



DISPUTE BOARD CONCEPTS INTERNATIONALLY – DIVERGENCE OR CONVERGENCE – AUSTRALASIAN PERSPECTIVE

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Australian Construction Industry Background

For the size of the country in terms of population (22 million), the Australian Construction Industry punches well above its weight.

According to the Australian Bureau of Statistics, the value of all non-residential construction work in Australia for the year ending December 2011 was \$140 billion.

Some other statistics:

- There is currently estimated to be a backlog of infrastructure projects in Australia valued at \$770 billion.
- As a result of the natural disasters which occurred along the eastern seaboard in 2011, it is estimated that there will be \$5.6 billion in direct costs to the Federal Government alone, the costs of rebuilding Queensland will be approximately \$3.9 billion and the costs of rebuilding other flood-affected areas will be \$1.0 billion.
- At the end of April 2011, there were 94 energy and resources projects at an advanced stage of development, with a record capital expenditure of \$173.5 billion. This represents a 31% increase from October 2010.
- In 2010/2011, exploration expenditure in Australia's minerals and energy sector is estimated to be \$5.9 billion, broadly similar to expenditure in 2009/10.
- New capital expenditure in the mining industry is estimated to be \$55.5 billion in 2010/2011, 53% higher than 2009/10.
- 81% of engineering construction was undertaken by the private sector and only 19% by direct labour employed by public sector instrumentalities.
- The Australian Construction Industry employs approximately 1 million people (some 10% of the total Australian workforce).

Engineering and construction projects consist primarily of:

- Transport;
- Mining;
- Heavy industry;
- Commercial and industrial buildings;
- Utilities;
- Social infrastructure

Apart from the mining sector, the primary source of engineering and construction work is the public sector.

Australian Dispute Resolution Background

Prior to the introduction of Dispute Resolution Boards (**DRBs**) or Dispute Boards (**DBs**) in Australia in 2003, arbitration, expert determination and mediation were the



most common forms of dispute resolution utilised in construction projects. All of these dispute resolution processes are retrospective, that is, they are brought to bear after a dispute has manifested itself.

According to a BDW/ACA survey in 2006 on disputes in the construction industry:

- fewer than 40% of all projects had no disputes;
- disputes were present on approximately \$8 billion spent on construction projects;
- the causes of disputation, from most prevalent to the least prevalent were variations to scope of works, contract interpretation, EOT claims, site conditions, late/incomplete/substandard information, obtaining approvals, site access, quality of design and availability of resources;
- the most common forms of dispute resolution were project level negotiation (72%) and executive negotiation (59%);
- satisfaction with dispute resolution processes was reported as low and satisfaction fell when dispute arose in contracts of larger value.
- 25% satisfaction reported in the \$20-\$50 million range projects and 9% satisfaction for projects worth \$200-\$500 million.

Previous dispute resolution processes have met with high levels of dissatisfaction by those utilising them. This dissatisfaction increases with the greater the size and scope of the project.

The traditional dispute resolution processes (mediation, other forms of ADR, arbitration, litigation and expert determination) are all reactive in nature – that is, their focus has been on resolving disputation, not avoiding it.

Any third party expert determination (including arbitration and litigation) would be referred to an expert or referee who would have had no prior knowledge of the issues and the issues, facts and evidence would have to be fully ventilated before that determiner.

During the 1990s and 2000s, there was explosive growth in the use of Alliances which, by definition, involved the “no blame/no dispute” philosophy.

However, Treasury officials in the east coast states of Australia (whether properly informed or not), have appeared to embrace the philosophy that Alliances did not provide value for money in all instances and have generally discouraged their central agencies and statutory corporations from using Alliances for major projects.

Since the establishment of the DRBA in 2003, there has been a focus on keeping records of the numbers of projects using DRBs, the values of those projects and the disputation outcomes. These are set out in the following table:



