

Dispute Resolution Boards – A Better Way Forward?

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Abstract

*A Dispute Resolution Board ('DRB'), which is also sometimes called a Dispute Review Board is a body that is established by the parties under a contract to assist in the avoidance and resolution of issues and disputes that arise out of or in connection with the performance of work under that contract. In other words, a DRB is an alternative dispute resolution process. However, whereas most alternative dispute resolution processes such as mediation, conciliation, expert determination and arbitration only come into play when a dispute arises between the parties, one of the primary functions of a DRB is to **avoid** disputes rather than merely provide an alternative process by which the parties can settle their disputes. The DRB is also empowered to determine any matters that cannot be resolved by the parties.*

Background

Although Dispute Resolution Boards have been around since the early '60s, they have mainly been used overseas, particularly in the USA. Accordingly, the concept and use of a DRB is not all that well known within Australia. However, their use has increased significantly over the past few years. In particular, the New South Wales Government has embraced the concept of having a DRB on a number of its larger projects including:

- Sydney Ocean Outfall Tunnels – approximately \$320m;
- Sydney Desalination Plant – approximately \$1 billion;
- Port Botany Expansion Project – approximately \$560 million; and
- South-West Rail Link – approximately \$600 million.

Attached to this paper is document that has been obtained from the Dispute Resolution Board Australasia Inc ('DRBA') website which identifies the projects which are currently known to have used a DRB in Australia. Although DRBs are presently used in Australia mostly on a number of large scale contracts there is potentially no reason why a DRB could not be used on much smaller projects such as for example, the development of a block of residential apartments.

Significantly, the effectiveness of the DRB concept as a dispute avoidance process can be seen from statistics provided by the DRBA which indicate that as at 2008:

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- 60% of projects with a DRB had no disputes; and
- 99% of projects with a DRB recommendation had no subsequent arbitration or litigation.

The international DRB conference that was held in Sydney in May 2012 indicated that these figures were being maintained.

The extent to which DRBs are used world-wide can be seen from the fact that the international ‘Dispute Resolution Board Foundation’ or ‘DRBF’ is represented in 28 countries around the world.

Composition of the DRB

Typically, the most common form of DRB is comprised of three members. However, there is nothing to prevent the use of a single board member on smaller projects. The usual process on a three member board is that each party to the contract selects one member of the DRB with the third member as chairman, being nominated by the other two DRB members.

One of the key features of a DRB is that each member must be entirely independent of both parties regardless of the party who nominated that member. In other words, a member who is nominated by a party is not the representative of the party that nominated that member.

Prior to his/her appointment as a DRB member, that person (including the chairman) is required to make a full and frank disclosure of any potential conflicts of interest so as to afford either party with the opportunity to object to that person’s appointment. The DRB member has an ongoing duty to make a further disclosure of any new or previously undisclosed conflict which may come to their attention.

The appointment of a suitably qualified member to carry out the functions of the DRB is a key step in the process. Essential qualifications that should be considered by a nominating party include: experience, contract and technical knowledge, language, qualifications, availability, impartiality and independence.

Formation of the DRB

In order to play a significant part in the dispute avoidance process, it is fundamental that a DRB should be formed at the earliest possible time. Preferably, this should occur on, or shortly after, the parties enter into the contract. A suggested draft clause which provides for the formation of a DRB may be found on the DRBA website.

Some of the benefits that are to be gained from the early formation of a DRB are that:

- the DRB becomes familiar with the project from the commencement of the project;
- the DRB is aware of both parties’ plans and expectations for the project as well as their initial concerns;
- the DRB is able to undertake regular visits to the site at an early stage and is able to monitor performance generally; and
- the DRB has the opportunity to influence the parties from the outset and thereby avert issues that could result in disputes.

Operation of the DRB

At the first meeting of the DRB, the DRB is usually briefed on the project by way of a joint presentation by the parties. There is also a discussion of the roles and objectives of the DRB on the project as are the details of the operating procedures. This usually includes:

- reinforcing the without prejudice nature of the DRB meetings and any documents produced by the parties for the purpose of those meetings;
- the importance of neutrality;
- communications by the parties with DRB members;
- documents to be progressively provided by the parties to DRB members including minutes of meetings;
- meeting frequency and venue;
- site visit protocols;
- preparation and distribution of DRB minutes;
- discussion of the procedure to be followed if a DRB determination is required.

A typical DRB agreement also makes provision for both the general operating procedures of the DRB as well as the procedures that are to be followed if the DRB is required to make a formal decision of a dispute.

As the primary purpose of the DRB is to avoid disputes, the DRB usually meets with the parties at pre-arranged times and also meets regardless of whether or not differences or disputes have arisen between the parties. Usually, DRB meetings are held every two months or so, but may increase depending on need. Senior representatives from both parties which include both on-site and off-site personnel are usually required to attend DRB meetings.

