

DISPUTE BOARDS IN AUSTRALIA

– THE STORY SO FAR¹

Dr Donald Charrett

Background to the use of Dispute Boards in Australia

Although Australia's population is small by world standards (22 million), the construction industry is a substantial employer, with 1 million people employed (10% of the workforce). The annual value of non-residential construction projects in December 2011 was \$14 billion, with a backlog of projects valued at \$770 million. The seemingly insatiable demand from China and other countries for Australia's minerals, iron ore, coal and LNG, continues to fuel a resources boom in which expenditure increased 53% from 2009/2010 to 2010/2011. A significant feature of the construction industry in Australia is that it is overwhelmingly carried out by the private sector (81%), although the major source of construction work outside the resource sector is the public sector.

As in other countries, many Australian construction projects are subject to disputes. It was estimated in 2009 that the wastage from disputes in the Australian construction industry was approximately \$7b per year. Prior to 2003, construction disputes that were not resolved by negotiation were resolved by one or more of mediation, arbitration, expert determination, or litigation – all retrospective processes that are only implemented after a dispute has formally crystallised. In a survey of disputes in the construction industry in 2006, it was found that fewer than 40% of all projects had no disputes. The survey found that, in common with disputes in the construction industry around the world, the primary causes of disputes were: variations, contract interpretation, EOT claims, site conditions and late, incomplete or substandard information.

The industry response to the perceived level of disputes arising from the traditional contracting model was to turn to less adversarial

Author Profile



Donald Charrett is a barrister, arbitrator, mediator and Dispute Board Member, and is the Chairman of Melbourne TEC Chambers in Melbourne Australia. He is a Principal Panellist with the Building Disputes Tribunal.

contracting mechanisms, such as partnering and alliancing. The "No Dispute" report of 1990 by the National Public Works Conference/ National Building & Construction Council was an early promoter of more collaborative forms of contracting. Australia has since been an enthusiastic adopter of the "no blame/no dispute" culture inherent in alliancing contracts. There are however, recent suggestions by governments that alliancing contracts may have been used inappropriately in circumstances where traditional hard money contracts may have delivered the employer better value for money.

Dispute Boards (DBs) in Australia have provided a mechanism for reducing the adversarialism in construction projects, without losing the benefits of traditional hard money forms of contract. The DB concept was first introduced into Australia in the Sydney outfall tunnels project in 1987. Although a few projects used DBs in the 1990s, they became more widely used from around 2003. This awakening of interest was the result of:

- industry wide dissatisfaction with the traditional methods of resolving disputes after they had arisen;
- the successful and expanding utilization of DBs internationally, particularly in the USA; and
- the establishment of the Dispute Resolution Board of Australasia (DRBA) as a special interest group and Chapter of the Dispute Resolution Board Foundation (DRBF) to facilitate training in and promotion of the use of DBs.

Since 1987, more than 30 DBs had been completed or are in progress in Australasia. There were only 5 DBs before 2003, with a total project value of approximately \$580 million. Since 2003, the combined value of the approximately 25 projects that have had DBs exceeds \$11 billion. Typically, DBs have been used in infrastructure projects such as roads, bridges, rail projects, tunnels, dams, ports, pipelines and water plants. With several exceptions, these projects have been government funded. At least 5 or 6 DBs have started or are starting in 2012 on major projects.

The use, familiarity and penetration of DBs in Australia need to be considered within the context of Australian approaches to

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procurement. The most widely used standard form contracts are those issued by Standards Australia, whose suite includes contracts for construction only, design and construct and management contracts. These contracts are often amended, sometimes heavily, usually by the employer, to alter the "standard" risk allocation. Bespoke contracts are widely used, particularly in the resources industry, and for alliance, PPP and partnering contracts. There is an increasing sophistication of the construction market, along with increasing risk aversion and the need to account for public policy considerations in public procurement. Further, there is an increasing emphasis on achieving "value for money", which is one of the prime considerations in awarding government contracts. There is no reference to DBs in Australian standard form contracts, and any contracts that incorporate them must therefore be purpose written for the specific project.

Dispute Board processes – dispute avoidance

The use of DBs in Australia, although limited to date, has the enviable record that all disputes have been resolved within the DB process, with no disputes proceeding to arbitration or litigation. In addition, many potential disputes have either been avoided or amicably resolved within the DB process, without crystallising into formal disputes. There appear to be a number of features of this successful use of DBs that seem to be specific to the Australian experience.

