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## **THE FUTURE FOR DISPUTE BOARDS IN AUSTRALIA AND NEW ZEALAND**

by

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### **Introduction**

Dispute Resolution Boards (DRBs, DABs, or in this paper, DBs), as used within the construction industry in Australia and New Zealand (Australasia), are a relatively new development in the spectrum of commercial dispute resolution processes. Despite their recent provenance, DBs appear to have now reached the threshold of a period of rapid growth, due to their remarkable success in not only resolving disputes on projects more efficiently (with respect to both time and cost) but also and more significantly, by the creation of a 'dispute avoidance' attitude to project management and a 'best-for-project' relationship between the parties.

In this paper, I will briefly outline the recent history of DBs in Australasia and the reasons for their increasing popularity. I will also consider the factors which are likely to limit the future of DBs as a dispute resolution process within commercial contracts in Australasia. Finally, I

make some predictions about the future trends in this region, in relation to both the 'take-up' of DBs and the manner in which they will be utilised.

## **Recent history of DBs in Australasia**

The DB concept was first introduced to Australasia by a firm of US construction consultants, Hatch & Jacobs, in 1987. The particular project in question involved two major tunnelling contracts and the consultants brought their first-hand experience with DBs in similar US projects with them. Although (and possibly because) there were no serious disputes arising during the project, the local (Australasian) construction industry was not immediately converted to DBs. Throughout the 1990s, DBs on major projects were few and far between. The Australasian construction industry remained a fertile ground for adversarial dispute resolution practices such as arbitration / litigation, although alternative and more cost-effective approaches such as mediation had made some headway.

A resurgence of interest in DBs began about 8-10 years ago, attributable to a number of factors. Several large, high-profile disputes on major public projects had contributed to industry-wide dissatisfaction with traditional approaches such as arbitration. The widely-held view was that "there must be a better way". At the same time, the successful utilisation of DB concepts had become widespread in the USA and had more recently been introduced into Europe through the adoption of DABs in standard forms of contract such as those published by FIDIC and the multilateral development banks (MDBs). In Australasia, the DRBA was formed in 2003 as a special interest group (and as a chapter of the DRBF), to facilitate training in and promotion of the use of DBs.

Since that time, there have been some 25 significant 'DB contracts' in progress or completed within Australasia, with a combined total value in excess of AUD\$ 11 billion. These DB contracts cover a wide range of public-sector project types, including roads, bridges, rail, tunnels, dams, ports and water treatment plants. The contract value (in AUD\$, excl. inflation) of these projects ranges from \$22 million to \$1.8 billion. At the time of writing (April 2012), there are several new 'DB contracts' about to go to public tender, for projects with a total value of in excess of AUD\$ 4 billion.

Given the increased number of DBs in the last few years, there is now a solid body of experience in Australasia and corresponding statistical information which corroborates the successful USA experience. Within our overall DB experience in Australasia to date (as noted above), there have been only 8 formal referrals of disputes for determination by a DB and all of these 8 disputes have been subsequently resolved within the DB process. In a majority of these DB contracts, there have been no formal disputes at all. The corollary to these figures, albeit based on anecdotal evidence, is that there have been many disputes avoided and potential disputes amicably resolved as a result of the establishment of a DB and the DB's regular interaction with the parties during the course of the project.

### **Reasons for growth in DB use.**

There are several reasons for the recent surge in growth of DB use, some of which are common to the construction industry worldwide and others which reflect the particular nature and characteristics of construction work in Australasia.

#### Dissatisfaction with traditional dispute resolution processes

The Australasian construction industry, as in other western countries with well-developed economic, social and legal systems, is no stranger to a high level of dispute arising from major projects. The vast majority of contracts for this work include procedures for the resolution of disputes, traditionally by arbitration or litigation. However over the last 20 years, industry concern with the extremely high costs, disruptive impacts and significant risks of proceeding with arbitration / litigation has given rise to several "alternative dispute resolution" (ADR) processes. Such processes now include mediation, expert determination and statutory adjudication. While these ADR processes have, to some extent, ameliorated the high 'costs' issue, they are by definition initiated only after a dispute has arisen (as is similarly the case with formal arbitration/litigation). In other words, they are reactive rather than pro-active processes, in the sense that they are generally not able to influence the performance and outcome of the project in any positive way. Similarly, since the ADR process inevitably follows after the causal event(s) giving rise to the dispute, there is little or

no opportunity for the contracting parties to manage the project so as to modify or eliminate such causes. In contrast, DBs have now evolved (within the Australasian construction industry) in a form which enables these shortcomings to be addressed.

#### Benefits of a pro-active dispute resolution process

The unique aspect of the DB process, as utilised in Australasia, is that it is pro-active rather than reactive. It is this aspect that differentiates DBs from conventional ADR processes. While in the past, certain variants of the DB concept have been used with their focus only on dispute resolution, we now consider these to be of historical interest only. Specifically, the 'ad hoc' formation or involvement of a DB only after disputes arise, fails to utilise the real advantage which differentiates DBs from other ADR processes - the opportunity to avoid disputes altogether. A DB which is in place between the parties from the project outset seems to be the only process which can influence project participant behaviour, maintain good relationships between the parties and substantially reduce the probability of "issues" escalating into "disputes".