Prior to, or at the conclusion of, each DRB meeting, the DRB members usually undertake a site inspection in the company of both parties so that they can see first-hand the status of the ongoing works. Again, the parties are usually obliged to identify any areas of the site that are, or may be, the subject of any potential issue or dispute.

By meeting regularly, even when there are no differences or disputes, the DRB is able to keep abreast of all developments on the project. By doing so, any potential differences can often be identified at an earlier point in time and can often be promptly brought before the DRB for discussion and resolution so as to avoid that issue being elevated to the level of a dispute. By raising matters of concern and potential disputes during the DRB meetings the parties are not only bringing these matters to the attention of the DRB, they are also giving themselves the opportunity to air their grievances and engage in open and honest discussions with the other party in a without prejudice environment under the guidance of the DRB.

One of the key factors that often result in the early resolution of matters that have been brought before

the DRB is the knowledge of the parties that if they are unable to sort out their differences during the discussion stage, then the DRB will in any event become involved in the resolution of that dispute. Other key factors are that the parties recognise that the DRB is usually the best placed to determine any such disputes because the members of the DRB have been selected by the parties for their knowledge and expertise in the relevant fields. In addition, the DRB has the benefit of having detailed and contemporaneous knowledge both of the project and of the issues as they develop.

Resolution of Disputes

Where the parties are unable to resolve an issue in conjunction with the DRB, and have satisfied the pre-conditions for dispute resolution, the parties are entitled to elevate that unresolved issue to the level of a dispute. In that event, such disputes are then referred to the DRB for their decision.

The typical DRB agreement provides for the operating procedure that is to be followed in the event that such a dispute arises. The procedure is very similar to that which is followed in an expert determination as it usually involves written submissions by the parties with the DRB being given the right to request further information and/or call a conference if considered necessary. Significantly, the operating procedure often requires the dispute to be determined by the DRB within a relatively short period of time. For example: the recommended DRBA operating procedure suggests a maximum period of 60 business days after referral of the dispute to the DRB. This can usually be achieved by the DRB because of its familiarity and knowledge of both the project and the particular issues in dispute. The quick resolution of such disputes is vital in ensuring that the parties maintain their relationships by not allowing these disputes to ‘fester’. It allows the focus to be maintained on progressing the construction of the works.

Depending on the operating procedures, the decision that is handed down by the DRB may or may not be required to contain reasons and also may or may not be required to be unanimous. However, it is obviously preferable that the DRB reach a unanimous decision. Depending on the terms of the contract between the parties the decision by the DRB may or may not be binding on the parties or may only be binding in the event that the matter in dispute is less than a certain amount. Whether the decision has been binding or non-binding, the experience world-wide on over 1,400 projects up until about 2007 has been that 97% of decisions made by DRBs have been directly accepted or have led to a negotiated settlement between the parties.²

However, if the DRB's decision is non-binding and is not accepted by one or more of the parties, the decision by the DRB including any minority decision, may be admissible as evidence depending on the terms of the contract between the parties.

² See paragraphs 3.6 and 3.8 of the paper by Peck and Dalland titled “The Benefits of Dispute Resolution Boards for Issue Management of Medium to Large Construction Projects” Volume 26 no.1 of the Arbitrator & Mediator at p21 and p23.

Costs and Cost Effectiveness of the DRB

Regardless of whether or not a DRB is ever required to adjudicate on a dispute there will be costs incurred in maintaining that DRB. However, the extent of those costs can be easily determined and allowed for by the parties before they enter into the Contract.

Typically, each of the parties is liable to pay 50% of each of the members' fees and disbursements. This reinforces the fact that none of the members have any further alignment with their nominating party. However, in the end, it is the owner of the project who ultimately pays as the contractor simply includes its share of the DRB costs into its contract price.

For projects with a contract value greater than about \$20 - \$30 million it is considered that the use of a 3 person DRB is easily justified with the costs of the DRB generally running in the range of 0.05% to 0.3% of the contract value.³ In the writer's opinion, this is very cheap 'insurance' having regard to the costs of litigation.

For projects with a contract value less than \$20 - \$30 million it is considered by the writer that the use of a single person DRB may also be justified. The writer suggests that there is no lower limit on the value of a project that can use a DRB although obviously, the percentage costs of a DRB would increase as the contract value decreased.

Further reading and information

See the DRBA website: www.drba.com.au and the various publications referred to on that website.