AUSTRALIA

DRBs comprised 3 Independent parties except where noted otherwise

DRBA No	Project Name	Type	City	State	Start Year	Finish Year	Owner / Principal	Contractor	Contract Value nearest AUD\$10m
1	Sydney Ocean Outfall Tunnels (3 No.)	Construct only	Sydney	NSW	1987	1991	Sydney Metropolitan Water, Sewerage & Drainage Board	Phillip Holzman- John Holland JV	\$320m
2	Warragamba Dam Upgrade	Construct only	Sydney vicinity	NSW	1988	1990	Sydney Metropolitan Water, Sewerage & Drainage Board	Concrete Constructions	\$22m
			This DRB had nominated parties as Senior executives of Contractor & Client; Chairman independent. All issues resolved within the DRB but biggest single issue left to the Chairman to give a binding decision. No carry over from DRB.						
3	Sydney Airport, Third / Parallel Runway	D & C	Sydney	NSW	1988	1991	Federal Airports Corporation	Bilfinger+Berger-Baulderstone Hornbrook JV	\$100m approx
			This DRB also had nominated parties as Senior executives of Contractor & Client; Chairman independent. All issues resolved within the DRB.						
4	Dandelup Dam	Construct only	Perth vicinity	WA	1991	1993	WA Water Authority	McMahon Construction	\$35m
5	Sydney International Terminal Upgrade (SA2000)	D & C	Sydney	NSW	1998	2000	Sydney Airports Corporation Ltd	Bovis Lend Lease	\$105M
			The Project had an Audit Committee with nominated parties as Senior Executives of the contractor and the client with an independent Chairman. All issues resolved within the Project Audit Committee.						
6	Harvey Dam	Construct only	Perth vicinity	WA	2000	2002	Water Corporation of WA	Leighton Contractors	\$50m
7	Burrup Fertilisers Liquid Anhydrous Ammonia Production Plant Project	EPC	Burrup Peninsular	WA	2002	2003	Burrup Fertilisers Pty Limited	SNC – Lavalin (S.A.) Inc	\$unknown
8	Ross River Dam	Semi Alliance / Construct only	Townsville	QLD	2006	2008	North Queensland Water	John Holland / McMahon Joint Venture	\$94M
9	Ipswich Road / Logan Motorway Interchange	D & C	Brisbane	QLD	2006	2009	Queensland Main Roads	Leighton Contractors	\$240M
10	Gateway Arterial Upgrade	D,C&M	Brisbane	QLD	Nov-06	Dec-10	Queensland Motorways Ltd	Leighton Contractors / Abigroup Joint Venture	\$1,500M



11	City West Cable Tunnel	Construct only	Sydney	NSW	2007	2009	Energy Australia	Thiess Contractors Pty Ltd	\$70M
12	Sydney Desalination Plant	DBOM	Sydney	NSW	2007	Mar-10	Sydney Water Corporation	Blue Water Joint Venture	\$1,003 M
13	Port Botany Expansion Project	D & C	Sydney	NSW	2008	Mar-11	Sydney Ports Corporation	Baulderstone Hornibrook~Jan de Nul JV	\$560M
14	Adelaide Desalination Project (2 contracts)	DBOM, Plant	Adelaide	SA	Apr-09	Dec-11	SA Water Corporation	Adelaide Aqua Consortium, Plant	\$1,824M combined value of plant & TPS
		D & C, Transfer Pipeline System						MDBE JV, Transfer Pipeline	
15	Townsville Waste Water Upgrade Program	Competitive ECI, Construct only	Townsville	Qld	Sep-09	Oct-11	Townsville City Council	Baulderstone Pty Ltd	\$180m
16	Flinders Street Mall **	Competitive ECI, Construct only	Townsville	Qld	Mar-10	Jun-11	Townsville City Council	Watpac Pty Ltd	\$35m
17	Pacific Motorway Upgrade - Section B	Competitive ECI, D & C	Qld Gold Coast	Qld	Oct-09	Dec-11	Dept Transport & Main Roads	Bielby Hull Albern Joint Venture	\$200m
18	Bruce Highway - Cooroy to Curra Section B	Competitive ECI, Construct only	Qld country	Qld	Nov-09	Dec-10	Dept Transport & Main Roads	Abigroup Pty Ltd	\$100m
19	Digital Train Radio System	Design, supply, Install, Commission; ECI converted to Lump sum	NSW Electrified network	NSW	Jan-10	Oct-12	Rail Corporation of NSW	United Group Infrastructure Pty Ltd	\$180m
20	New Outer Suburban Rail Cars, Stage 3	Design, Build & Commission: Cost Reimbursable, Target price with pain share/gain share arrangements	Sydney	NSW	Sep-09	Apr-12	Rail Corporation of NSW	United Group Rail Services Limited	\$320m
21	Liverpool Turnback Project	Managing Contract	Sydney	NSW	Jun-10	Jan-12	Transport Construction Authority	John Holland Pty Limited	\$120m
22	South West Rail Line	Design and Construct	Sydney	NSW	Nov-10	Dec-12	Transport Construction Authority	John Holland Pty Limited	\$600m
23	Northern Link/Legacy Way	Design, Construct and Maintain	Brisbane	Qld	Dec-10	Dec-14	Brisbane City Council	BMD Constructions, Acciona and Ghella Joint Venture	\$1,600m



Australian DRB Background

Prior to 2003, the usage of DRBs in Australia was relatively limited.

In a 1998 survey published in the IAMA Journal, only 8% of respondents had had any direct experience with DRBs, compared with 80%-90% of respondents who were familiar with Arbitration, Mediation and Expert Determination.

The Co-operative Research Centre for Construction Innovation operated from 2001-2009 in Australia and conducted research and produced a number of studies and reports into the construction industry. One of its last projects was "Dispute Avoidance and Resolution" (DAR).

DAR recommended the establishment of DRBs in Australia, primarily due to the proactive stance of the DRB in solving potential problems – critically, before they reached the dispute stage.

In 2003, a group of industry professionals informally established the DRBF Australasia Chapter called Dispute Resolution Board Australasia Inc. (DRBA)

DRBA was seed-funded by the Australian Constructors Association (ACA) which is a major sponsor of this International Conference.

