete the expert determination process in a timely way
- any conflict of interests of potential expert determiners
- the reputation of the expert determiner and past experiences with that expert determiner (either positive or negative)
- past contribution and service of the expert determiner to Resolution Institute
- diversity considerations, including, but not limited to gender, age, experience and qualifications, and cultural background.



### Helpful tips

**Make sure you are thoroughly prepared to present your case in a manner that is both efficient and courteous to the expert determiner and the opposing party:**

- Prior to the expert determination, gather all relevant evidence and witnesses, prepare submissions and witness statements, and collate copies of documents or supporting material.
- Please be both punctual and mindful of the effects of delays. Attempt to attend all hearings, and if an adjournment is required be sure to seek this as soon as possible.
- Please observe any instructions given to you by the expert determiner or Resolution Institute and read any directions or communications carefully.

### The nomination process explained

#### 1 Initial review of application

For each nomination application, the Nomination Services Officer completes a compliance check of the application, considering a core set of factors and other features unique to the circumstances of the dispute. These include the technical nature of the dispute, jurisdiction, quantum of claim, the qualifications, experience, and expertise required, as well as the specific requirements of the applicant and the parties.

#### 2 Consideration and recommendation/shortlisting

Following the initial review, a summary is prepared setting out the key details and compliance criteria of the matter, including a shortlist of expert determiners.

Formulation of this shortlist requires the Nomination Services Officer to assess the appropriate experience, reputation, standing, accreditation and qualifications of the available professional members matching these to the criteria as set out in the application.

In circumstances where a member cannot be identified to match the criteria and requirements of the application, the Nomination Services Officer will discuss with both the Chief Executive Officer and the Chief Finance Officer to find an alternative for consideration.

#### 3 Appointment

The Chair of Resolution Institute will nominate a candidate from the shortlist of potential expert determiners.

Following nomination by the Chair, the Nomination Services Officer will contact the nominee, assess their availability to accept the matter, and discuss in general the nature of the dispute and the relevant fees.

#### 4 Post appointment

After Resolution Institute issues a Notice of Nomination to the parties, the expert determiner liaises directly with the parties to enter a formal engagement. The Nomination Services Officer will manage and administer the matter on an ongoing basis, checking to completion status of the matter until the Notice of Completion is returned and the Nomination Fee is invoiced.

### What are the fees?

#### Resolution Institute services

There is no fee to search the Resolution Institute dispute resolver directories.

Resolution Institute charges \$1,100 (including GST) to nominate an expert determiner.

#### Expert determiner services

Expert determiners typically charge between \$250–\$500 (excluding GST) per hour, depending on their areas and level of expertise, and the complexity of the issues in dispute.

To provide greater certainty to the parties, some experts provide a fixed/capped fee estimate for their entire process costs to finalisation of their decision, based on their assessment of process requirements at the preliminary conference.

A multitude of factors can affect the costs of an expert determination, including:

- the complexity of the dispute
- the process required by the parties and/or by the expert determiner
- urgency
- anticipated timeframe
- the number and frequency of meetings between the parties, the expert, and any others involved in the process.

Lower value matters often entail substantial work, especially where one or more parties are self-represented, and/or the expert determiner liaises with additional parties.

It is often not possible to provide exact pricing prior to the commencement of an expert determination. Resolution Institute and its members are mindful of costs and will make choices early on to help tailor the service to the needs of the parties. Experts are encouraged to set reasonably low fixed fees for low value disputes.

The costs of the expert determination process are either shared by the parties under the terms of their contract or agreement, or allocated by the expert determiner based on the outcomes of the process. The parties usually bear their own supplementary costs (e.g. legal costs), although this can also be modified at the start of the process.

# Accreditation

Expert determination accreditation gives experienced practitioners a recognised qualification that demonstrates they meet stringent training and competence standards and are committed to continuous professional development.

Resolution Institute is the only professional body across Australia and New Zealand that has a formal accreditation for expert determiners. This gives our members and disputing parties the confidence in the skills, expertise and competence of those experts on the register who hold this accreditation.



## How do I become an expert determiner?

To become an accredited expert determiner, you must complete a training course, complete pupillage or professional development, and be assessed by a panel of peers. The requirements are set out in the Resolution Institute Expert Determination Policy which can be downloaded from the [Resolution Institute website](#).



## I am an expert determiner – how do I remain accredited?

To maintain your accreditation and registration as an expert determiner, you must be a member of Resolution Institute, meet regular Continuing Professional Development (CPD) requirements, and meet masterclass requirements. This is reviewed for compliance every three years by the Resolution Institute accreditations team: you need to meet CPD requirements as set out in the Expert Determination Policy (a minimum of 15 hours in a three-year period).

More information can be found on the [Resolution Institute website](#).



# Next steps

Whether you are ready to move forward with your expert determination or still have questions about the process, Resolution Institute is happy to assist.

Regardless of the urgency of the matter, it is crucial to contact us as early as possible to ensure your matter progresses as efficiently as possible. Among other matters, during your initial enquiry our team may go through the respective benefits of each dispute resolution pathway at the inquiry level prior to confirming expert determination as the appropriate way to resolve the dispute.

We aim to respond to all enquiries within two to three business days. If you need an immediate response or simply prefer to talk, please don't hesitate to call us instead.

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