3 Supra at paragraph 3.7 p 21 - 25.

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AUSTRALIA									
DRBA No	Project Name	Type	City	State	Start Year	Finish Year	Owner / Principal	Contractor	Contract Value nearest \$10m
1	Sydney Ocean Outfall Tunnels (3 No.)	Construct only	Sydney	NSW	1987	1991	Sydney Metropolitan Water & Drainage Board	Phillip Holzmann - John Holland JV	\$220m
2	Warragamba Dam Upgrade	Construct only	Sydney vicinity	NSW	1988	1990	Sydney Metropolitan Water, Sewerage & Drainage Board	Concrete Constructions	\$22m
3	Sydney Airport, Third/ Parallel Runway	D & C	Sydney	NSW	1988	1991	Federal Airports Corporation	Bilfinger+Berger- Baulderstone Horntbrook JV	\$100m approx
4	Dandelup Dam	Construct only	Perth vicinity	WA	1991	1993	WA Water Authority	McMahon Construction	\$35m
5	Sydney International Terminal Upgrade (SA2000)	D & C	Sydney	NSW	1998	2000	Sydney Airports Corporation Ltd	Bovis Land Lease	\$105M
6	Harvey Dam	Construct only	Perth vicinity	WA	2000	2002	Water Corporation of WA	Leighton Contractors	\$50m
7	Burrup Fertilisers Liquid Anhydrous Ammonia Production Plant Project	EPC	Burrup Peninsula	WA	2002	2003	Burrup Fertilisers Pty Limited	SNC - Lavalin (S.A.) Inc	Sunkown
8	Ross River Dam	Semi-Alliance / Construct only	Townsville	QLD	2006	2008	North Queensland Water	John Holland / McMahon Joint Venture	\$64M
9	Ipswich Road / Logan Motorway Interchange	D & C	Brisbane	QLD	2006	2009	Queensland Main Roads	Leighton Contractor	\$240M
10	Gateway Arterial Upgrade	D,C&M	Brisbane	QLD	Nov-06	Dec-10	Queensland Motorways Ltd	Leighton Contractors / Abigroup Joint Venture	\$1,500M
11	City West Cable Tunnel	Construct only	Sydney	NSW	2007	2009	Energy Australia	These Contractors Pty Ltd	\$70M
12	Sydney Desalination Plant	DBOM	Sydney	NSW	2007	Mar-10	Sydney Water Corporation	Blue Water Joint Venture	\$1,003 M
13	Sydney Port Upgrade	D & C	Sydney	NSW	2008	Mar-11	Sydney Ports Corporation	Baulderstone Horntbrook-jan de Nul JV	\$560M
14	Adelaide Desalination Project (2 contracts)	DBOM, Plant	Adelaide	SA	Apr-09	Dec-11	SA Water Corporation	AdelaideAqua Consortium, Plant MBE JV, Transfer Pipeline	\$1,824M combined value of plant & TPS
15	Townsville Waste Water Upgrade Program- stage 2	D & C, Transfer Pipeline System Competitive ECI, Construct only	Townsville	QLD	Sep-09	Dec-10	Townsville City Council	Baulderstone Pty Ltd	\$180m
16	Finders Street Mail **	Competitive ECI, Construct only	Townsville	QLD	Mar-10	Jun-11	Townsville City Council	Waipac Pty Ltd	\$35m
17	Pacific Motorway Upgrade - Section B	Competitive ECI, D & C	Old Gold Coast	QLD	Oct-09	Dec-11	Dept Transport & Main Roads	Bebby Hill Albem Joint Venture	\$200m
18	Bruce Highway - Cooroy to Curra Section B	Competitive ECI, Construct only	Old country	QLD	Nov-09	Dec-10	Dept Transport & Main Roads	Abigroup Pty Ltd	\$100m
19	Digital Train Radio System	Design, supply, install, Commission; ECI converted to Lump sum	NSW Electrified network	NSW	Jan-10	Oct-12	Rail Corporation of NSW	United Group Infrastructure Pty Ltd	\$180m
20	New Outer Suburban Rail Cars, Stage 3	Design, Build & Commission: Cost Reimbursable, target price with pain share/gain share arrangements	Sydney	NSW	Sep-09	Apr-12	Rail Corporation of NSW	United Group Rail Services Limited	\$320m
21	Liverpool Turnback Project	Managing Contract	Sydney	NSW	Jun-10	Jan-12	TCA	John Holland Pty Ltd	\$120m
22	South West Rail Link	Design and Construct	Sydney	NSW	Nov-10	Dec-12	TCA	John Holland Pty Ltd	\$600m
23	Northern Link/Legacy Way	Design, Construct & Maintain	Brisbane	QLD	Dec-10	Dec-14	Brisbane City Council	BVD Constructions, Accoma and Ghella Joint Venture	\$1,600m