Dispute Boards Down Under: Experience & Innovation in Dispute Avoidance & Resolution.

- Graeme Peck
  - Country Representative, Australia & New Zealand;
  - Past President, DRBA.
Topics

• Introduction
• The DRBA approach.
• Recent ‘Innovations’ in DBs.
• The growth and success of DRBs within Australia.
• Some Specific Project Examples
• Conclusions
Current ADR Trends

- ADR embraces various processes - Mediation, Conciliation, Expert Determination, Mini-trials and Negotiation.

- these are REACTIVE processes initiated after the dispute event has to a greater or lesser extent become a fact of life.

- these processes are focused on minimising expensive formal litigation and arbitration dispute resolution procedures, rather than assisting with the improvement of interparty relationships and/or the management of issues as they arise to avoid disputes.

- Unless concluded with a written agreement, they are usually non-binding where significant sums are involved.
Current ADR Trends in Australia

• Example: -the theme of the 2011 national conference of the Institute of Arbitrators & Mediators Australia (IAMA)

• “Appropriate Dispute Resolution- seize the future
  ➢  . . . . . – safeguarding the strengths of traditional dispute resolution methods while emphasising the practical shift from “alternative” DR to “appropriate” DR.” (emphasis added)

• questions that immediately arise are

  ➢ What constitutes an “appropriate” DR process?

  ➢ Should one focus on dispute avoidance, rather than a cheaper method of dispute resolution?
Some recent relevant Research in Australia

• 2006 Industry Survey by Blake Dawson Waldron & Australian Constructor’s Association; “Scope for Improvement”;
  www.blakedawson.com/Templates/Publications/x_publication_content_page.aspx?id=54519

• The CRC for Construction Innovation 2007-2009 research Project - “Dispute Avoidance & Resolution”;
  www.construction-innovation.info.
BDW/ACA 2006 Survey

• Scope of projects: prior 3 years of data
• 183 in-depth responses from all industry sectors, representing over $20 billion worth of expenditure
• Objectives of survey, to identify:
  ➢ out-turn performance of construction contracts,
  ➢ dispute causation,
  ➢ preferred methods of dispute resolution,
  ➢ linkages between out-turn performance and the level of disputation,
  ➢ ways of improving both
Survey Findings - *Cost & time of disputes*

- **Survey data:** < 40% of all projects had no disputes.
  - Industry turnover data combined with “<40% no disputes” suggests about 8% of $100 bn. T.O. /annum (i.e., ≈ $8bn.) may be involved with construction disputes on an annual basis.

- **Survey data:** between 59% & 72% of disputes were settled by negotiation – higher % for lower value contracts.

- **Survey data:** However settled, much of this ‘dispute resolution’ effort carries on after the projects are completed - in some cases, several years after completion.
2006 Survey Findings - Time Performance

- **Survey data:** Only 56% of projects were completed on time (taking into account granted Extensions of Time).
  - So 44% of projects ran late!
- **27% of the projects ran more than three months late.**
- The greater the project value, the less likely it is that the project will finish on time.

<table>
<thead>
<tr>
<th>Value range</th>
<th>% completed on time</th>
</tr>
</thead>
<tbody>
<tr>
<td>$20-$50 million</td>
<td>66%</td>
</tr>
<tr>
<td>&gt; $500 million</td>
<td>50%</td>
</tr>
</tbody>
</table>
Survey Findings - *Dissatisfaction with Dispute resolution processes in common use.*

<table>
<thead>
<tr>
<th>Project Value range</th>
<th>% Respondents dissatisfied with dispute resolution process</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average across all projects surveyed</td>
<td>78%</td>
</tr>
<tr>
<td>$20-$50 million projects</td>
<td>75%</td>
</tr>
<tr>
<td>$200-$500 million range</td>
<td>91%</td>
</tr>
</tbody>
</table>

**Conclusion:**
The dominant industry view was that there had to be better methods than those in common use (in 2006)
The DRB difference - PROACTIVE processes for avoidance of disputes

• DRBs are frequently labeled as another ADR process, but as originally conceived it is not, & should be differentiated.
• it is **Proactive** rather than **Reactive**, and stands almost alone in this regard.
• perfection of individuals is a rarity, & the likelihood of imperfection escalates non linearly with size and/or complexity of the project.
• change during the course of a complex project is an almost inevitable outcome of that imperfection.
• Every ‘change’ opinion differences as to consequences & responsibility therefore (“issues” or “conflicts” arise!)
• an effective issue management process focused on interparty relationships is a primary requirement for successful delivery of any construction project.
The actual growth of DRBs within Australia.

Use of DRBs on Government contracts virtually ceased because of adoption of standardised Conditions of Contract by majority of public authorities.

