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## Time for Australia to embrace Dispute Resolution Boards?

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Given the continued growth of the construction industry, and the ever increasing size of projects, disputes are not going away and if anything they may become more prolific. Against this backdrop, to ensure the future viability of the industry, it is increasingly necessary for all involved in the construction industry to consider alternative methods to deal with disputes. It is suggested that this focus should be directed towards dispute avoidance.

In light of the reported success of Dispute Resolution Boards (DRBs), both around the world and in Australia, combined with the cost-benefit ratio of a DRB, it makes commercial sense to consider the wider adoption and use of DRBs on construction projects in Australia - in particular in Victoria, WA and SA.

In order to achieve this, the construction industry needs first to be educated on the proper operation of DRBs and the benefits that can be reaped from them.

As part of this process it is imperative to highlight the key factors determining whether a DRB will be successful, particularly the importance of appointing the right experts to the DRB panel, active engagement of the primary dispute avoidance function of the DRB and finally (but likely most importantly) the cooperative approach required to be adopted by the parties focussing on successful project delivery.

# What are DRBs?

There are various forms of dispute boards, including DRBs, Dispute Adjudication Boards and, most recently, International Federation of Consulting Engineers (FIDIC) Dispute Avoidance Adjudication Boards.

A DRB comprises a panel of neutral third party experts (usually three) appointed by the parties at the outset of the contract. DRBs are established by contract, as such the terms of the DRBs appointment dictate the DRBs specific function and role during the project.

The DRB members meet regularly during the course of the project, irrespective of whether any dispute has been referred, to review project progress. If requested, the DRB provides a non-binding recommendation on the likely outcome of any dispute. It is worth mentioning that in Australia the preference is towards DRBs providing interim binding decisions. For example, the decision would be binding unless challenged by a party within 30 days of the DRBs decision.

A DRBs primary focus is on dispute avoidance, this is in contrast to arbitration, litigation, expert determination, and all other forms of Alternative Dispute Resolution which are reactive in nature and deal with resolving disputes.

DRBs originated in the US construction industry, with the Dispute Resolution Board Foundation (DRBF), a non-profit organisation, established in 1996 to promote DRBs. Since then, DRBs have been adopted in a number of countries including the UK, France, Sweden, Denmark, Australia, New Zealand, South Africa, Canada, China, Ethiopia, Hong Kong and India.

DRBs were formally introduced in Australia in 2003 with the establishment of the Dispute Resolution Board Australia (DRBA), the Australasia chapter of the DRBF.

## How do DRBs work?

The DRB process is generally as follows:

- DRB members are selected and approved by both parties soon after award of a contract. Usually each party chooses a DRB member with the third being selected by the appointed DRB members to ensure neutrality;
- the DRB members are provided with key contract documents and regular project updates, for example copies of construction progress reports and minutes of weekly project meetings;
- as part of its ongoing informal dispute avoidance role, DRB status meetings and site tours are held periodically, often every 2-3 months, at the project site. The purpose of such meetings is to enable the DRB members to monitor project progress and also receive briefings from the parties. This allows the DRB members to become familiar with the project and its participants thereby building

confidence in the DRB. It also enables the DRB to be well informed as to any potential disputes as and when they arise. These meetings are held regardless of whether any disputes have formally arisen. A feature of the DRBs in Australia is that often these on site status meetings are on a Without Prejudice basis. It is thought that this allows the parties to communicate more openly and frankly;

- the dispute resolution function of the DRB is engaged where disagreements are not capable of resolution through negotiation. In such circumstances either party may refer a dispute, often through submission of position papers, to the DRB for an informal hearing. Rules of evidence will not apply and legal representation is limited;
- during the hearing, the DRB will question the parties and facilitate discussions. They will then provide a written decision with reasons. It is suggested that the DRB's familiarity with the project enables it to make a timely and appropriate recommendation to overcome conflict in a speedy and efficient manner; and
- where parties remain unsatisfied they may proceed to the dispute resolution procedure under the contract.

## Perceived advantages and disadvantages of DRBs

The principal benefit of a DRB is the avoidance of formal disputes on a project through rapid real-time decision making, thereby maintaining project relationships and progress of the works. This is particularly important on a long-term project where the parties will be working together for a number of years. It is also thought that DRBs have a positive impact on project budget and timely project completion.

Well-drafted DRB rules may also allow the parties to adopt a flexible approach to resolving disagreements if and when they arise during the performance of the contract.

With a DRB in place parties may be less likely to take extreme positions given a DRBs familiarity with the project and that the DRB can quickly see through weak claims. DRB decisions are also less likely to be disputed given the confidence in the DRB through its knowledge and familiarity with the parties.