Perhaps most importantly, the emphasis is on "issue management" and "dispute avoidance" throughout the project, rather than the resolution of formal disputes (although that may ultimately be a necessary role for the DB). The primary role of the DB is therefore one of a facilitator or mediator during the course of the project, meeting regularly with the contracting parties and assisting them to find cooperative solutions to issues as they arise. The DB's understanding of potential "hotspots" comes from their experience and their familiarity with the project through reading regular project communications and regularly attending meetings with key project personnel.

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The procedures commonly used allow for the DB to give an "advisory" opinion on an issue at the request of both parties, quite independent of the formal provisions for the adjudication of formal disputes. However, it does not appear that many such advisory opinions have been sought.

In order to promote dispute avoidance whilst retaining the ability to implement a structured and fair dispute adjudication of a formal dispute if required, the following procedures for regular DB meetings are commonly implemented in Australia:

- The DB is constituted at the time the project contract is signed, and regular DB meetings commence early in the project.
- The first DB meeting with the project participants may include an education session conducted by the DB members for those unfamiliar with DB procedures.
- At the first DB meeting, the agreed contractual provisions and any procedures relating to the DB's operation or function are reviewed, and if necessary are supplemented with further agreed procedures that provide for flexibility within an agreed structure.
- Standard DB meetings and communications are confidential and "without prejudice", and privileged from disclosure in any subsequent arbitration or litigation.
- Senior offsite executives from both employer and contractor attend regular DB meetings, in addition to the site representatives that have day-to-day responsibility for the project.

At the conclusion of the project, it is normal practice for the DB to hold a debriefing meeting. Such a meeting provides a forum for the parties to reflect on how well the DB process worked on the project, what were its strengths and weaknesses, and how it could be improved for future projects. The DRBA has been instrumental in ensuring, subject to confidentiality requirements, that such learning is disseminated to project participants contemplating using DBs on future projects.

Whilst the experience of the use of DBs on Australian projects has generally been very effective in assisting the parties to avoid disputes, on one recent project one of the parties precluded the DB from having

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a dispute avoidance and prevention role, because this was not specifically provided for in the operating procedures. In this case, notwithstanding that the DB was constituted from the beginning of the project, its role was confined to adjudication of formal disputes submitted to it. This case emphasises the importance of including appropriate operating procedures in the project contract, to ensure that the DB can be fully effective in what, in Australia at least, is regarded as its primary role – assisting the parties to manage issues and avoid disputes.

Dispute Board processes – dispute adjudication

Notwithstanding the emphasis on issue resolution and dispute avoidance, the DB may be called on to adjudicate on a formal dispute in accordance with the provisions detailed in the contract. In the 30 odd Australasian DBs to date, there have been approximately eight referrals of formal disputes to the DB for determination. If the DB is required to assume this role, its functions become more like expert determination or arbitration, rather than facilitation or mediation. Broad requirements for the DB process to be adopted, and the contractual consequences of the resulting determination are normally detailed in the contract.

In Australia, such determinations have variously been non-binding, binding or interim binding on the parties. The use of FIDIC style interim binding determinations now appear to be more common: the DB's determination is binding on the parties unless and until it is overturned by mutual agreement or arbitration or litigation as provided for the contract. There may be a specific period of time in which either party must serve a Notice of Dispute if it wishes to challenge the determination; at the conclusion of this period of time, the determination becomes binding unless such a Notice has been served. A recent innovation has been the use of a binding DB determination in the event that the monetary award is less than a predetermined limit, perhaps \$500,000 or \$5 million depending on the size and scale of the project. This approach is familiar to those who contract with the Government of New South Wales, whose GC21 contract provides for disputes to be resolved by binding expert determination in the event

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In some contracts that provide for a DB, a properly notified challenge to a DB determination via arbitration or litigation must be deferred until the completion of the project. Whether or not the contract contains such a constraint, it is common practice that the DB's determination must be complied with until formally overturned. Thus, similar to the statutory adjudication of payment claims in all Australian States and Territories, the adjudication by the DB typically determines which party has possession of a disputed sum of money, pending final and binding resolution of the parties' rights by arbitration or litigation (if implemented).

Most of the members of the DBs that have been used in Australia are members of the DRBA, which takes an active role in the training of new and prospective members of DBs. Given the number of DBs that have now been implemented and this training effort, there is now an increasing availability of experienced professionals appropriately qualified to act as DB members. The feedback from contract parties who have participated in a DB is that the proper selection of the DB members to ensure the appropriate mix of technical, legal and management skills and experience is fundamental to the success of a DB.