The ACA listed its objective for DRBs on major contracts as:

- make the industry less litigious;
- avoid confrontation/disputation;
- improve contract outcomes;
- run projects within budget for Time and Cost;
- manage issues during the currency of project;
- eliminate carry over issues to post completion; and
- work with clients in a spirit of mutual respect, good faith, co-operation and enthusiasm.

Today there are or have been at least 35 DRB Projects with a cumulative value of around \$11 billion dollars.

Australasian Procurement Approaches

The Australasian Construction Industry has favoured the use of standard forms of contract developed by Australian organisations (such as Australian Standards) and has been reluctant (if at all) to embrace the FIDIC form of contract.

As a consequence, whatever standard forms of dispute resolution are contained in the standard forms of contract have generally been adopted in Australasian contracts.

The standard form of dispute resolution process involves one or more of the following escalated steps:



- negotiation at project level;
- senior executive negotiation;
- mediation (or some other form of ADR);
- expert determination (binding or non-binding);
- arbitration or litigation.

Although many forms of bespoke contract (especially Design and Construct) have evolved over the last two decades, there has been no standard approach to dispute resolution and certainly no standard form of contract that invokes the use of DRBs or DBs.

The DRBA has promoted a standard set of clauses for use in contracts to incorporate DRBs or DBs but there has been relatively slow take-up.

DRB Trends in Australasia

You will see from the table above that there has been a reasonably rapid growth of projects utilising DRBs in Australasia.

The following trends have emerged on DRB projects in Australasia:

- (a) There is an increasing emphasis on **prevention and avoidance**. In particular, the Operating Procedures (or even the Tripartite Agreement or the contract clauses invoking a DRB) are increasingly specifying the prevention and avoidance of disputes role for the DRB. This is encouraged by the DRBA.
- (b) Designating the **standard DRB meetings and communications as without prejudice or privileged** has been increasingly adopted by DRBs to encourage openness and frankness of communication in the standard DRB meetings. The without prejudice or privileged status does not apply when the DRB is making a formal determination.
- (c) DRBs are almost always **set up at the time the Project Contract is signed**. The DRBA strongly promotes this process, especially for design and construct contracts.
- (d) The opening DRB Meeting is very often an **education session** as many Project participants have had little or no DRB experience.
- (e) **Training of new DRB members** appointed to a DRB is a task that the DRBA takes conscientiously.
- (f) There has been a recent increase in the use of **one man DRBs**. This use has not just been for projects less than \$50 million but for projects as high as \$120 million. It is not thought that this is entirely a cost issue but where the parties have agreed to vest their trust in a single person DRB whose skills and experience cover those necessary to give the parties a successful outcome.
- (g) The use of **advisory opinions** has not been widely taken up in the Australasian DRB arena. It may be that there has been a concern about a perceived bias, where the DRB has provided an advisory opinion and which



has not resulted in a settlement between the parties but has then gone on to a formal determination. Although all the appropriate safeguards are in place, there may be a “perception issue” when the issue is introduced into the formal determination process.

- (h) There is no consistency in DRB contracts on whether to adopt **binding v non-binding v interim binding determinations**. The DRBA promotes the model of Interim Binding (i.e. binding unless challenged by a party within 30 days of the publication of the DRBs Determination). It is the writer’s experience that Interim Binding is more common in Australian DRBs.
- (i) In some contracts, the parties have agreed for the DRB’s determination to be **binding** where the outcome is less than some agreed figure (e.g. \$500,000 or \$5.0m).
- (j) In some contracts, the parties have agreed for the DRB’s **determination not to be enforceable or challenged** until the Project has reached completion. This is not a process promoted by the DRBA.
- (k) In one contract of which the writer is aware, because the avoidance and prevention role was not specifically included in the Operating Procedures or in the Tripartite Agreement, and perhaps because a major dispute was looming, one party **actively prevented the DRB from exploring avoidance and prevention** options. The DRBA actively encourages the DRB’s avoidance and prevention role to be specifically included in the Operating Procedures or in the Tripartite Agreement for all Projects.
- (l) Generally, at the conclusion of a DRB, the DRB members and Project participants undertake a **DRB debriefing** – what went right, what could have been done better, evaluation of the DRB process. This debriefing process is encouraged by the DRBA and often a questionnaire is distributed in advance.

You will see in some of the papers presented in Section 6, certain legal issues that have arisen in relation to DRBs in Australia.

Summary

The use of DRBs in Australia has increased and will continue to increase as its success rate and acceptability in the business community increases.

It is unlikely that FIDIC contracts will be adopted generally or in a widespread manner in Australia. It is equally unlikely that there will be a new standard form of contract acceptable to all parties in the construction and infrastructure industry any time soon.

Although the Council of Australian Governments (**COAG**) have a working group set up to implement standard forms of contract, and that Working Group has agreed to embrace DRBs as standard in its dispute resolution clauses, the output from COAG is not expected for many years to come.

In the interim, the DRBA and other industry professionals will continue to promote the use of DRBs in current standard form contracts and in bespoke contracts.

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