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

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Dispute Resolution Board Australasia Inc

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

- Survey period : October 2005 - January 2006.
- 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.

Value range	% completed on time
$20-$50 million	66%
> $500 million	50%

Survey Findings- *Dissatisfaction with Dispute resolution processes in common use.*

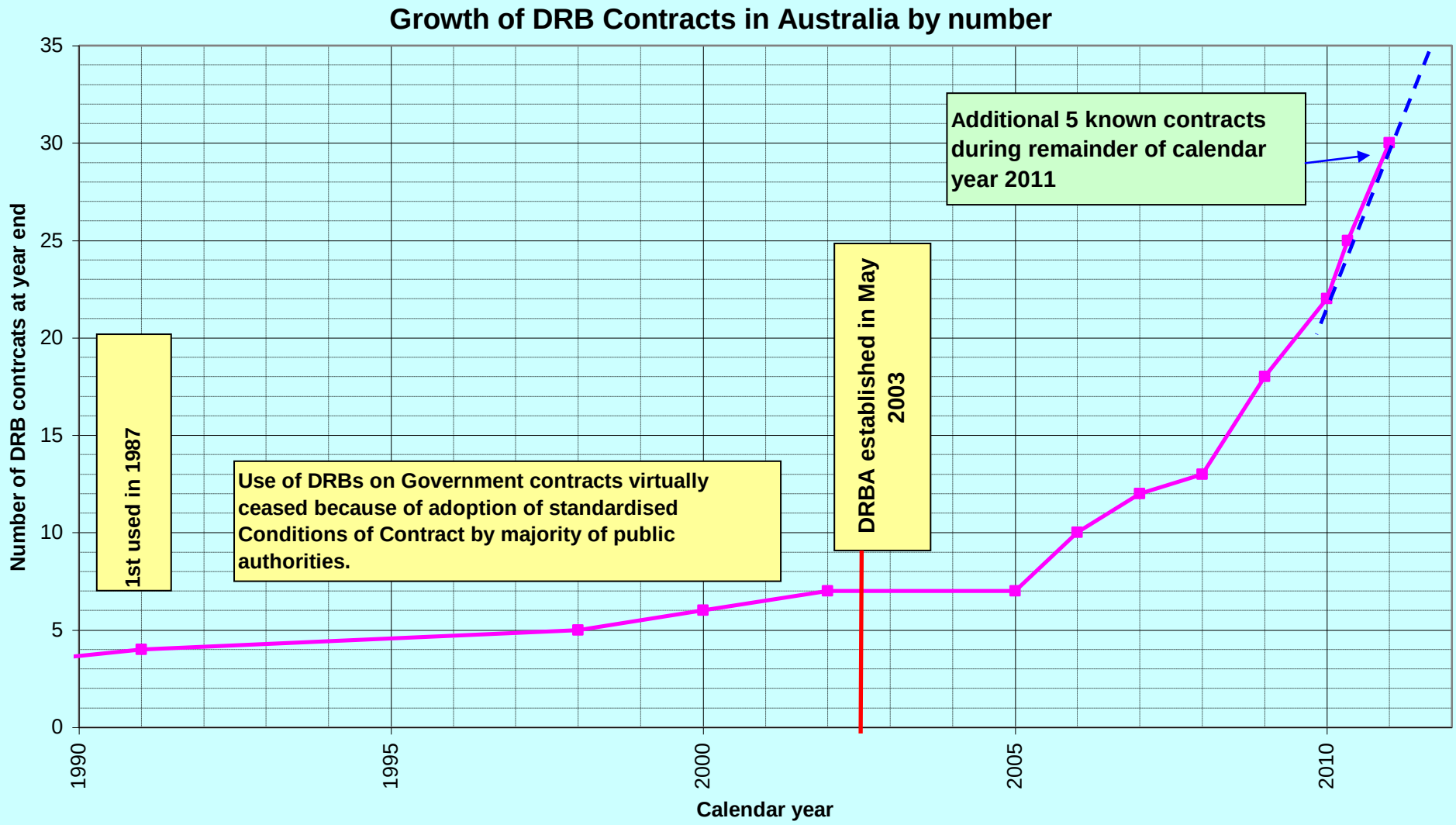
Project Value range	% Respondents dissatisfied with dispute resolution process
Average across all projects surveyed	78%
$20-$50 million projects	75%
$200-$500 million range	91%

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.