The avoidance of formal disputes is likely to result in substantial savings in legal costs and management time, it may also avoid the need to engage outside counsel or experts.

The primary drawback of engaging a DRB is often seen as the cost of engaging a sitting panel for the duration of the project, this is why DRBs have generally been seen as more suited to larger projects. A three-person DRB costs around \$150,000 - \$250,000 per annum shared equally between the parties. This represents between 0.15% to 0.25% per annum for a \$100 million project.

In comparison to the costs of a full blown dispute, which for an international arbitration may cost 10% to 15% or more of project costs, this amount seems more than reasonable and may be regarded as 'cheap insurance'.

# Are DRBs effective?

The value of Australian and New Zealand projects utilising Dispute Boards is approaching more than \$60 billion. Since 1987 the total number of DRB contracts on record is 111 (101 of these are in Australia).

The DRBA reports that of the 111 projects with DRBs, in each instance of their use no disputes progressed to arbitration or litigation. This equates to a 100% success rate. This is an astonishing outcome and it is worth focusing on.

From a global perspective, the DRBF statistics (as at July 2014) report that:

"The available recorded and anecdotal evidence indicates that 98% of projects utilising DBs (now numbering well over 2700 internationally) have been completed without reference beyond the DB.

"... just under 80% have been completed without a single referral to the DB, compared with an industry norm for projects without DBs of less than half that percentage being completed without off-site dispute resolution processes being invoked."

In terms of timely completion within budget, the DRBF reported that:

"More than 80% of DB projects have finished on or ahead of time compared to the industry norm of well under 60% for similar value projects without DBs. The majority of DB projects have also been completed within the Owner's budget."

The information is not reported, but given the cost, distraction and resource demands of even small disputes, the savings in avoiding disputes intuitively appear to more than justify the costs of establishing a DRB.

## International DRBs

DRBs have been utilised on a number of major projects worldwide including the UK Channel Tunnel project.

The Channel Tunnel project commenced around 1986 and was one of the first projects in the UK, and possibly Europe, to contain provisions for referral of a dispute to a dispute board, specifically an expert panel (**Expert Panel**). The project was procured on a very early PPP/PFI framework basis.

The contract between the Channel Tunnel Group and Balfour Beatty provided for disputes to be referred to the Expert Panel who would give a binding decision in writing within 90 days.

Provided the Expert Panel's decision was unanimous, the decision would be final and binding, unless within 90 days of the dissatisfaction the matter was referred to arbitration.

The Expert Panel had a pool of five members, with decisions taken by three members: the chairman and two members. The Expert Panel was made up of a French professor of law (the chairman) and four engineers of different nationalities (two French and two British), with the individual members chosen for their particular expertise.

During the seven years of the project there were in the region of 20 formal referrals to the Expert Panel, with three subsequent referrals to arbitration and, within this process, court proceedings.

Given the number of referrals to the Expert Panel and the limited use of formal proceedings, the Expert Panel can be said to have been successful in finally resolving disputes. This is supported by the fact that similar provisions were adopted in subsequent projects such as the Channel Tunnel Rail Link. Further, the Expert Panel's mandate and contract provisions are remarkably similar to FIDICs 1999 Dispute Adjudication Board.

Success of the Expert Panel is attributed to the facilitative role played during the works which enabled issues to be aired and addressed as and when they arose. Also the mix of the panel members' nationalities and backgrounds, the ability to secure the services of highly qualified experts and the fact that the project was not run solely on English Law principles.

## The Australian experience

DRBs were formally introduced in Australia in 2003, however DRBs were used in Australia long before this date. The first DRB on record was the 1987 Sydney Ocean Outfall Tunnels in NSW which had a contract value of \$320 million.

Use of DRBs in large infrastructure contracts within Australia has increased, most significantly in NSW and Queensland, although growth has not matched that of the international position. Current statistics report the approximate split in use of DRBs in Australia since 1987 as follows:

State	No. of DRBs
Australia-wide	5
NSW	64
Queensland	25
Victoria	Nil
South Australia	1

Western Australia	3
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## Active and successful DRBs in Australia

### Sydney Desalination Plant (Sydney Desal Plant) 2007-2010

In July 2007, Sydney Water appointed John Holland Pty Ltd and Veolia Water Australia as preferred tenderer to Design, Build, Operate and Maintain (DBOM) a state of the art Reverse Osmosis Desalination Plant. The contract value was \$1 billion.

Subsequently, Sydney Water entered into a design and construction (D&C) contract with John Holland and Veolia Water Australia (Blue Water) and an operation and maintenance (O&M) contract with Veolia Water Australia.

At the time of construction, Sydney Desal Plant was the largest desalination plant in Australia and the second largest in the world.

