

RESOLUTION INSTITUTE EXPERT DETERMINATION GUIDE including EXPERT DETERMINATION RULES 2024

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EXPERT DETERMINATION GUIDE

About Resolution Institute

Resolution Institute is the leading organisation for dispute resolution professionals in Australasia. It is the successor organisation to the Institute of Arbitrators Australia (IAA), the Institute of Arbitrators and Mediators Australia (IAMA) and LEADR.

Expert determination

Expert determination offers a fast and efficient means of resolving disputes between two or more parties leading to a determination made by an independent Expert Determiner. The process can be readily adopted by parties to a contract or dispute. Determinations can be readily enforced through the Courts.

This Guide

This guide is designed to assist parties to conduct an efficient cost-effective dispute resolution process, and comprises the following documents:

- Model Expert Determination Agreement;
- Model Expert Retainer;
- Resolution Institute Expert Determination Rules 2024; and
- Expert Determination Process.

Parties should consider whether the documents included in this guide suit their situation.

Expert determination agreement

The parties must specifically agree that expert determination will apply to the resolution of a dispute.

Before a dispute arises

The parties can choose expert determination before a dispute arises. Often, parties include a dispute resolution clause in their contract. This can lead to a more efficient and less acrimonious resolution if a dispute arises.

The Resolution Institute Board adopted the following model expert determination clause on 15 October 2024:

Any dispute arising out of or in connection with this contract is to be finally resolved by expert determination in accordance with the Resolution Institute Expert Determination Rules 2024.

After a dispute has arisen:

If there is no prior expert determination agreement, the parties can agree to use expert determination to resolve a dispute after it has arisen. However, they must make a specific agreement to do so. The Resolution Institute Model Expert Determination Agreement is set out at page 7 and can be used.

Expert determiner retainer

Most expert determiners will require the parties to enter into a retainer agreement that sets out the terms and conditions of their appointment.

The Resolution Institute's Model Expert Determiner Retainer for that purpose appears at pages 7 to 8.

Resolution Institute Expert Determination Rules 2024

Expert determination rules provide a detailed framework for the conduct of an expert determination process and facilitate mechanical and administrative aspects of the process.

On 15 October 2024, the Board of Resolution Institute resolved that where an expert determination agreement incorporates the Resolution Institute Expert Determination Rules, the *Resolution Institute Expert Determination Rules 2024* will apply. These Rules are at pages 9 to 14 of this Guide.

In agreements made before 15 October 2024, parties may have referred to prior expert determination rules made by Resolution Institute or its predecessor organisations. These include:

The Resolution Institute Expert Determination Rules (effective 3 August 2016).

The IAMA Expert Determination Rules 2010 (effective 18 October 2010).

The IAMA Expert Determination Rules 2001 (effective 22 November 2001).

These rules will continue to apply where specified in agreements made before 15 October 2024.

Directions

An expert determiner will generally make directions setting out the process for the conduct of the determination at an early stage of the process.

A sample set of directions that can be used by the determiner or adopted by the parties are found at page 15.

Selecting the Expert Determiner and the Role of the Resolution Institute

The Resolution Institute Expert Determination Rules state that the Parties may agree on the identity of the expert determiner.

If the Parties do not agree upon the expert determiner, then on request the Resolution Institute will nominate one. Resolution Institute does not provide an administration service for the conduct of the expert determination.

Resolution Institute's nominees are usually drawn from its professional panel of accredited expert determiners. These expert determiners have passed a rigorous qualification process, must undertake annual CPD requirements, must complete a triennial masterclass, are bound to the Resolution Institute's ethical code and are subject to the Resolution Institute complaints procedures.

The Resolution Institute panel of accredited expert determiners is on the Resolution Institute website. Parties are encouraged to agree upon a Resolution Institute-accredited expert determiner.

Disclaimer

Parties must consider whether the documents provided in this Guide suit their particular circumstances. Resolution Institute makes no representation or warranty that the documents suit parties' specific circumstances.