DRBA established in May 2003

Additional 5 known contracts during remainder of calendar year 2011

Growth of DRB Contracts in Australia by number

- Number of DRB contracts at year end
- Calendar year

0
5
10
15
20
25
30
35
1990
1995
2000
2005
2010

1st used in 1987

May 2011

DRBA

11
Success record DRB projects in Australia since 2004

- The simplest measures of a successful project:
  - on time,
  - within budget,
  - meets the quality &/or performance objectives expected
  - the paperwork is finished when, or very soon after, the project is operational.
- The ultimate decision for adoption of DRBs lies with the project Owners and their legal advisors,
- Factual data regarding above factors are important to any marketing thrust.
- The following slide summarises known performance on complete or substantially complete DRB contracts in Australia since 2004,
  - (Records before formation of DRBA are generally not available).
# Australian DRB Contract performance to April 2011 (# 1)

<table>
<thead>
<tr>
<th>Total # of Contracts</th>
<th>Projects with referrals</th>
<th>Total No. of referrals</th>
<th>Gross value of Initial Contract Sums ($M)</th>
<th>Gross value of Adjusted Contract sums with Agreed scope changes ($M)</th>
<th>Gross value of Claims settled in addition to Agreed scope changes ($M)</th>
<th>Completion time status of Projects</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>On time or ahead</td>
</tr>
<tr>
<td>14</td>
<td>3</td>
<td>5</td>
<td>5,832</td>
<td>6,173</td>
<td>123</td>
<td>12</td>
</tr>
</tbody>
</table>

1. Statistics include one contract with uncertain data on outcome time & final cost.  
2. A further $3 Bn contracts are in progress & not included. Indications to date are consistent with the included projects.  

“Agreed scope changes” includes 1 project with $97m of options which were either Pre-agreed, or negotiated shortly post award, + a $184m variation for a 5 km x 6 lane expressway extension negotiated at about the 80% complete stage of the original scope.
While the DRB contract sample to date is small compared to the BDW industry survey sample (slides 9 to 11), the indications are very positive & consistent with various DRBF international surveys.
Some Specific Project Examples

- Sydney desalination facility
- Sydney Ports upgrade
- Gateway project
- OScar 3 project
Purpose written Contracts
Awarded 18/7/07. DRB tripartite agreement signed 17/8/07.

1st DRB meeting 29/10/07
Start work on site 12/11/07.

Cost performance (rounded):
At award: $1,000,407,000
Final: $1,003,000,000 incl $10m bonus for safety.

Contract completion dates:
125 ML/d : 14/02/10
250 ML/d : 16/05/10

Actual Completion dates:
125 ML/d : 18/02/10
250 ML/d : mid May

Official opening of plant:
19/04/10

No. of referrals to DRB
Zero

Sydney’s 250 Ml/d desalination plant
Port Botany Expansion

- Contract award date: 20/12/2007
- DRB appointed: 21/12/2007
- 1st DRB meeting with parties: 14/04/2007
- Work start on Site: May 2008
- Time performance:
  - Original Contract Completion Date: 7 March 2011
  - Extended date (“abnormal weather”): 11 May 2011
- Projected Construction Completion date at 98%: on or before extended date.
- Cost performance at 98% complete:
  - Original Contract Sum: $516m
  - Adjusted Contract Sum (Agreed Scope variations): $526m
  - Other claims: $1.85m
- DRB Referrals:
  - Nil at 98% complete. All issues have been resolved by discussion between the parties, with assistance from the DRB. *(One possible issue has arisen at a late stage)*
Contract Award 26/09/2006
DRB appointed Jan 2007
1st DRB meeting 5/03/2007
Work start on site 16/02/2007

Initial Scope:
18.9 km of 6/8 lane expressway + Brisbane R bridge duplication.

Time Performance:
3 intermediate Separable Portions; 2 met, 1 late.
New Bridge opening & Final completion of original work: 7 months ahead of time.

Cost Outcomes:
Contract sum @ award = $1.35 Bn
Pre-Agreed & negotiated scope changes (Deed of Variation) up to mid 2008 = $97m
Negotiated ‘Project Extension’ at ≈ 80% complete stage = $185m.
Miscellaneous claims & early completion ‘bonus’, settled between the parties ≈ 1.7% of adjusted contract sum.

DRB referrals:
2 matters referred to DRB
Decisions on both. Cost implications of 1 remains under discussion between the parties.

Other
Recipient of Infrastructure Partnerships Australia 2011 National Infrastructure Award.
• Described as a “quasi Alliance”, but is effectively an ‘ECI’ Relationship Contract, with defined risk allocation, cost reimbursable components & a pain/gain share arrangement.
• Target price at award $335m
• DRB in place from outset.
• Excellent relationships developed, zero referrals to DRB at 70% point.
• First trains achieved ahead of time & cost.
• Contract now extended by a further 5 x 4 car sets plus 2 spare cars. Rev target price $440m.
• Joint entry submitted for Infrastructure Partnerships Australia 2011 National Infrastructure Award.

COMPARE:
• Previous 2 conventional contracts with same Contractor, no DRB;
• > 1 year late, much over budget, + major arbitrations.
Thank you