The majority of Australian projects that have had DBs have had a project cost in excess of \$100 million, and one of the most recent (the Gateway Bridge Project in Brisbane) was in excess of \$1.6 billion. In these large projects the costs of a three-person DB are an extremely small proportion of the total project cost, and are not difficult to justify on the grounds of being "insurance" against the cost of litigation or arbitration of disputes. A recent trend in Australia has been to use a one-person DB on smaller projects, where the cost of a three-person Board is not considered to be justified. Given the range of skills and experience needed by a DB, the member of a one-person Board needs to be very carefully selected and agreed to by the contracting parties to ensure that s/he can function effectively.

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The future for Dispute Boards in Australia

The proven efficacy of DBs, and the active marketing of their value by the DRBA, presents opportunities for their use in areas other than construction, including defence and IT projects. A recent highly successful example of the use of a DB in a non-traditional area is the application to a Contract Works Insurance policy with a value of in excess of \$5 billion. The broker and underwriters accepted the concept of a three-person DB and appointed members from London, Singapore and Australia to supervise any insurance claim in excess of \$5 million.

There may be a future role for DB as an auditor of probity and governance on major public projects. PPPs are widely used to deliver government infrastructure in Australia, with the private operator contracted to operate facilities for a number of years on behalf of the government. Independent DBs, or at least an independent chair on such projects, can play an important role in ensuring that proper procedures are followed at all stages, and that the government is getting value for money.

There are a number of challenges to the more widespread use of DBs in Australia. There is a perception that the costs of a DB are too large to be justified on many projects, although this can be countered by the use of a one-person DB. There is a considerable reluctance of the private sector to use DBs, and to date the committed users amongst employers are confined to government organisations.

Whilst many contractors have had experience of DBs on previous projects, they may be reluctant to propose their use at the contract negotiation stage. There is a reluctance to raise and seriously address dispute resolution matters at the tender stage, perhaps based on the perception that the mere mention of disputes might indicate a confrontational attitude to administration of the contract.

Another constraint on the wider use of DBs in Australia is the perception that their only function is the resolution of disputes. Given

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that, in most circumstances, the formal adjudication of a dispute by a DB may be "appealed" to arbitration or litigation, the cost of having a DB involved in the project from the outset is viewed as an unnecessary expense to resolve disputes. If the DBs role was indeed only the resolution of disputes, such a view has some validity, particularly in the Australian statutory context where parties have a legal right to seek adjudication of money disputes under the relevant *Security of Payment* legislation. Appointing a DB to a project cannot remove that statutory right. However, in a project with a well-run DB that is functioning effectively to manage issues and avoid disputes, there should be no need to resort to such statutory adjudication, and that has been the Australian experience to date.

End Notes:

1. The material in this paper is based on papers delivered at the 12th International DRBF Conference in Sydney, May 2012 by Ron Finlay, Graham Easton and Alan McLennan.

Further Reading

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**DRBF 13TH ANNUAL
INTERNATIONAL CONFERENCE
& TRAINING WORKSHOP
2-4 MAY 2013 PARIS, FRANCE**



Dispute Boards (DBs) are recognized worldwide for their effectiveness in the real time avoidance and resolution of disputes on major projects. Embraced by government agencies, private owners, and multilateral development banks, Dispute Boards ensure project success through significant decreases in costs and time overruns.

Day one offers a full day of practical case study in workshop format. For the first time, the two day conference will offer split sessions on Friday afternoon and Saturday morning. Participants will have the choice between sessions on the mechanics and procedures of how Dispute Boards function or more advanced topics for experienced practitioners. Content will include an update on the use and financing of Dispute Boards by international financing institutions and the European Union; a look at best practice in public/private partnerships in international construction projects; and the impact of ICC Dispute Board Center and FIDIC Conditions of Contract. Legal experts will explore the use of DBs in the civil law countries of France, Germany, Italy and Spain, and report on the current developments in enforcement and other matters. In addition, there will be an update on major projects using DBs from Latin America and France (TGV and ITER), and growth of the process in Asia and Africa.

Event Details

- ⇒ May 2: **Dispute Boards Workshop** - A full day workshop of practical study.
- ⇒ May 3 & 4: **DRBF International Conference** - Choose an introductory track on DB procedure or the advanced track on new developments and best practice.
- ⇒ May 3: **Gala Dinner** - Enjoy dinner and music aboard *Le Paquebot* by les Yachts de Paris, a classic cruise down the Seine River through the heart of Paris.



For more information and to register, visit www.drb.org

The workshop and conference will be held at La Maison des Arts et Métiers conference centre, located a stone's throw from the Eiffel Tower and run by one of France's leading engineering universities. The DRBF will provide a list of four, three and two star accommodation options located nearby the conference centre. Workshop delegates will qualify for CPD credits.