Dispute Resolution Boards Down Under – An Australian Perspective

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I begin this discussion from the premise that to be actively engaged in the process of dispute resolution – be it litigation, arbitration, Dispute Resolution Boards, or other forms of alternative dispute resolution – is to have failed in some regard. I do not regard that premise as controversial. For a dispute resolution process to have begun there must be a dispute – and the existence of a dispute implies a failure – of completion, or communication, or expectations, or all of the above and perhaps more. I consider it worth highlighting because in my experience it is all too often too easy to be pulled into a worldview that regards successful dispute resolution – as vastly improved as it has been over the last few decades – as the best possible outcome. Certainly that may be the case once the process of dispute resolution has begun, but we should be careful to remember that of all possible worlds, parties and contractors would most happily choose the one without a dispute in the first place over the one with a successfully resolved dispute.

Consider for a moment what traditional dispute resolution means for a principal and a contractor on a major project. First, work will often have stopped. This delays eventual completion of the project and can lose the principal exponential amounts of capital. Where that principal is a government, as I shall discuss later, the ramifications are even more severe – for both a government short on political capital for the next project and for a population deprived of important infrastructure. Second, the principal will usually be withholding payment. This can mean the difference between solvency and insolvency for not only the contractor, but for subcontractors too as the livelihoods of business large and small often depend wholly on the successful outcome of one major work. Third, the process of dispute resolution will not usually be quick. Even the most fast-tracked litigation or arbitration has a timeline that can often see businesses fail as a result of a necessarily time-consuming process of claim, defence,

counterclaim, the adducing of evidence, and the consideration of often complex questions of liability and quantum of damages.

Alternative Dispute Resolution came about, broadly speaking, because those who worked both inside and outside litigation were able to see its shortcomings as a means by which disputes over large projects were resolved. They put themselves in the position of a party to a dispute and asked the basic question "is there an easier, more efficient, and cheaper way to resolve this issue?". It is no accident that so many practitioners in the field of ADR – myself included – began in construction law, as there the question had particularly high stakes: if a principal and contractor were currently engaged in multiple large projects simultaneously and a problem arose with one, was there a means by which disputes could be resolved without disrupting the relationship between party and contractor such that *all* of the projects they were cooperating on were thrown into jeopardy? Happily, we have made substantial progress in Australasia away from a "litigate first" mentality to one that is far more accommodating of ADR processes. In large part that is due to the shifting of incentives for major law firms: it is highly difficult nowadays as a lawyer in Sydney or Auckland or Perth to say to a multinational construction or resources company that you don't consider arbitration a very good idea when clients are increasingly educated, highly sensitive to their best interests, and have a keen eye for the bottom line. As a dispute resolution practitioner, a failure to embrace the kind of change we have seen in the field over the last few years will surely mean your client base disappears.

In the same sense that the embrace of forms of ADR such as mediation or arbitration required a change in mentality on the part of both practitioners and clients, so too did the move to Dispute Resolution Boards in Australasia necessitate a radical shift in how we approach problem-solving. In fact, though it is very similar in kind to the move from, for example litigation to arbitration, it is of a wholly greater degree in that it requires that we completely immerse ourselves in the

client's perspective. If it is indeed true that the world the client would most happily choose is one without any dispute to be resolved in the first place, then how can we bring that about?

Needless to say, it has been a formidable task to bring about Dispute Resolution Boards as an attractive and viable option for clients and contractors alike in Australasia. The use of a DRB was first proposed in an Australian context by Hatch & Jacobs, a US consulting firm engaged in a joint venture with local group John Connel & Associates to design and supervise a set of ocean outfall tunnels between 1987 and 1991. Though the success of this $320m project should have indicated the utility of DRBs in Australia and Australasia, there were relatively few employed until a resurgence, lead by local committed individuals, beginning in 2003 with the formation of the Australasian chapter of the DRBF. Though the fundamentals of DRBs are strong – appoint a panel of experts from the very beginning of a project to ensure it has the best chance of completion on time and on budget – there is something to be said for an institutional memory in building confidence for both principals and contractors that the cost of a DRB is money well spent at the outset of a project. Happily we are closer now to a scenario where that institutional memory is entrenched for both contracting parties (like Hatch & Jacobs, who recognised the protection a DRB would provide in the completion of a project) and for principals (like state and federal government actors, who see the fiscal and political value in effectively taking out an insurance policy on the completion of a project).

