

Use of Dispute Resolution Boards in the oil and gas, manufacturing and defence industries

By John Cooper, Partner, Allens Arthur Robinson

May 2012

Introduction

Dispute Resolution Boards (**DRBs**) have been used successfully on a number of major projects in Australia.

Have they been used in the oil and gas, manufacturing and defence industries? Are they suitable for use in these industries? What is preventing them being taken up as a preferred method of dispute resolution in these industries?

This paper explores each of these questions in an attempt to help the Dispute Resolution Board Australasia Inc (**DRBA**) expand on the use of DRBs in Australia in the oil and gas, manufacturing and defence industries.

DRBs are suitable for these industries

It is appropriate to ask as a first question if DRBs are suitable for projects in these industries.

DRBs:

1. are characterised by the use of panels or individuals who understand the relevant project and have the appropriate skills, expertise and experience necessary to assist in resolving issues and, if necessary, conduct a process which will enable them to make a quick determination on issues with sufficient credibility for the determination to, at least, be persuasive;
2. through early and continual involvement in the project, are able to identify issues as they arise and urge the parties to deal with and resolve them early or, at the very least, to take steps to ensure that the issues do not grow unnecessarily;
3. provide a disincentive to raise anything but real issues as the DRBs are likely to see vexatious, frivolous, artificial and unrealistic claims for what they are;
4. when considered in light of the overall size of major transactions and the costs they help the parties avoid on disputes, are cost effective;
5. are confidential; and
6. can be constructed to involve upstream and downstream parties.

DRBs are costly to establish and maintain.

The typical fee structure involves:

- (a) a retainer and/or hourly rate for availability and exclusivity, and regular review of project documentation;
- (b) a fixed fee or hourly rate (and expenses) for routine meetings and site visits;
- (c) hourly or daily rates for dispute determination/referrals; and
- (d) escalation provisions.

According to Finlay, projects have to exceed \$50M in value to justify a three member DRB¹.

Although there is no published data on the total costs to these industries of disputes, it is not uncommon for major disputes in these industries to occur on significant projects and for a party's external costs to exceed amounts which would have been payable under the above fee structure. The only difference is that the cost of the DRB is spread over the life of the project, rather than incurred toward the end of the project when most major disputes on projects arise.

For the above reasons DRBs are suitable for complex, high risk and high profile projects.

With projects including:

- the many publicised projects in the oil and gas sector, including Arrow Energy CSG – LNG project, Australia Pacific LNG, Bonaparte LNG, Browse LNG Development, Gladstone LNG, Gorgon, Ichthys LNG project and the Shell Prelude FLNG Project;
- manufacturing projects in the aerospace, rail, bus and maritime sectors; and
- those projects listed in the Defence Capability Plan,

to mention a few, there are sufficient complex, high risk and high profile projects in the oil and gas, manufacturing and defence industries to justify a significant use of DRBs.

DRBs are not being sufficiently utilised

Whether DRBs are being sufficiently utilised is a marketing question which should be relatively easy to answer.

In a perfect world with perfect information we could count the number of projects in the oil and gas, manufacturing and defence industries for which DRBs would be appropriate and then compare it to the number of DRBs in use. This would provide us with information about the size of the gap in the use of DRBs in these industries. Unfortunately, our world is not perfect and this information is not readily available.

According to Peck and Easton, 20 DRBs are on record as having been established since 1987². The author is aware that, as at the end of last year, no DRBs had been employed in the defence sector in Australia.

The "Energy in Australia 2011" report published by the Department of Resources Energy and Tourism lists 18 major oil and gas projects as at October 2010.

¹ Ron Finlay, 2010, "Dispute Resolution Boards Preventing Disputes in Major Projects", paper presented in 2010.

² Graham Peck and Graham Easton, 2009, "Dispute Boards in Major Infrastructure Projects an Australian Perspective", May 2009.

The Department of Defence “Defence Capability Plan 2011” lists over 120 acquisition and sustainment projects which are at various stages of approval.

On top of this there are other private sector, Federal, State and local government acquisition and sustainment projects across many industries which will involve manufacturing.