MODEL EXPERT DETERMINATION AGREEMENT¹

PARTY A:

ACN/ABN

Signed for Party A: Date:

by Name: Position:

PARTY B:

ACN/ABN

Signed for Party B: Date:

by Name: Position:

The Parties agree to refer the **Dispute** between them to expert determination under the Resolution Institute Expert Determination Rules 2024, subject to any **Special Conditions** set out below.

Dispute²

.....
.....
.....

Special Conditions:³

The Expert Determination Process⁴ will apply: Yes/No.

.....
.....
.....

¹ This model agreement may be used where the parties have not previously entered into an expert determination agreement or intend to amend a previous expert determination agreement. Parties should ensure that it is appropriate for their particular circumstances.

² Accurately describe the dispute to be decided by expert determination. The dispute may be defined by reference to documents exchanged between the parties.

³ Special conditions or terms that amend or expand the Resolution Institute Expert Determination Rules 2024 or amend any previous expert determination agreement.

⁴ See last page of Expert Determination Rules.

MODEL EXPERT DETERMINER RETAINER⁵

EXPERT DETERMINER:

Signed by Expert Determiner: Date:

The Expert Determiner agrees to determine the **Dispute** between the **Parties**, under the Resolution Institute Expert Determination Rules 2024, on the terms and conditions set out below.

PARTY A:

ACN/ABN

Signed for Party A: Date:

by Name: Position:

PARTY B:

ACN/ABN

Signed for Party A: Date:

by Name: Position:

Dispute⁶

.....
.....
.....

Special Conditions:⁷

The Expert Determination Process will apply: Yes/No.

.....
.....
.....

Expert's Fees and Expenses

The parties must pay the Expert Determiner in equal shares:

- (a) fees for all time spent at the hourly rate of inclusive of GST, and
- (b) reimburse any expenses incurred.

⁵ This model agreement between the parties and the Expert Determine may be used to set out the basis on which the Expert Determiner is to carry out the expert determination process. The parties and the Expert Determiner should ensure that it is appropriate for their particular circumstances.

⁶ Accurately describe the dispute to be decided by expert determination. The dispute may be defined by reference to documents exchanged between the parties.

⁷ Special Conditions may include specific agreements the parties have made about the procedure to be followed.

Security for the Expert Determiner's fees and expenses must be deposited to:

Releases

Except in the case of fraud, neither the Expert Determiner nor Resolution Institute, its members, officers, servants or agents is liable for the Determination or any decision made or any action taken or for failing to make the Determination or any decision or act, whether negligently or otherwise.

Except in the case of fraud, the parties jointly and severally release and indemnify and keep indemnified the Expert Determiner and Resolution Institute against all actions, suits, proceedings, disputes, differences, accounts, claims, demands, costs, expenses, and damages of any kind whatsoever including, but not limited to, defamation, bias or other misconduct, whether a cause of action or claims arise:

- (a) under or in connection with the agreement;
- (b) in tort for negligence, negligent advice or otherwise;
- (c) otherwise at law (including statute to the extent it is possible to release, exclude or indemnify) and in equity generally, including without limitation for restitution for unjust enrichment, or
- (d) arising out of, or in connection with, the expert determination process or the Determination.

RESOLUTION INSTITUTE EXPERT DETERMINATION RULES 2024

Part A – Introduction

1 Adoption of Rules by Resolution Institute

These Rules are the **Resolution Institute Expert Determination Rules 2024**.

On 15 October 2024, (**Commencement Date**) the Board of Resolution Institute resolved that where an agreement made on or after that date refers to the Expert Determination Rules of Resolution Institute, the Institute of Arbitrators Australia, or the Institute of Arbitrators and Mediators Australia, these Rules will apply.

