

Dispute Resolution Boards

Avoiding conflict before it occurs

A Dispute Resolution Board comprises a panel of three independent technical experts jointly selected by the Principal and the Contractor. This Dispute Resolution Board is established at project commencement and meets regularly at site briefings dealing with progress and potential issues.

Where an issue is not resolved by negotiation between the Principal and the Contractor, it is formally referred to the Board which is required to present a recommendation within a short period of time.

The recommendation is usually non-binding, but discoverable in any subsequent legal proceedings.

The greatest challenge facing the construction industry today is how to resolve conflicts as they occur and, failing that, to control the conflict and its related costs.

It is a rare occurrence during the construction phase of a project for both parties to a contract to be confident that:

- The work is running within budget provisions for time and cost;
- There are no foreseeable issues in completing the work;
- All variations to date have been justified and resolved; and,
- There are no carry over issues for settlement at completion.

The difficulty in arriving at this happy position stems very largely from the confrontational structure of traditional forms of contract.

Various attempts have been made in recent years to avoid the confrontational approach and the consequent drift towards arbitration or litigation – both of which are very expensive in terms of time and money.

Such attempts have included alliancing, mediation, alternative dispute resolution and partnering – all with mixed success.

Of all the different approaches which have been tried, only one (apart from alliancing) is structured to address issues as they emerge, with a primary strategy of dispute avoidance. This is the Dispute Resolution Board and it has shown outstanding success.

Acceptance of the Dispute Resolution Board approach in many countries has been growing rapidly – a compound annual growth rate of 20 percent. In the 15 years to July 2002, 920 projects valued at some \$US73 billion have operated under a Dispute Resolution Board arrangement. The number of issues on which a recommendation was made totalled 1125, and 97.6% of these were accepted.

Australian and New Zealand projects have had some exposure to Dispute Resolution Boards, and the success rate mirrors overseas experience.

This is compelling evidence that the Dispute Resolution Board process is highly efficient in achieving its aims with minimal time and cost expended.

The concept of establishing a Dispute Resolution Board is agreed at project commencement, i.e. before any issues have arisen;

Each of the Parties to the Contract nominates one industry expert to be a panel member, and requests the other to approve their nominee;

These two panel members, once approved, select a third member for approval by the two Parties. The third member is appointed as Chair of the panel;

All members must be experienced and respected, and must certify that they have no relationship with either of the Parties;

All members sign an agreement obliging them to serve both of the Parties equally and fairly. They are indemnified from any personal or professional liability arising from their Dispute Resolution Board activities;

Fees and expenses of the members are shared equally by the Parties. Alternatively, the Principal meets all fees and expenses, except for a 50-50 sharing during the processing of referred issues; and,

Most importantly, the process is flexible and can be adapted to suit a project's particular circumstances.



This project was constructed in the period 2000-01 at a contract value of approximately \$50 million. A Dispute Resolution Board was established from project commencement and it received monthly progress reports, as well as making site visits each quarter during the construction phase.

Additional work required on foundation clean-off resulted in a significant claim for extra payment by the Contractor. The existence and encouragement of the Dispute Resolution Board was sufficient to bring about settlement by negotiation between the Parties without the need for a formal referral.

Although no issues were formally referred to the Board, the Parties consider the Board to have been a success and that its cost was well justified.

The panel members are provided with contract documents, programs, progress reports and other relevant documents in order to become familiar with the project and progress of the work;

The Dispute Resolution Board makes regular site visits to keep abreast of project activities and to meet with representatives of the Parties. At these meetings, every effort is made to encourage resolution of issues at site level. These meetings serve also to develop the essential level of respect and trust between the project staff and the Board members;

Either Party can refer an issue to the Dispute Resolution Board when negotiation has broken down;

When an issue is referred, the Dispute Resolution Board will promptly convene an informal but comprehensive hearing, complete timely deliberations and prepare a recommendation; and,

Written recommendations of the Dispute Resolution Board are usually non-binding, but admissible as evidence later in arbitration or litigation to the extent permitted by law. Alternatively, they may be binding up to a pre-agreed level, or binding unless appealed within an agreed period.

Most importantly, issues are able to be studied and resolved while the people involved are still at the site.



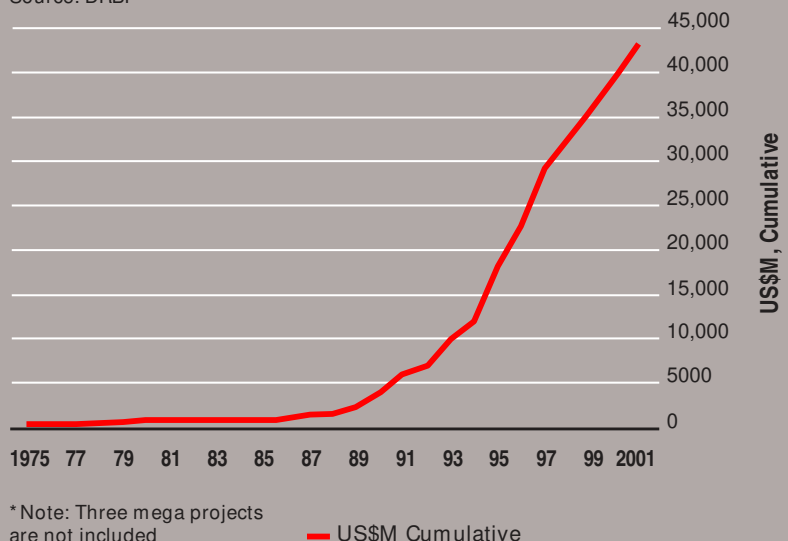
This project was constructed in 1997-98 as repairs to subsidence and cracking resulting from an earthquake. Cost was NZ\$50 million.