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)

Total # of Contracts	Projects with referrals	Total No. of referrals	Gross value of Initial Contract Sums ($M)	Gross value of Adjusted Contract sums with Agreed scope changes ($M)	Gross value of Claims settled in addition to Agreed scope changes ($M)	Completion time status of Projects		
						On time or ahead	Late	> 3 mths late
14	3	5	5,832	6,173	123	12	2	1

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.

Australian DRB Contract performance to April 2011 (# 2)

Comparative Summary, Australian DRB contracts vs 2003-2005 BDW Survey non-DRB contracts			
Value range of DRB Projects	Min^{m} = $35m (1 less than $60M)	Max^{m} = $1.8 Bn	Average = $406m
	DRB contracts complete or substantially complete		Industry norm as BDW survey, comparable value non-DRB contracts,
% of projects completed on or ahead of time	87%		<56%
% of projects completed > 3 mths late(see note below)	6.7%		27%
% of projects with no referrals	80%		<40% did not require activation of the dispute resolution process
Average no. of referrals per project	0.33		Not available
Average cost increase including agreed scope growth & settled claims	8.7%		Not available
Average claims over & above agreed scope growth	0.64%		14.7 % (may include some of the item above)
Note: The one contract in the "> 3 months late" category was the subject of a renegotiated contract. Both parties agree that without the DRB involvement, this contract would have finished with a major dispute.			

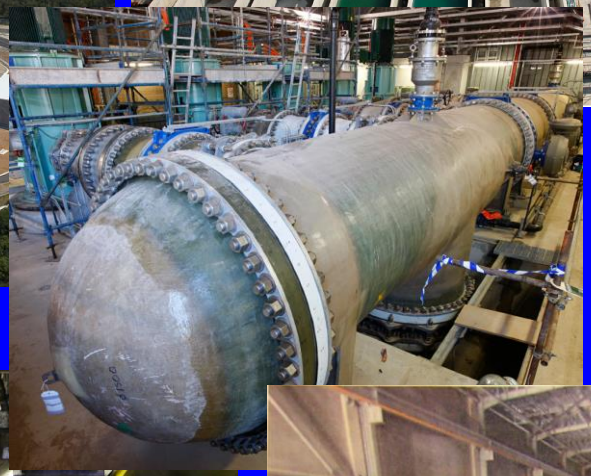
While the DRB contract sample to date is small compared to the BDW industry survey sample (slides 9 to 11), the indications are very positive & consistent with various DRBF international surveys.

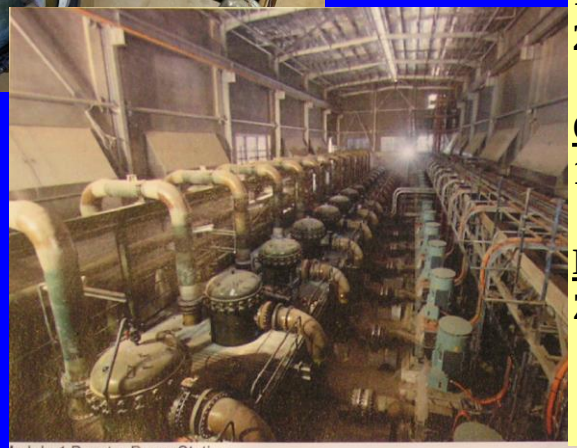
Some Specific Project Examples

- Sydney desalination facility
- Sydney Ports upgrade
- Gateway project
- OScar 3 project

Sydney's 250 Ml/d desalination plant

http://www.sydneywater.com.au/water4life/Desalination/overalldocumentation.cfm#top





Module 1 Booster Pump Station

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.

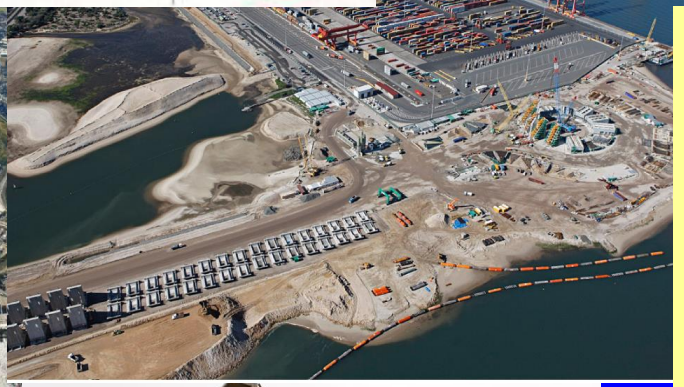
Contract completion dates:
125 ML/d : 14/02/10
250 Ml/d : 16/05/10

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

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

<u>Time performance:</u>

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.