Part B – Application of these Rules

2 Agreement made after 15 October 2024 to Expert Determination Rules

Where parties make an agreement *on or after the Commencement Date* that disputes are to be referred to expert determination under or in accordance with Expert Determination Rules of:

- (a) Resolution Institute;
- (b) The Institute of Arbitrators Australia; or
- (c) The Institute of Arbitrators and Mediators Australia (IAMA),

or words to similar effect, then these Rules apply.

Such an agreement may form part of a larger agreement or may be a specific reference after a dispute has arisen. The parties may adapt the Resolution Institute's Model Expert Determination Agreement for this purpose.

3 Agreement prior to the Commencement Date

Where the parties agreed, *prior to the Commencement Date* that disputes are to be referred to expert determination under or in accordance with:

- (a) the Resolution Institute Expert Determination Rules; or
- (b) the IAMA Expert Determination Rules,

or words to similar effect, then the dispute must be determined under the Rules in force when that agreement was made.

Part C – General

4 Not arbitration

The expert determination process is not an arbitration within the meaning of any statute or at common law.

5 Legal representation

Each party may be legally represented or assisted by any person.

6 Waiver of jurisdictional challenge

If a party fails to apply to the Expert Determiner in writing within 14 days after becoming aware of the grounds of any challenge, or within 14 days after those grounds should have reasonably become known, by that party, claiming that:

- (a) the Expert Determiner lacks jurisdiction;
- (b) the process is not in accordance the parties' agreement or otherwise has been improperly conducted;
- (c) there is a real danger of bias on the part of the Expert Determiner; or
- (d) there is any other irregularity affecting the Expert Determiner or the Process,

then that party will be considered to have waived any right to raise that challenge before the Expert Determiner or a court. The Expert Determiner is to consider and rule upon any such challenge under this clause as soon as practical.

7 Parties to do all things necessary

The parties must do all things reasonably necessary for the proper, expeditious and cost-effective conduct of the expert determination, including, but not limited to:

- (a) attending all procedural conferences either personally or by a representative with authority to bind the party, and
- (b) complying with all directions made by the Expert Determiner.

8 Disclosure of communications

All notices or documents may be given by the parties or the Expert Determiner by hand or by email to the addresses notified in writing by the party or the Expert Determiner.

All communications to the Expert Determiner by any party must be communicated by that party to all other parties at the same time.

All communications from the Expert Determiner to a party must be copied to all parties at the same time.

9 Confidentiality

The parties, the Expert Determiner and the Resolution Institute must keep confidential the existence of the expert determination, all directions, the Determination, all documents created for the expert determination and all documents produced by any other party in the expert determination not otherwise in the public domain.

The obligation of confidentiality does not apply to the extent that disclosure may be required by law, to pursue a legal right or to enforce or challenge the Determination.

Part D – The Expert Determiner

10 Identity of the Expert Determiner

The expert determination must be conducted by a person who accepts appointment as the Expert Determiner as:

- (a) agreed by the parties; or
- (b) nominated by the Chair of Resolution Institute.

11 Agreement

The parties may agree on the identity of the Expert Determiner.

12 Nomination

If the parties have not agreed on the identity of the Expert Determiner within 14 days of either party proposing the identity of a person to act as Expert Determiner, then either party may apply to Resolution Institute to nominate an Expert Determiner. Resolution Institute must promptly nominate an Expert Determiner and inform the parties and the nominee.

13 Expert's conditions, fees disclosure

Where an Expert Determiner agrees to determine the dispute, the Expert Determiner and the parties must execute an expert determination agreement.

The proposed or nominated Expert Determiner must promptly provide a proposed Expert Determination Agreement to the parties, which may, but need not, be in the form of Resolution Institute's Model Expert Determiner Retainer. A party must not refuse to sign an agreement proposed by an agreed or nominated Expert Determiner, which is not unreasonable.

The expert determination commences on the date on which the Expert Determiner accepts an appointment.

14 Disclosure

When a person is approached in connection with a possible nomination or appointment as an Expert Determiner, that person must disclose any circumstances likely to give rise to a real danger of bias.

