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CONTINUING PROFESSIONAL DEVELOPMENT PROGRAMME

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EXPERT DETERMINATIONS – ISSUES THAT ARISE

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- 1 Expert determination is an important alternative to arbitration and other forms of alternative dispute resolution. It involves the referral of specific issues in dispute to an independent expert who is selected on the basis of his or her specialist qualifications and expertise in the particular area of the dispute. Using that skill and expertise, the expert will give an opinion on the questions put to him or her and may or may not require evidence or submissions from the parties. The parties usually agree that they will be bound by the expert's opinion.
- 2 Expert determination is not to be confused with expert appraisal, where the expert investigates the dispute and then provides advice on the facts, the possible and desirable outcomes for the dispute, and ways of achieving such outcomes. An expert appraisal is not binding but may be used as the basis of a negotiated settlement.
- 3  Expert determinations are common in the construction industry. Building contracts often require an independent expert identified by his or her role (for example, architect or engineer) to determine issues such as whether work is defective.
- 4 Expert determination clauses are also common in government contracts such as defence department contracts. Energy Australia, copyright licensing societies and other organisations have expert determination procedures in place and expert determination clauses are common in private contracts, for example, joint venture agreements. A simple example of such a clause is:

If the parties are unable to resolve the dispute by the exchange of notices or conference with the Independent Person a party may require the dispute to be submitted to and settled by an independent expert consultant who is a chartered accountant in NSW employed by, Bentleys, Ernst and Young, KPMG, or PricewaterhouseCoopers. The decision of the expert will be final and binding on the parties. The expert must also determine which party or parties pays the costs of and incidental to the resolution of the dispute.
- 5 Some agreements provide that, in the absence of agreement between the parties, the expert will be appointed by the president of some industry body. Some agreements have escalating clauses, which require executive meetings, then mediation and then expert determination or arbitration. Examples of expert determination clauses can be found in the Australian Encyclopaedia of Forms & Precedents and on the websites of The Institute of Arbitrators & Mediators Australia and the Australian Commercial Disputes Centre. Both those websites also contain those organisations' rules for expert determination.

- o the parties may wish to avoid the regulation of the *Commercial Arbitration Act 1984*.
- 9 The court will enforce an agreement to resolve a dispute about factual matters, and will also enforce an agreement for expert determination of legal issues: *Triarno Pty Ltd v Triden Contractors Ltd* (1992) 10 BCL 305 per Cole J; *Horwitz Grahame Books Pty Ltd v Mid-City Centre Pty Ltd* [1991] ANZ ConvR 139; (1990) NSW ConvR 55-514, per Bryson J.
 - 10 The court has power to stay a proceeding where the parties have agreed that the dispute should be decided by an expert: *Zeke Services Pty Ltd v Traffic Technologies* [2005] 2 Qd R 563 at [19] per Chesterman J. A party opposing a stay in these circumstances has a heavy onus which can ordinarily only be discharged by showing that the dispute is not amenable to resolution by the mechanism chosen by the parties: *Zeke Services* at [21], [22]. A binding determination can be enforced by an order for specific performance or it can give rise to an action for damages: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 336.

Control of Procedures

- 11 The fact that the parties can control the procedure in an expert determination is a very important advantage that is not available in arbitrations. The parties can choose to confine the issues and they can limit costs.
- 12 The procedure to be followed must be agreed between the parties or determined by the expert. The court has no jurisdiction to determine the procedure: *Triarno Pty Ltd v Triden Contractors Ltd* (1992) 10 BCL 305 per Cole J. In *Triarno*, it was held that, if the parties have not agreed the procedure, the court cannot fill the void and there is no implied term that the court will determine the procedure.
- 13 In *APM Group (Aust) Pty Ltd v Galwin Pty Ltd* [2006] VSC 325, Hansen J dealt with the question whether the expert could extend the time for delivering his determination without the prior agreement of the parties and, in a more general sense, whether the expert has the power to decide the procedure for determination without the agreement of the parties. While the parties had agreed to a timetable for the delivery of the expert determination, the expert determination agreement permitted an extension of time to be determined by the expert 'in conjunction with' the parties. Hansen J rejected the argument that any extension required prior mutual agreement of the parties, relying on the use of the words 'in conjunction with'.
- 14 In *M1 v L1* [2007] NSWSC 346, a dispute that had arisen in relation to management services provided by the plaintiff to the defendant, a international financial group parties was mediated by Trevor Morling QC. The matter settled at mediation and the settlement deed included a clause providing for referral of disputes to a 'Wise Man', RJ Ellicott QC – an interesting use of two ADR techniques. This combination of mediation and expert determination and also be reversed – I have been involved in expert determinations which have transformed into mediations.
- 15 The issue before Einstein J was whether the Wise Man had made his decision acting as an expert or an arbitrator. Einstein J took the view that the fact that the parties had decided upon the procedures for resolving the dispute was inconsistent with an intention to submit to arbitration. Also, the deed required confidentiality and Einstein J thought arbitration might compromise the confidentiality of the dispute.