Across some 30 projects using DRBs in Australia, not one has had a dispute proceed beyond the DRB. And there have been a total of just 6 disputes referred for formal determination. For each of those 6 issues, there are literally hundreds more that if left unattended would undoubtedly have become a source of conflict. One of the elements of DRB practice in Australasia that distinguishes it from other places in which DRBs operate - especially Europe - is that the emphasis is not only on resolving disputes once they arise, but on preventing issues from turning

into disputes from the very outset. In my view one of the limitations of the FIDIC model, where disputes must be formally referred in order to be adjudicated, is that the ‘soft power’ of the DRB goes under-utilized.

In fact, in many ways, the name 'DRB' is a misleading one in an Australasian context, where disputes are often not resolved, but rather avoided in the first place. On every project, there are bound to be dozens of issues that arise between contractor and client. The key to delivering a project on time and without unnecessary complication is preventing those issues from becoming full-blown disputes that take focus away from completion.

That is certainly true when we consider a few examples of DRBs in major projects Australia. The Sydney Port Upgrade was a Design & Construct Contract for $516 million between the Sydney Ports Corporation and a joint venture of Baulderstone Hornibrook and Jan de Nul. That contract was awarded on December 20, 2007. The very next day, a DRB was appointed, consisting of John Tyrril as chair, who is a dual-qualified architect and lawyer; Ron Finlay, a construction lawyer and Secretary of the DRBA; and Graeme Peck, an engineer. All three brought extensive experience in major projects to the table.

Having been appointed from the very outset, the DRB didn't need to get up to speed on the project every time an issue arose – a key difference between this model of dispute prevention and the post-hoc fact of arbitration or other forms of dispute resolution. The Board kept abreast of developments through regular meetings with the offsite and onsite representatives of the parties, and were well-placed to deal at an early stage with dozens of the kind of issues that can easily escalate if not dealt with promptly. The success of that DRB is clear when we consider that the contract was completed on time, and within the budget agreed on by the parties, without a single formal referral to the DRB. Now that doesn't mean that the members of that DRB were

under-employed for the three years that contract was running. In fact, it demonstrates the opposite: that a proactive DRB, factored into the project from the very start, can work to ensure that any issues that arise are dealt with early on. And because of the extensive experience in different fields of major projects all three of these board members brought to the table, they were able not only to deal effectively with these issues when they arose, but to see them coming on the horizon and act accordingly.

Likewise the Sydney Desalination Plant: a Design, Build, Operate & Maintain contract between a wholly-owned subsidiary of the Sydney Water Corporation and a Blue Water Joint Venture comprising John Holland and Veolia Water. The overall contract was for just over $1 billion, and ran from mid-2007 to May 2010. The Desalination plant was required to process 250 million litres of water per day, scalable to 500 million litres, and to connect to the city water supply via an 18 km pipeline, which is a not insignificant undertaking. Approximately one month after the contract had been awarded, the parties agreed on a DRB consisting of George Golvan QC, Graeme Peck, and Ron Finlay. Once again, all three were appointed based on their extensive experience in the delivery of major projects. The first DRB meeting occurred about 6 weeks before work started on site, and was followed up with bi-monthly meetings over the course of the project. And once again, the hard work of the DRB, the willingness of the parties to trust their expertise, and the open lines of communication, ensured that despite dozens of smaller issues cropping up, there was not a single formal referral to the DRB for determination. The project was completed on-time, and under-budget, and forms an important part of NSW infrastructure.

The capacity of a ‘brains trust’ to be across any potential issues from the moment they flare up; to offer sage advice to both contractor and principal; and to – if necessary – make a determination in the event that a dispute is unavoidable has paid further dividends across a wide variety of other projects in Australasia. Two others are worth sketching here:

- Port Botany Expansion Project – Sydney's largest container shipping facility by volume.
    - This $516m project was contracted on 20 December, 2007.
    - A DRB was appointed on 21 December, 2007.
    - Completed on time and on budget, with zero DRB referrals.
    - Winner of the 2012 ACA/Engineers Australia *Construction Achievement Award*
- Gateway Upgrade Project – 18.9km of 6-8 lane highway leading into Brisbane
    - This $1.5bn project was contracted on 26 September, 2009.
    - A DRB was appointed in January, 2007.
    - Work commenced on 16 February, 2007.
    - 2 matters were referred to the DRB, which made a liability decision on both. Quantum was settled between the parties.
    - The project was delivered 7 months ahead of time and was a recipient of the Infrastructure Partnerships Australia 2011 National Infrastructure Award.