In addition to the major benefits in project cost and time which flow from the avoidance of disputes, there are significant intangible benefits provided by the regular meetings between the DB and the senior project executives. These meetings provide a forum, outside the formal contractual regime, for the parties to review their performance, identify current and future problems, remove road blocks to progress and actively engage with each other on a 'best-for project' basis.

#### 'Value-for-money' project delivery methods

The various forms of contract and delivery methods selected by clients for major projects in Australasia have evolved over the last 20 years according to market demand, risk profile, size of project, client preferences and public policy (i.e. government) considerations. While there has been a general trend on major projects towards 'relationship' delivery methods such as partnering and alliancing arrangements, several recent projects are indicative of a reverse trend to more competitive, 'value-for-money' arrangements. In this regard, we are

seeing many more competitively-tendered 'design & construct' (D&C) contracts, often with 'early contractor involvement' (ECI), being used for major projects in Australasia.

The nature and structure of these D&C and ECI contracts makes them ideally suited to the inclusion of a dispute avoidance and resolution procedure such as a DB. There is also an increasing recognition by both clients and contractors that the presence and involvement of a DB in the early life of a major contract, particularly during the design and establishment phase, is often critical to the ultimate success of the project.

A further driving factor is the pressure on public authorities responsible for major projects to be able to demonstrate a transparent and cost-effective approach to project management and delivery. In this regard, the existence of an independent, experienced DB serves an important role.

#### Targeted promotion of DBs

As noted by Gordon Jaynes in his companion paper in this session – *"Quo vadis" Dispute Boards* – new ideas often require at least ten years to mature, be understood and accepted. This view seems particularly applicable to DBs in the Australasian construction industry. The conservative forces against change are often strong. Any new idea usually has to prove itself and develop its own 'champions'.

In Australasia, the primary role of DRBA, since its formation in 2003, has been as such a 'champion', to promote the concept and use of DBs as the most cost-effective dispute prevention and/or resolution process for major contracts. The DRBA has been fortunate in being able to utilise the specific experience of its local members and the broader skills and knowledge possessed by DRBF through its international membership. This knowledge and experience has been focused on providing encouragement and assistance to those particular individuals within the construction industry who are responsible for contract drafting, tender documentation and project procurement. Such targeted promotional efforts have resulted in a much better DB adoption rate than that which could have been achieved through general awareness seminars. The DRBA's approach has also fostered

innovation. The DB procedures in several recent contracts are now being tailored, on the basis of shared experiences within DRBA, to provide a more pro-active role and to suit particular project needs.

## **Limits to growth of DB use**

By comparison with the USA and Europe, the size of the Australasian construction industry and the relatively small number of large infrastructure projects creates a natural ceiling for the possible utilisation of DBs.

### The Australasian construction market

The value of construction work (excluding residential building) undertaken by commercial contractors in Australia was close to \$100 billion for the financial year 2009-2010 (the last yearly figures I have available). I do not have a corresponding figure for New Zealand although on a per capita/market size basis, it is likely to be in the order of \$10 billion.

In Australia the construction industry employs approximately 1 million people out of a total population of 23 million. Although not large by international standards, the efficient provision of infrastructure is critical to the effective development of the capital assets and communication networks which are the foundation of the Australian economy. Going forward, the volume of construction work is likely to increase substantially as a result of the rapid expansion of the resources (mining, oil, gas), transport (road, rail, air, ports) and energy sectors of the economy. Correspondingly, the potential for DBs will grow but will soon reach a plateau unless the DB concept is taken up by other commercial sectors, such as IT and defence systems, where the benefits may also be significant but are yet to be realised.

### The cost of DBs

It is a common perception that the costs of including a DB process within the dispute resolution provisions of a construction contract are prohibitive and cannot be justified.

Nevertheless, while the costs of a 3-person DB, particularly where substantial travel or retainer costs are involved, is not insignificant, the Australasian experience to date is that the base cost of a DRB is only 0.1%-0.2% per year for a \$100 million project. That is, a likely additional cost to the project of \$100,000 - \$200,000 per year. Moreover, this cost does not increase with projects of greater value and the percentage cost of DBs may be as low as 0.01%.

Those of us (including clients, contractors and DB members) in Australasia who have had the experience and can compare the costs of the operation of a DB and the traditional approach to dispute resolution on major projects, will verify that the relative costs can differ by a factor of more than x100. The existence of a DB is clearly a very cheap insurance premium to avoid the large costs of traditional dispute resolution methods such as arbitration or litigation.

There is also an occasional perception that if a project utilising a DB proceeds to completion, without the DB having any disputes referred to it, then its existence was superfluous and the associated costs were unnecessary. However, that view completely ignores what is now regarded as the primary role of a DB in the prevention of disputes and the maintenance of good project relationships.