A three-member DRB was established to provide recommendations to assist the parties to resolve disputes. Despite its complexities, the project was delivered without any contractual disputations. It was also delivered on time and under budget.

The presence of the DRB is said to have contributed to the success of the project. As explained in an open letter from the DRB Chairman in an award submission:

“The purpose of the DRB was to assist the parties to the Project to identify, discuss and resolve potential issues of concern between themselves, at the earliest possible stage, in a frank and open environment to avoid potentially acrimonious disputes. With the cooperation of the parties a range of potential issues were raised and discussed in a frank and open environment at DRB Meetings with the focus on successful Project delivery and dispute avoidance. The discussions invariably resulted in rapid and pragmatic solutions to all problems or potential problems within a relatively short time after they were identified.”

The DRB acted in a facilitation capacity encouraging the cooperation of the parties and adopting a range of creative dispute avoidance procedures. The processes encouraged by the DRB are said to have resulted in pragmatic lateral solutions, or ongoing processes, to deal with problems before positions became entrenched. This resulted in all issues being dealt with successfully by the parties themselves, without formal references to the DRB or the contractual dispute resolution procedure.

### Adelaide desalination plant (Adelaide Desal) 2009-2011

In around February 2009, the SA Government engaged McConnell Dowell Constructors, Abigroup Contractors and Acciona Aqua (**Adelaide Aqua D&C Consortium**) under a D&C contract to construct the desalination plant, and Acciona Aqua and Trility Pty Ltd to operate and maintain the facility. The project was carried out under a DBOM contract. The contract value was \$1.8 billion.

At the time, the Adelaide Desal project was the largest infrastructure project that SA had funded, owned and completed successfully.

The project implemented a DRB, although it is understood that the dispute avoidance function of the DRB on the project was not enabled, the consequence being that the DRB could only make decisions on disputes formally referred to it. The DRB was, however, regarded as successful as the decision issued by the DRB was persuasive in resolving the issues and it is reported that the project was delivered on time and within budget.

## **North-West Rail Link/Sydney Metro OTS Project (Sydney Metro) 2014-2019**

The project involved a PPP for a major rail project in NSW. The project was an availability PPP between a NSW Government agency (**Principal**), and the SPV (**OpCo**) with sub-contracts for design and delivery (**D&D**) and operations and maintenance (**O&M**). This project was part of a larger project which consisted of three major interfacing contracts, with a total delivery value of \$7.3 billion, completed in approximately six years.

The project had a DRB and, following completion representatives from the project contributed to a 'lessons learned' paper. The key points to note and lessons learned were: [1]

- the Principal elected to use the name 'Dispute Avoidance Board' (DAB) rather than 'Dispute Resolution Board' as a signal to tenderers of its resolve to avoid and prevent disputes, not just resolve and determine disputes;
- although the DAB agreement was between the Principal and OpCo, the DAB encouraged (and the Principal and OpCo agreed) that representatives from both D&D and O&M should be represented as observers at all DAB meetings from the outset. The lesson learned from this was that it is essential for the project that all parties are represented and actively participate in DAB meetings. It was suggested that in future PPP contracts attendance should be prescribed by the contractual regime;
- quality and consistency of the project teams is essential for efficient project management and delivery. From the DAB's experience on other projects, less experienced project teams making questionable decisions (sometimes in an adversarial manner) results in problems and disputes arising. On this project, it was stated that both parties had in place quality 'A teams' and importantly personnel were largely maintained and unchanged throughout the project giving continuity in decision making;

- it is important for the functioning of the DAB that its members are kept adequately informed of progress, issues, claims and disputes. The reporting on this project was thorough and detailed. In terms of lessons learned it was noted that the preparation of a joint presentation by the Principal and OpCo (with support of D&D and O&M) is a best practice method of ensuring that issues are raised and addressed before and during a DAB meeting; and
- addressing issues that might lead to claims in a timely manner provides certainty for all contracting parties. This prevents aging unresolved issues.

## What makes a successful DRB?

The importance of appointing the right professionals to the DRB panel cannot be underestimated. Significant thought must go into the selection process with a need for the DRB members to be highly respected (by both parties), with the necessary skills and experience of similar projects. Notably one of the factors contributing to the success of the Expert Panel on the UK Channel Tunnel project was said to be the professional expertise and mix of nationalities. It is the parties' confidence and respect for DRB members that has a significant impact on the effectiveness of the dispute avoidance function and the finality of any interim non-binding recommendations.