If the number of past projects that have been implemented has any likeness to the number of projects referred to above, the number of complex, high risk and high profile projects which have commenced, when compared to the number of DRBs that have been employed, suggests that DRBs are not being sufficiently utilised in Australia.

That could be viewed as the bad news.

However, the good news is that it shows there is a massive opportunity for DRBs in Australia.

What is preventing DRBs being taken up as a preferred method of dispute resolution in these industries?

What is preventing DRBs being taken up in these industries is also a marketing question.

There is no data publicly available on this question.

However, data is obtainable.

A survey was conducted by the author of a number of internal legal counsel and managers in companies and Government agencies that participate in these industries. Those surveyed were not randomly chosen and the number surveyed and the number that responded was small. Therefore, the results are not statistically reliable. However, the answers provide some insights and demonstrate a need to conduct further research in order to fully understand why DRBs are not being used as much as they possibly could in these sectors.

Those surveyed were asked the questions set out in Appendix 1.

Of those surveyed two respondents said they had used DRBs. These two respondents were satisfied with them and would use them again in the future. These responses suggest that DRBs are suitable for these industries.

Two respondents had not heard of DRBs and the majority of respondents had not used them.

This poses an interesting question. If DRBs are a viable form of dispute resolution in these industries and there are many opportunities for their use why are they not being used?

The responses received provide some insights. All but one of those surveyed indicated a preparedness to change from the current form(s) of dispute resolution currently being used by their organisations.

Most respondents had an open mind to using DRBs in the future.

As to why respondents are not currently using them the respondents’ answers included the following:

- “On our one-off contracts we generally accept the advice of our legal advisers who have not to date proposed their use”;
- “DRBs are not yet perceived in the organisation as an orthodox approach”;

- “The estimated financial cost of DRB implementation is yet to be countervailed by the perceived benefits”;
- “DRBs introduce an additional challenge in negotiating and concluding major procurements in circumstances where contractors are not necessarily "on board" and where uniform terms (including dispute provisions) across contractors are considered essential”;
- concern about external interference in the way project managers conduct their affairs; and
- "A perception that DRBs increase the exposure to putting the fate of an issue in the hands of a third party (when compared to achieving bilateral negotiated outcomes)".

The responses received suggest:

- once DRBs have been used by an organisation in these industries they are likely to be used again;
- lawyers who are drafting or assisting their clients with contracts could be educated about DRBs and persuaded to recommend them and this could have an impact on their use; and
- there is a lack of information about DRBs (e.g. the role DRBs play in assisting the parties to resolve a dispute before proceeding to determination, the binding nature of determinations and the ability to appeal them, the cost/benefit equation in relation to DRBs, the amount DRBs have been used and how successful they have been).

Based on this research, it appears that there are significant opportunities for the use of DRBs in the oil and gas, manufacturing and defence industries and it is recommended that the DRBA carry out a detailed survey of participants in the industries around the use of DRBs in order to gain a greater understanding of why they are not being used more significantly and how the use of them can be increased.

Appendix 1 – Survey

Please answer by circling either Yes or No below.

1.	Are you aware of Dispute Resolution Boards (DRBs)?	Yes/No
2.	Has your organisation used any DRBs on projects/procurements?	Yes/No

Please answer by circling a number below (with 1 meaning definitely not, 5 meaning definitely and 0 meaning the question is not applicable to you).

3.	Would your organisation use DRBs in the future?	1 – 2 – 3 – 4 – 5 - 0
4.	Is your organisation likely to change from the form(s) of dispute resolution currently used by it on major projects/procurements (e.g. if you found that another form of dispute resolution had proved to be very successful)?	1 – 2 – 3 – 4 – 5 - 0

Please answer each of the following:

5.	If you are aware of DRBs and your organisation has not used them, please explain why? <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
6.	If your organisation has not used DRBs, would you be prepared to receive information about them? <hr/>
7.	If your organisation has used DRBs, please provide details of the number and types of projects/procurements on which DRBs have been used? <hr/> <hr/> <hr/> <hr/> <hr/>

8. If your organisation has used DRBs, would it use them again? If so, why and, if not, why not?