After appointment, the Expert Determiner has an ongoing duty to disclose such circumstances to the parties.

15 Incapacity of the Expert Determiner

If an Expert Determiner cannot make a determination within a reasonable time as a result of sickness, incapacity or fresh circumstances giving rise to a real danger of bias, the Expert Determiner must withdraw and may, upon request, return all documents to the party that provided them.

If an Expert Determiner withdraws from a process:

- (a) the Expert Determiner is entitled to be paid for any time spent or work done up to the time of notifying the parties of the withdrawal in writing;
- (b) Part E continues to apply; and
- (c) the parties may agree on the identity of the replacement Expert Determiner, or the Resolution Institute will nominate the replacement.

Part E – Exclusion of liability

16 Expert not liable

Except in the case of fraud, the Expert Determiner is not liable to any party upon any cause of action whatsoever for anything done or omitted to be done by the Expert Determiner, whether a negligent act or omission or otherwise.

17 Resolution Institute not liable

Except in the case of fraud, neither Resolution Institute nor its members, officers, servants or agents are liable for any decision made or any action taken or for failing to make any decision or failing to act.

18 Release and indemnity

Except in the case of fraud, the parties jointly and severally release and indemnify and keep indemnified the Expert Determiner and Resolution Institute against all actions, suits, proceedings, disputes, differences, accounts, claims, demands, costs, expenses, and damages of any kind whatsoever

including, but not limited to, defamation, bias or other misconduct, whether a cause of action or claims arise:

- (a) under or in connection with the agreement;
- (b) in tort for negligence, negligent advice or otherwise;
- (c) otherwise at law (including statute to the extent it is possible to release, exclude or indemnify) and in equity generally, including without limitation for restitution for unjust enrichment; or
- (d) arising out of, or in connection with, the expert determination process or the Determination.

Part F – Costs

19 Costs

Unless agreed to the contrary, each party must bear its own costs in relation to the expert determination and share equally the Expert Determiner's fees and expenses.

20 Security

The Expert Determiner may, at any time, require any parties to provide security for the Expert Determiner's fees and expenses, including by deposit into a nominated holding account.

21 Security – payment

The parties irrevocably authorise the Expert Determiner to draw upon the security upon provision to the parties of a tax invoice.

22 Security – proceed ex parte

If a party fails to comply with a direction to provide security, the Expert Determiner may on due notice, suspend or terminate the expert determination or dismiss the defaulting party's claims and defences and determine the Dispute.

23 Security – unequal contributions

If a party fails to comply with a direction to provide security, then the other party may provide that security.

A party may not object to the Expert Determiner continuing to conduct the expert determination on the grounds that any party has contributed a greater amount of security than any other party.

24 Final payments

After the Determination is made, the Expert Determiner may render an account to the parties setting out the deposits received, the total fees and expenses of the Expert Determiner and must direct the return of any unexpended security to the parties.

25 Lien

The Expert Determiner may withhold a Determination until all fees and expenses have been paid.

26 Joint parties

Where a number of entities jointly participate in the Expert Determination Process, the Expert Determiner may decide that they are to be treated as a single party for the purposes of this Part.

Part G – Process

27 Efficient and cost-effective

The Expert Determiner may conduct the expert determination in such manner as the Expert Determiner considers appropriate. The Expert Determiner should adopt procedures suitable to the circumstances, avoiding unnecessary delay and expense, and is to conduct an expeditious, cost-effective and fair means of determining the Dispute.

28 Basic process

The Resolution Institute’s Expert Determination Process will apply if the parties agree in writing and may be supplemented by such additional directions as the Expert Determiner considers appropriate.

29 Procedural fairness

Each party must be given a reasonable opportunity to present its case.

30 Rules of evidence

The rules of evidence do not apply to the expert determination. The Expert Determiner may determine the admissibility, relevance, materiality and weight of any material presented. The Expert Determiner may take into account their own expertise, general knowledge and skill in making the Determination.