Other Aspects of Expert Determinations

Pty Ltd (formerly TXU Networks (Gas) Pty Ltd (2006) Aust Contract R 90-241; [2006] VSCA 173.

- 24 In *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587, Barrett J said at [35]:

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

- 25 While there is no requirement that an expert give reasons, if the expert determination agreement in fact requires reasons, the court may order an expert to give reasons or give further reasons. In a 2007 United Kingdom decision, *Halifax Life Ltd v Equitable Life Assurance Society* [2007] 2 All E.R. (Comm) 672; [2007] 1 Lloyd's Rep. 528, the claimant had agreed to reinsure the defendant's business and an expert was appointed to determine the precise value of the premium payable. Importantly, the expert determination agreement provided that the expert would give reasons for his decision. Cresswell J found that the reasons given by an expert were deficient, failed to address the areas of concern raised by the parties, and failed to indicate the extent to which he had checked the underlying figures if such figures were not agreed. His honour declined to find that the determination was not binding and directed the expert to state further reasons.

Does the expert determination agreement oust the jurisdiction of the court?

- 26 The issue of whether an expert determination agreement ousts the jurisdiction of the court has been considered in a number of decisions. In *Fletcher Construction Australia Limited v MPN Group Pty Ltd* (unreported, NSWSC 14 July BC9705205), Rolfe J said at 18 that an expert determination clause



does not purport to oust the jurisdiction of the Court. It is an agreement between the parties that the specified disputes shall be determined by an expert. There is nothing unusual about such a provision and parties are held to their bargain if they agree to such a clause.

Nor is there anything unusual about the clause providing that the expert's decision shall be "final and binding" or "conclusive", and provisions such as that do not oust the jurisdiction of the Court. The effect of the clause is to make the decision of the expert final and binding provided the matters referred to him are ones which the agreement contemplates. The expert's decision is, however, susceptible of attack in a Court if there is a failure to comply with the contract or there is some vitiating factor relevant to the decision.

- 27 In *Straits Exploration (Australia) Pty Ltd v Murchison United NL* (2005) 31 WAR 187, Wheeler J said

*[15] The effect of a valid expert determination clause, however, is not to oust the jurisdiction of the court, but to limit, in some circumstances, the matters which the court can consider. Prior to the conclusion of the expert determination procedure — that is, prior to the making of a determination — any party to a contract containing such a clause remains free to sue upon the contract, unless the contract itself makes compliance with some form of dispute resolution procedure a condition precedent to the enforcement of rights under the contract. In relation to the latter type of contract, the effect of the clause is not to invalidate an action brought in breach of it, but to provide a defence and to "postpone" but "not annihilate the right of access to the Court" (*Freshwater v Western Australian Assurance Co Ltd* [1933] 1 KB 515 at 523 per Lord Hanworth MR).*

- (d) the use of the term 'arbitrator' is not determinative: *Edmund Barton Chambers (Level 44) Co-op Ltd v MLC Assurance Co Ltd* [1983-84] ANZ ConvR 544; (1984) NSW ConvR 55-177 per Moffitt P; see also *Thomas Cook Pty Ltd v Commonwealth Banking Corporation* (1986) 4 BPR 9185; [1986] ANZ ConvR 598; (1986) NSW ConvR 55-286
- (e) the absence of the words 'expert determination' does not make the expert an arbitrator: *M1 v L1* [2007] NSWSC 346, Einstein J.

The expert determination agreement

- 33 When drafting or settling an expert determination agreement, it is useful to consider the following:
- o clear identification of the particular questions to be dealt with and whether they are all within the expertise of the appointed expert;
 - o the consequences of the expert's decision;
 - o the process of the determination;
 - o what happens if the expert dies or is unable or unwilling to give a decision;
 - o where the expert determination will deal with issues involving money, whether the decision of the expert should create a debt which be sued upon as a liquidated demand;
 - o the time by which the expert should be required to give an opinion;
 - o the circumstances in which the expert determination may be reviewed by the court;
 - o the nature, timing and length of any submissions to be made or evidence to be given, and whether there should be a right of reply;
 - o whether the parties should appear before the expert to give submissions or evidence;
 - o whether any evidence is to be verified by statutory declaration
 - o whether the expert should have a discretion to vary any agreed timetable; and
 - o whether the expert should give reasons for his or her decision.

Expert determinations ordered by the court

- 34 The courts are empowered to refer questions to an expert for consideration: See Pt 31, Div 2, Subdiv 5 of the Uniform Civil Procedure Rules 2005 (NSW).

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THE INSTITUTE *of* ARBITRATORS & MEDIATORS AUSTRALIA
ACN 008 520 045
ARBITRATORS • MEDIATORS • CONCILIATORS

EXPERT DETERMINATION RULES

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 I

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:

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 advisers 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.

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
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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

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.

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 (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;
 - 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 2a 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.

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 2c and 2d of Rule 9.
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.