<u>Cost performance at 98% complete:</u>

Original Contract Sum: $516m
Adjusted Contract Sum (Agreed Scope variations) : $526m
Other claims: $1.85m

<u>DRB Referrals :</u>

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*)

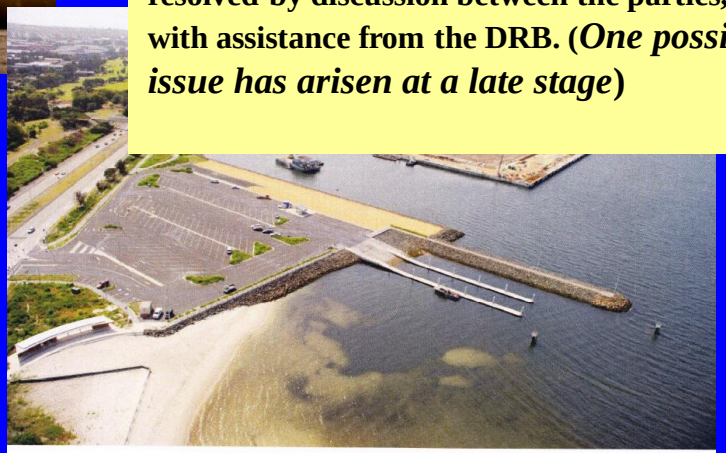
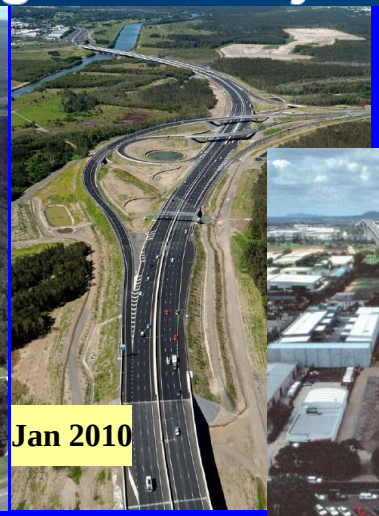
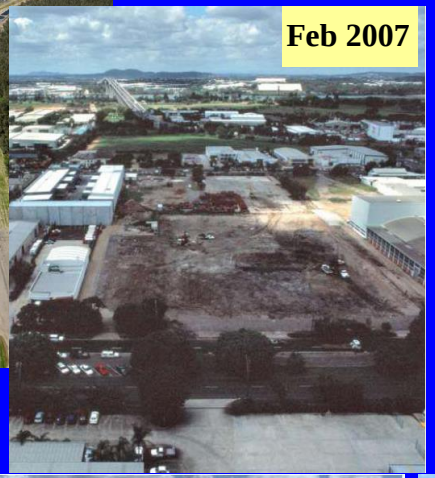
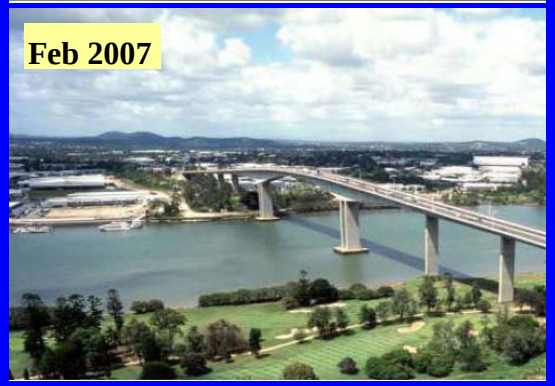


Photo 4 – New Boat Ramp (Foreground) & New Terminal Area (Background)

Gateway Upgrade Project







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.

OSCar 3.

Design & Build of 18 x 4 car suburban train sets.

- **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.**
- **<u>COMPARE:</u>**
- **Previous 2 conventional contracts with same Contractor, no DRB;**
- **> 1 year late, much over budget, + major arbitrations.**

Thank you