

## Collaborative Expert Resolution

In addition to providing the services of an arbitration centre, PCERA will make arrangements for a combined expert determination of any commercial dispute. The assessment may be undertaken on a binding or non-binding basis.

PCERA will maintain a panel of expert legal assessors with substantial experience in commercial disputes and their resolution. In appropriate cases, they may be assisted by industry experts.

The process for collaborative expert resolution (CER) involves 5 steps: agreement, appointment, consultation, conferral and determination (as set out in more detail below).

The CER process provides a means by which disputes can be resolved quickly and at much less cost than court litigation or arbitration. The process facilitates informal disclosure by each party to an independent expert. The experts for each party then meet to consider the likely outcome if the case went to court. As the experts are all retired judges or practising senior counsel they have a wealth of experience in identifying the likely outcome if the case was formally adjudicated by a judge or an arbitrator.

It is the common experience of senior practitioners involved in dispute resolution that the outcome when cases are adjudicated after a trial or hearing tends either to fall within a range of outcomes identified by independent counsel quite early in the litigation or to depend upon the answer to one or two points of principle that are identified at an early stage. Resolving disputes often involves great time and expense in closing the gap in the range of outcomes or putting off the time when the critical points of principle are ruled upon.

The combined expert determination procedure exposes at a very early stage the range of outcomes or the points of principle and provides a reasoned answer from leading experts at a fraction of the cost of a court trial or an arbitration. By using the CER process, the parties can save substantial legal costs as well as the time and distraction which comes with a drawn-out dispute. The process also enables ongoing working or contractual relationships to be maintained more effectively.

Once appointed, the experts are committed to reaching a common view. However, the advantage of the process over a single expert procedure is that each assessor can engage in a discussion with a particular party and then bring the perspective of that party to the final assessment process. Even so, ultimately the outcome of the process is an independent assessment. Once appointed, the experts will not act for any party in respect of the subject matter of the dispute outside the CER process.

The 5 steps in the CER process are as follows.

**First**, *agreement between the parties* to submit their dispute to CER. PCERA has a standard form agreement by which a dispute may be submitted to CER by PCERA appointed experts. The parties must describe in general terms the nature of the dispute and the outcome for which each party contends.

**Second**, the *appointment of expert assessors*. The number of expert assessors appointed will equal the number of parties. The parties may choose the panel from which the assessors will be appointed. An assessor is then allocated randomly to a particular party by PCERA. If no panel is nominated then PCERA will make the appointments from its panel. Assessors will make disclosure of matters relevant to conflict of interest. A party may request PCERA to appoint a replacement expert on the grounds of conflict of interest. If satisfied that there is a proper objection PCERA will appoint a replacement.

**Third**, each expert will undertake *a process of confidential consultation* with one of the parties to the dispute. To assist in this process the expert will usually receive a written brief from the legal representatives for the party and then meet in conference. The expert will make inquiries and may meet with key people, including any critical witnesses.

**Fourth**, the experts will meet together to undertake *a process of private conferral*. The experts undertake a frank and objective review of the subject matter of the dispute. They will review together the applicable legal principles and consider how key factual disputes may be resolved. If an issue requiring particular non-legal expertise is identified then after discussion with the parties the assessors may decide to engage an appropriate non-legal expert. After conferral, the experts may repeat the consultation process if further information is required. Then they will repeat the conferral process.

**Fifth**, the experts will produce *a joint agreed statement* as to their assessment of the likely determination by the courts if the matter was litigated. The statement will be provided to all parties. It will only contain the views of the experts and will state the main issues and the way the experts believe they will be resolved. The statement will address legal issues and will only address factual issues to the extent necessary to identify key matters in dispute. If the assessment has been undertaken on a non-binding basis then the statement will be subject to without prejudice privilege. If the assessment has been undertaken on a binding basis then the lawyers for each party may provide a short written response to the assessment within a time specified by the assessors and then the assessors will issue their final and binding determination.

Assessors will be appointed on terms that exclude liability and prevent the experts being called by any party as a witness. Standard terms of appointment are published by PCERA. A binding assessment may only be set aside on the grounds of fraud.

There is a further option available as part of the CER process which can be included where the dispute relates to the quantum of a money claim. If the parties agree to select this option then each party must state at the outset a single amount for which that party contends. The experts must pick one of the two amounts as the binding outcome. This process encourages parties to be reasonable in their assessments whilst also being able to participate in a process where there is discussion with the expert assessors as to the reasons why their proposed figure should be selected as the binding outcome. This process is not used for non-binding determinations.