31 Views

The Expert Determiner may direct that a view be conducted of any site or any other place or thing relevant to the Dispute.

32 Production of documents

The Expert Determiner may direct the parties to produce documents, exhibits or other things within such times as the Expert Determiner determines.

33 Oral submissions

The Expert Determiner must not conduct a meeting to hear oral submissions unless both parties agree. The expert determination does not become nor is to be treated as an arbitration because an oral hearing of submissions has taken place.

34 Proceeding ex parte

Where a party fails to make a written submission or appear at any meeting or oral proceeding after receiving due notice, the Expert Determiner may proceed with the expert determination.

35 Termination

The expert determination may be terminated only by the written agreement of the parties. Termination by the parties does not affect the Expert Determiner’s entitlement to payment or the operation of Part E.

Part H – Determinations

36 Determinations are final and binding

The Determination of the Dispute is final and binding on the parties.

37 Reasons

The Determination must be in writing, signed and dated by the Expert Determiner and must have a statement of reasons as sufficient as the Expert Determiner considers appropriate, having regard to the value and complexity of the Dispute.

38 Service of the Determinations

The Determination is to be completed as soon as reasonably practicable and sent to all parties at the same time.

39 Corrections and slips

The Expert Determiner may amend a Determination to correct any:

- (a) clerical mistake;
- (b) error from accidental slip or omission;
- (c) any miscalculation of figures or mistake in the description of any person, thing or matter; or
- (d) any defect in form.

EXPERT DETERMINATION PROCESS

The parties or the Expert Determiner may decide that the following directions shall apply.

1. Procedural conference

Unless otherwise agreed by the parties, the Expert Determiner, or nominee Expert Determiner, must convene a Procedural Conference with the parties, in person or by electronic means, to be held as soon as possible to discuss and agree upon:

- (a) the terms of the agreement between the parties and between the parties and the Expert Determiner (if not already agreed);
- (b) the Dispute, or a procedure by which the Dispute may be clearly identified and agreed;
- (c) arrangements for execution of confidentiality agreements by people participating in the Process; and
- (d) any necessary modifications to the procedure set out below.

2. Claim

The claimant must within **21** days of the date on which the Expert Determiner accepts the appointment, provide the following to each other party and to the Expert Determiner:

- (a) a statement in writing detailing the Dispute, the legal and factual issues involved, and its contentions in relation to each. Where the Dispute includes an assertion that money is payable to the claimant, the statement must identify the amount claimed;
- (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 Dispute.

3. Response

Each party other than the claimant must within a further **21** days after receipt of the claim, provide the following to each other party and to the Expert Determiner:

- (a) a statement in writing indicating whether it agrees with the claimant's written statement under paragraph 2(a), and if not, its statement of the Dispute, the legal and factual issues involved in the Dispute, and its contentions in relation to those issues. Where the Dispute includes a claim that money is payable to one or more of the parties other than the claimant, the statement of that party must identify the amount admitted to be owing (if any) or any amounts claimed by the responding party to be owing to it;
- (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 claim.

4. Reply

If the Expert Determiner agrees, a party may reply to written material served under paragraph 3, within a further **21** days after receipt of the response, by providing the following to each other party and to the Expert Determiner:

- (a) a statement in writing in reply indicating whether it agrees with the written statement under paragraph 3(a) and, if not, its reply as to the nature of the Dispute, the issues likely to arise and its contentions in relation to the same;
- (b) all documents and other evidentiary material in reply to material served under paragraph 3(b); and
- (c) its written submissions in reply to the legal and factual issues involved.

5. Timetable

Any times fixed in accordance with the foregoing process may be varied by agreement of the parties. In the absence of such agreement and on proper cause being shown by a party, the Expert Determiner may vary the times fixed on such terms as the Expert Determiner considers reasonable in the circumstances.