Secondly, engagement of a DRBs dispute avoidance function. The Adelaide Desal project is an example of where the DRBs facilitative function was constrained; meaning that the DRB was prevented from engaging with the parties, thereby assisting in the airing of any issues. The Sydney Desal project, however, illustrates the proactive facilitation role that should be adopted by the DRB during the project and the significant positive impact of such function on the prevention of disputes.

Thirdly, the importance of ensuring that the DRB covers all levels of a contract and all project participants, as illustrated by the Sydney Metro project. It is essential to have the buy in and involvement of all concerned, in a PPP structure this would be the D&C subcontractor, SPV and principal.

Finally, the approach and mindset of the key project participants. For a DRB to succeed the parties must adopt a cooperative approach with a joint commitment to successful project delivery.

In the Sydney Desal project it is suggested that for the life of the project, both Blue Water and Sydney Water displayed a commitment to creating a pro-active mutual problem solving environment to facilitate successful delivery of the project. Similarly in the Sydney Metro project emphasis was on the quality of key project personnel and the parties' open and transparent communications.

## Why has Australia fallen behind on the uptake of DRBs

Australia's reduced enthusiasm towards DRBs, in particular Victoria, WA and SA, when compared to the rest of the world, may in part be a consequence of more wide use of standard forms developed locally in those jurisdictions, particularly by principals.



For major projects internationally, FIDIC is the most commonly used standard form contract. FIDIC led the way with a standing Dispute Adjudication Board in its 1999 suite of contracts. This was replaced in 2017 by FIDIC's Dispute Avoidance Adjudication Board which was intended to signal a focus towards dispute avoidance. Australia's more conservative use of DRBs may therefore be due to the fact that FIDIC is not widely used within Australia.

Interestingly, in 2015 draft AS11000:2015 was touted to replace existing AS2124:1992 and AS4000:1997. The dispute resolution clause in the proposed revision had been substantially expanded to include the option of a DRB. Unfortunately, as of 4 April 2017, Standards Australia confirmed that AS11000 would not be released, stating that the contract "was not supported by the full spectrum of interests".

This may be seen as a lost opportunity for DRBs, as had such amendments to Australia's standard forms been enacted this would have no doubt increased awareness of DRBs in Australia and most likely encourage their use.

Nevertheless, there is greater use of more novel standard form contracts in Australia. For example NEC4, a UK collaborative standard form contract, which provides a dispute board option, is being used by Sydney Water in its new collaborative enterprise model (Partnering for Success).

## Key takeaways

DRBs are an effective form of dispute avoidance and resolution. From a global perspective, it is reported that 98% of projects utilising Dispute Boards (over 2700 internationally) have been completed without reference beyond the Dispute Board.

Interestingly, it is NSW and QLD that have shown the most enthusiasm for DRBs.

A successful DRB can achieve avoidance of formal disputation on a project through rapid, real-time decision making which assists with maintaining valuable project relationships and progress of the works. Avoiding formal disputes in turn results in significant savings in legal costs and senior management time.

Successful DRBs have a number of common characteristics which should be carefully considered by project participants at the outset of a project, including:

- the importance of appointing the appropriate experts to the DRB panel. Significant deliberation should go into the appointment process with the selected experts being highly respected (by all parties) and possessing the necessary expertise and experience. It is the parties confidence and respect for the DRB members that has a significant impact on the effectiveness of the DRBs dispute avoidance function and the finality of any decisions issued;
- absolute activation of the DRBs dispute avoidance function allowing the DRB to fully engage with the parties during the project thereby facilitating the airing of issues as and when they arise. It is this

proactive avoidance function that sets a DRB apart from other forms of dispute resolution i.e. expert determination, arbitration;

- the DRB must be operable at all levels of the contract i.e. in a PPP between the principal, SPV and D&C subcontractor, to ensure full cooperation and involvement from all project participants; and
- parties must set aside any adversarial tendencies adopting a cooperative approach to the management of the project from the outset with a joint commitment to successful project delivery.

Australia's preference for home grown form contracts is likely to be one of the reasons DRBs have been less widely used in Australia compared with the rest of the world. This may soon change with greater acceptance of alternative contract forms such as NEC4 (which has an option for a dispute board) being apparent more recently.

The prevalence of disputes is likely to increase given the growth in the size and value of construction projects. To ensure the future viability of the construction industry it is necessary for parties to consider alternative methods of dispute resolution.

We suggest that this focus should be on dispute avoidance, and where necessary dispute resolution, through the wider adoption of DRBs. However, to achieve greater recognition of DRBs in Australia, and to encourage their use, there first needs to be an education on the proper operation of DRBs and the benefits a successful DRB can deliver.

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[1] R Finlay and J Tyrriil, Lessons Learned: The Use of Dispute Boards on a Public Private Partnership Project, 2 May 2020.

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