

# DRBF R3 Breakfast Briefing

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## ***A DB User's Perspective and Challenges***

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# Introduction

- ➔ DBRF Region 3 (R3) recently engaged in-depth with senior representatives of an Owner/DB User to discuss their ongoing use of DBs.
- ➔ Senior staff turnover within the organisation meant that there had been a loss of “DB champion(s)” and a loss of “corporate memory” in recent times.
- ➔ Equally, some anecdotal and some real experiences have created different perceptions regarding the use of DBs.
- ➔ This presentation is to outline some of the User’s concerns, R3’s responses and possible solutions.

# Operating Environment

- ➔ The User has utilised more than 40 DBs on its infrastructure projects over the past 10 years.
- ➔ The User is currently faced with a series of challenges:
  - ➔ Staff working largely out of office (for much longer than the rest of us!)
  - ➔ COVID-19 and associated claims.
  - ➔ Increases in resource costs (fuel, steel, etc).
  - ➔ Scarcity of staff resources (esp. experienced project managers) and high staff turnover.
  - ➔ An industry push towards “collaborative contracts”.

# Feedback #1

- DB members who are not legally trained (such as technical specialists / consultants) do not have the necessary skills or experience to write persuasive Advisory Opinions / Decisions.
  - *R3 response*: The premise of the Feedback is not accepted. Many non-lawyer Arbitrators, Adjudicators or Expert Determiners have the skills to write Advisory Opinions/Decisions.
  - R3 emphasises the need for complementary skills to be considered in the selection of a three-person DB, including skill and experience in writing reasoned Decisions.

## Feedback #1 (cont'd)

- Where challenged by the legal analysis of an issue or the writing of a complex Advisory Opinion or Decision, a one-person DB without appropriate legal experience can, with the consent of the parties, appoint an independent legal expert to advise / support the one-person DB on the legal aspects of the matter.

## Feedback #2

- ➔ Challenge to find suitable, experienced DB members, especially those willing to travel to remote or regional projects.
  - ➔ *R3 response:* 75 R3 members have completed a DB Advanced Training Workshop and a majority are available for appointment (at least 40 R3 members have had prior DB experience).
  - ➔ R3 has never heard any concerns expressed by Users or DB Members about travel to remote or regional areas.

## Feedback #3

- ➔ User proposes a “1+2” DB structure. One member (the Chair) attends all site visits and site-based meetings. The remaining two members receive reports and the like but do not attend the regular DB meetings in person. The “plus two” added solely for the purposes of Advisory Opinions / Decisions.
  - ➔ *R3 response:* A three-person DB allows the full diversity and experience of DB members to bring positive outcomes in dispute avoidance activities and improves trust and communications with the contracting parties.

## Feedback #3 (cont'd)

- A “1+2” DB structure significantly dilutes the advantages of a three-person DB.
- A “1+2” DB structure provides insignificant cost savings for the User.
- Therefore, R3 does not support a “1+2” DB structure



## Feedback #4

- Is there a role for a DB on an “Incentivised Target Cost Contract”?
  - *R3 response*: DBs are appropriate for Incentivised Target Cost Contracts (in whole or in part).
  - A good example is the DB which was appointed to the Oscar 3 Rolling Stock Manufacturing Project in NSW, from 2009 to 2012. This was an Incentivised Target Cost Contract with a very successful outcome, attributed mainly to the presence of the DB.

## Feedback #5

- ➔ There does not appear to be any avenue for a DB User (Owner or Contractor) to lodge a complaint or express a concern about the operation of a DB.
  - ➔ *R3 response:* Since 2018, R3 has an avenue for compliments, comments and complaints directed to a confidential line to the President of R3.
  - ➔ A secure email address has been established ([presidentau@drb.org](mailto:presidentau@drb.org)) and publicised to Users and R3 members.

## Feedback #6

- There is no nomination or accreditation body for DB members.
  - *R3 response*: For good reasons, R3 as a voluntary organisation, is not, and does not wish to become, a nominating or accreditation body.
  - R3 is willing to provide (and has provided) to Users, a list of R3 members who have completed an Advanced Training Workshop and who have experience as a DB member.
  - R3 continues to encourage an inexperienced member as the “third” DB member selected

## Feedback #7

- User wants DB members to be flexible in meeting arrangements and available at short notice, especially where there are joint project governance meetings (e.g., MRG) held together with the DB meeting.
  - *R3 response*: It is R3 members' experience that there has never been any reluctance to travel to routine (or urgent) DB meetings in the city or regional areas.
  - *R3 response*: Where a monthly retainer is paid, it is the DB members' obligation to remain available to attend DB meetings or other related activities at short notice.

## Feedback #8

- ➔ It is the User's experience that DB Decisions are increasingly being challenged by the losing party (e.g., by way of a Notice of Dissatisfaction).
  - ➔ *R3 response*: It is a common practice, recognised worldwide, for the “loser” of a DB Decision to lodge a Notice of Dissatisfaction and request additional time or a moratorium for ongoing negotiations and discussions.
  - ➔ This practice ensures there is a longer period for negotiation and possible settlement between the Owner and the Contractor, thus avoiding the Decision from becoming binding.

## Feedback #8 (cont.)

- The worldwide DB statistics (and Australia's 100% record in this regard) demonstrate that the vast majority of DB Decisions / Determinations are accepted by the parties or at least form the basis for a commercial settlement. In the latter case, those disputes are almost always ultimately resolved “within the project” and do not proceed to a final arbitral award or litigation judgment.

## Feedback #9

- There should be a role for the DB in post-Decision discussions with the parties, particularly where new senior executives from the parties become involved.
  - *R3 response*: Provided the DB's role and the DB Agreement have not been terminated, R3 members are encouraged to participate in post-Decision discussions with the parties.
  - This may involve some changes to the Appendix 1 and 2 Rules within R3's standard DB Agreement, as the parties often believe that the DB is “functus officio” with regard to an issue, after a Decision has been made.

## Feedback #10

- ➔ User enquired how the DRBF Code of Ethical Conduct (see Chapter 6 of the DRBF Manual) is incorporated into Australian DBs
  - ➔ *R3 response:* Upon renewing a person's membership each year, that member agrees to be bound by the DRBF Code of Ethical Conduct.
  - ➔ In addition, the R3 Board has approved expanding its template DB Agreement to specifically require DB members to give an undertaking, both to the Owner and the Contractor, to observe the DRBF Code of Ethical Conduct.



# QUESTIONS / COMMENTS