In total, DRBs in Australia have operated on projects ranging from $35m to $1.8bn, with an average of $406m. 87% of those projects have been completed on or ahead of time, versus an industry norm of less than 56%. Four out of five of those projects were completed without a formal referral to the DRB, and the average rate of referrals was 0.33%. These figures indicate the value of a DRB to a major project – and the DRBA is actively engaged in collating and disseminating statistics such as these that reveal the utility of DRBs.

Two further factors militate in favour of the use of DRBs, especially in the construction of major public works. The first is the exponentially larger downside risk should a project fail to be completed where it forms a part of public infrastructure. Whilst we should obviously welcome the wider usage of Public-Private Partnerships (PPPs) in delivering key infrastructure, it is important to recognise that when the development of a piece of rail or road infrastructure falls behind – or worse, stops completely – it has far more consequential effects than a wholly private development. Not only is each party affected, but those who would rely on the new infrastructure – businesses that use rail and road infrastructure to import or export; companies that rely on employees being able to reliably commute to work; and citizens whose basic need is to get to and from work each day – all pay a price when it is not delivered. And in the aggregate, that price can be high indeed.

Furthermore, a private actor has the comparative luxury of being able to have disagreements, both within its walls and with other companies, without attracting the kind of media attention that comes with problems on a piece of public infrastructure. It is natural that contracting parties and contractors will have differences of opinion, but what a DRB provides is an opportunity to air out those differences away from the kind of media scrum that comes when a project stops to arbitrate or litigate. At a time when media attention often focuses on the low-hanging fruit, it is especially important that there be no reason for a story to be written on the latest PPP issue putting a stop to the delivery of major infrastructure.

A large part of the reason for that is that the government makes fiscal decisions not on its own behalf but on trust for its citizens – and those citizens have an understandable concern that there be a solid return on investment. Together with money, therefore, a state government spends political capital in generating the wherewithal to see a major project through to completion. A large and public problem with one major piece of infrastructure makes every subsequent project

that much more difficult to begin. Often with major public works, the best decision is not always the most popular, meaning every piece of political capital should be held important in not just the instant project, but the next. The capacity of DRBs, which are proactive in engaging with the parties, and establishing clear and open lines of communication between them, is tremendously important in dealing with issues as they arise, and well before they've escalated to the point where they become a serious threat to the progress of a project.

One important selling point of DRBs in an Australian context is the vanishingly small cost of establishing a DRB as part of a contract compared to the value it delivers. The base cost of a DRB in Australia is between 0.1 and 0.2% of the total project cost of a project over $100 million. And really what a DRB amounts to is an insurance policy against the possibility of a dispute that disrupts project completion. Since 1987 there have been 30 DRBs in Australia and New Zealand, 24 of them since 2003. In that time DRBs have prevented dozens upon dozens of issues from escalating into disputes by constantly engaging with the parties and by bringing all their significant expertise in major projects to the table. Across all those projects - with a range in value from $22 million to $1.8 billion, there have been a total of only 6 formal referrals to determination. And all of those have been resolved successfully within the DRB, with no need for further adjudication.

It is inevitable that DRBs will grow in popularity in Australasia. The current New South Wales South West Rail Project already has 3 DRBs in place. The North West Rail Link is also expected to use DRBs on its major contracts. Sydney’s Wynyard Walk, one of the first of the harbourside Barrangaroo development projects, also provides for a DRB in its contract. But there remains much work to do. There is a fledgling group of industry-renowned experts in Australasia who are now available for appointment as DRB members. The DRBA has been assiduous in promoting growth and awareness – recently we hosted the International Conference of the DRBF in

Sydney, an opportunity for both those heavily involved in infrastructure development in Australia to explore the possibilities of future employment of DRBs and to engage in training with the current membership of the DRBA so as to make those future Boards even more capable. The DRBA can also play a rôle in publicizing the achievements of DRBs in ensuring project requirements are met, and serves as a centre for the collection of data on projects in Australasia. Finally, the DRBA has – and continues to get – 'runs on the board'. Every project that utilizes a DRB that is delivered on time, within budget, and in line with quality and performance objectives forms yet another argument for the widespread use of DRBs in an Australasian context. The hard work of practitioners in this field in Australasia, together with the increasing argument in favour of DRBs as a best practice standard for industry, should ensure a bright future for DRBs down under.