#### The reluctance of the private sector

In Australasia, one of the current difficulties with the promotion of DBs is a lack of interest or utilisation by private-sector clients. There appears to be several reasons for this state of affairs. First, there is a fear, often expressed by private-sector clients, that the existence of a DB will somehow lessen their authority and control over the project and its outcomes, particularly with regard to costs.

Secondly, there is a commonly-held (but somewhat naïve) view at the procurement stage that “there will be no disputes on this project”. Correspondingly, a contractor bidding for such a project is usually reluctant to raise the matter of “dispute resolution” with the client. Thirdly, many large private-sector clients have strong views about commercial

confidentiality and risk allocation. They are often reluctant to expose their contractual arrangements and management to the scrutiny of the independent DB members.

Finally, it is a fact that within the Australasian construction sector, the benefits of utilising a DB on a project resonates far more with public-sector clients, where DBs can assist in meeting their obligations to the wider community. These obligations include matters such as probity, accountability, social responsibility and 'best-for-project' decision making.

#### The availability of experienced DB members

In many developing countries, the availability of experienced professionals to serve on DBs is a fundamental limitation to the adoption of DB concepts. This issue has been highlighted by both Gordon Jaynes and Professor Toshihito Omoto in their companion papers in this session. However, it is not seen as a limiting factor in Australasia.

Within the commercial community generally and in the engineering construction sector in particular, there is already a large group of experienced professionals working in relevant legal and technical areas. Many of these persons have also had experience in the management of projects and are skilled in the various aspects of dispute resolution. While there is still an important task to be undertaken by DRBA / DRBF in the specialist training of these people to act as DB members, this is best achieved through the "hands-on" experience of sitting as a member of a DB rather than sitting in a classroom.

However, the availability of suitable candidates is more problematic when one considers the likely growth of 1-person DBs. One of the key reasons for the success of DBs in preventing disputes has been the combination of specialist legal, technical and management experience which a 3-person DB can bring to a project. There are relatively few individuals in Australasia (or elsewhere) who embody all three of these attributes, particularly when service as a DB member requires both long term availability and an independent status, free from any conflicts of interest. Nevertheless, the pool of such persons in Australasia is growing and with a planned increase in DRBA's training and mentoring activities, there should be sufficient suitable persons to meet the demand.



## **Future DB trends in Australasia**

The likely future trends in the adoption of DB concepts within Australasia have been addressed by other speakers during the Conference. The three main objectives which constitute the future focus for DRBA/DRBF development efforts in the region are summarised below.

### 1. Increasing the numbers of DBs

It is clear that the current trend towards the utilisation of DBs for major public infrastructure projects will continue, as the benefits and successes of existing DBs are recognised. The more enlightened public authorities (some of which have reported their experiences during this Conference), are also likely to extend their DB applications to smaller value projects (say, less than \$100 million), often by adopting the 1-person DB (DRA) model.

The other potential growth areas for Australasia are those occupied by private-sector construction (such as resources and energy) and other industries (such as defence and IT) where the successful management and efficient completion of large, complex projects is a fundamental part of their business. There have also been some very useful insights into these areas presented by earlier speakers. However, the essential conservatism of project managers in these areas and the lack of 'champions' of the DB process, will mean that the utilisation of DBs will inevitably be slower.

### 2. More innovative roles for DBs

As noted by others during the Conference, DBs in Australasia to date have mostly been established via 'purpose-written' contracts rather than via standard forms such as FIDIC. While this factor has been a restraint on growth in numbers of DBs, it has enabled those responsible for the drafting of new contracts, to more readily incorporate their experiences and learnings into the DB process. In this way, the evolution of DBs in Australasia has been quite rapid and innovative. Probably the most obvious example of this trend is the move

from the traditional DB role of 'dispute resolution' to the more proactive roles of 'issue management' and 'dispute avoidance'.

There are several other aspects of the DB concept which are likely to be the subject of further 'DB innovations' in the near future. One likely development is the utilisation of the DB as a facilitator or mediator during the course of a project, particularly to deal with changes in project delivery methods or outcomes. Another future development is a role for the DB as the independent chair within 'relationship' contracts, such as alliances, and in PPP projects where there are several major stakeholders. A third possible innovation is likely to be the utilisation of the independent DB members as probity-monitors in large public projects.

### 3. Promotion and monitoring of DBs

In Australasia, as in the USA, the initial phase of promoting 'awareness' of DBs and the basic training of potential DB members has essentially passed. The future promotion of DB concepts is likely to be much more targeted at particular opportunities and will seek to consolidate DB's reputation as the most effective of the recognised ADR processes.

There is a growing role for DRBA/DRBF in ensuring the proper implementation of DBs and in monitoring the operation of DBs in a quality control sense. I would urge all experienced DB professionals to assist in this way by regularly communicating with and advising other DB members of their own DB experiences. Fulfilling a role as a mentor to inexperienced DB members is probably one of the most effective means of quality control and maintenance of high standards for future DBs in Australasia.

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