“Dispute Avoidance Using Dispute Boards”
by Alan McLennan
Construction in Australia

- Initiatives to minimise the effects of disputation
- Range of contract forms in regular use
- Relationship (Collaborative) Contracting is commonly used on Public Sector Projects
  - Alliancing
  - Early Contractor Involvement
Research Into Dispute Avoidance

- Quest to minimise / eliminate disputes is ongoing

- The Cooperative Research Centre for Construction Innovation – international research into recurring causes of disputes

- Published an authoritative study: “The Guide to Leading Practice for Dispute Avoidance and Resolution”
Critical Factors in Avoidance/Minimisation of Disputes (from CRC Guide)

1. Each new project involves the creation of a new group of people:
   - need to intentionally create a project oriented culture based on trust

2. Early joint involvement:
   Client, Constructor, Designer – prior to finalising contract requirements

3. Proactive issue/dispute resolution process that works in real time

4. Contract framework and process architecture that reflects the above
Key Research Findings

Dispute Avoidance / Minimisation is most likely when:

- There is a culture where working relations are defined by trust, openness, and cooperation

- There are joint governance arrangements, and a deliberate strategy to sustain the culture over time

- A proactive issue / dispute avoidance strategy is used
A Package of Initiatives to Avoid Disputes (from CRC Guide)

- **Client Leadership:**
  - Adopt a process architecture that aligns the goals/objectives of the parties
  - Fair and equitable approach to risk sharing

- **Positive Response from Constructing Parties:**
  - Build and maintain cooperative working relations, building trust
  - Open, honest communications

- **Proactive Issue/Dispute Avoidance Strategy:**
  - Include independent monitoring through a DB
How Does the DB Work in Relationship Contracts

- The factors identified in the CRC Research on avoidance are similar to key features of Relationship Contracting

- Key features are:
  - Joint Governance arrangements, including PLG
  - Relationship Charter defining agreed team objectives, behaviours and principles
  - A proactive Issue Avoidance process

- The DB complements and reinforces the cooperative relations
How Does the DB Work in Relationship Contracts (cont)

- The DB uses skills and knowledge to facilitate the efforts of the parties to find practical solutions

- The open, trusting environment allows:
  - Issues to be identified, dealt with more effectively
  - The governance arrangements allow more effective monitoring by the DB
  - The facilitation and discipline provided by the DB achieves resolution earlier, and at a lower level
Effectiveness of Single-Member DBs

- Single-member DBs have found a place, especially in the collaborative environment

- Advantages of single-member boards:
  - Effective on projects up to $100M AUD
  - Contains the cost of independent monitoring by a DB
  - Some clients are more comfortable with single-member boards
Local Experience with DBs on Collaborative Contracts

- Queensland experience is that total avoidance is possible when:
  - a DB operates as part of a Dispute Avoidance strategy in an open, trusting project culture

- The DBs role centres on:
  - Early identification of potential issues
  - Promotion of timely resolution at the lowest possible level
  - Independent facilitation and guidance on the escalated items
  - Seven (7) recent examples in Queensland of successful outcomes
Case Studies

Case 1:

- $400 M AUD Motorway Upgrade
- 3-member DB, Collaborative ECI Contract
- High level of complexity and uncertainty
  - Traffic flows at capacity during construction
  - Geotechnical uncertainty
  - Extensive community interaction, pedestrians and cyclists
Case Studies

Case 1 (cont.):

- **Collaborative Elements:**
  - Joint governance – PLG
  - Relationship Charter
  - Issue Resolution Strategy, including DB

- **Issues:**
  - Extensive design variations early in project life
  - Major scope changes

- **Effect of DB:**
  - Provided validation of the jointly agreed value of design variations
  - No unresolved issues
Case Studies

Case 2:

- $70 M AUD Highway Duplication
- Single-member DB, Collaborative ECI Contract
Case Studies

Case 2 (cont.):

- **Collaborative Elements:**
  - Joint governance – PLG
  - Relationship Charter
  - Issue Resolution Strategy, involving single-person DB

- **Issues:**
  - Interruptions in wet tropical environment
  - Traffic interaction
  - Geotechnical concerns

- **Effect of DB:**
  - Maintained harmonious relations
  - Timely resolution of all issues by Project Team
Conclusions

- Recent research into dispute avoidance points to major opportunities to avoid or minimise disputes when:
  - Collaboration exists in a trusting, supportive environment;
  - the process architecture is fair and appropriate to the project; and
  - there is a proactive dispute resolution strategy in place (improves with independent DB monitoring).

- Client leadership strategies condition the way people behave

- Constructors response to those strategies determines the level of success achieved.

- Experience in Queensland confirms the findings of the research.