There were several issues with potential for serious dispute, including the abutments and the deepened foundation. The Dispute Resolution Board visited the site three times following the initial meeting, the last being in August 1998 and the various issues were given a thorough airing before the Board during each visit.

By the time of the final visit any contractual problems arising out of the project had been resolved by negotiation between the Parties. Construction finished early and there was a bonus for early completion.

Contract value of Projects started with DRB*

Source: DRBF



The chart above illustrates the Contract Value of Projects commenced with a DRB

Dispute Resolution Boards are successful because:

Project staff behave reasonably with the awareness that conduct may be subject to scrutiny by experts whose knowledge they have grown to respect. This becomes apparent in the presentation of claims with realistic valuations, in the disappearance of the flat rejection of claims, and the recognition of the benefits of reduced antagonism;

Project staff develop a personal pride in resolving issues at their level, in preference to a referral to a higher authority. Furthermore, the presence of the Dispute Resolution Board can provide sound justification for otherwise unpalatable decisions;

There is a stronger element of certainty for both Parties in relation to budget projections and cash flow forecasts;

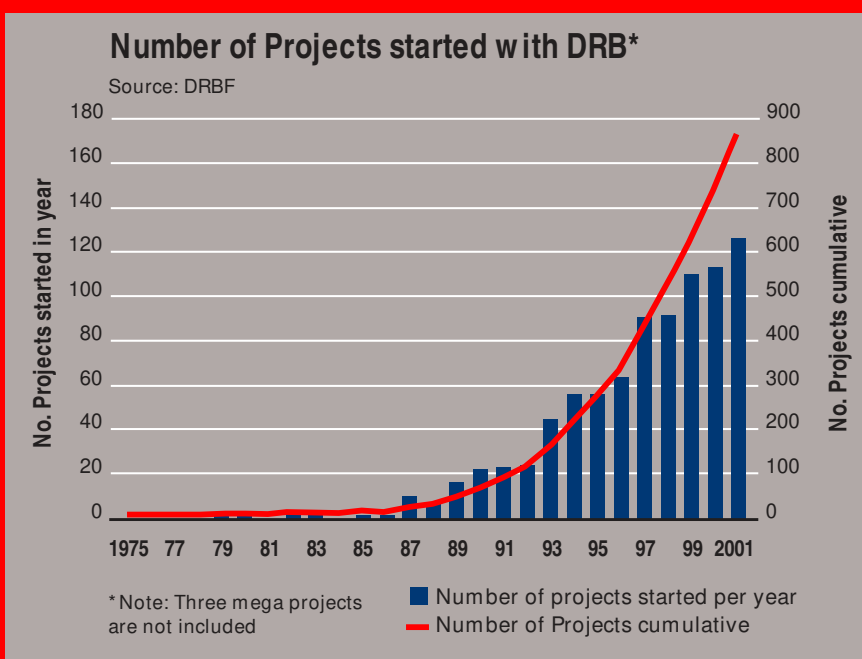
The early resolution of issues saves time and money by diminishing the need for consultants and lawyers, as well as freeing the Parties to focus on more productive work rather than fighting over claims;

When an issue is to be referred to the Dispute Resolution Board, the preparation of the submissions can induce a revised expectation and settlement even before the formal meeting with the Board;

When the Dispute Resolution Board proceeds through the hearing and recommendation phases, the time taken, input required and costs incurred are all significantly less than those for a formal arbitration or litigation;

Historical evidence confirms that recommendations given by Dispute Resolution Boards are rarely contested; and,

The Dispute Resolution Board process tends to enhance trust at every step in contrast to its dilution with most other processes.



“Our review of contracts utilizing Dispute Resolution Boards covered 108 projects. In 72 of these projects (66%), Parties did not hold a Dispute Resolution Board hearing, presumably indicating that disputes which arose under the contracts were resolved without the need for a formal hearing.

It appears the availability of a regular forum for discussion of outstanding issues, and the intent of Dispute Resolution Boards to encourage negotiation between the Parties, contributed to the apparent timely and reasonable settlement of disputes.”

Cecil T Bragg

Inspector General

Florida Department of Transportation
September 2002.

The chart above demonstrates the number of Projects commenced with a DRB

In 1995, the International Federation of Consulting Engineers (FIDIC), an organisation whose standard forms of contract for construction work are widely used throughout the world, published its new Design and Build Contract which provided for the resolution of disputes by a Disputes Adjudication Board. Since that time this revision has been carried into all its standard forms of contract.

In the same year, the World Bank issued new sample bidding documents which recommended Dispute Resolution Boards for all World Bank funded projects in excess of US\$50 million. For smaller projects between US\$10 million and US\$50 million, the World Bank recommended a one-man Dispute Review Expert.

The Asian Development Bank has also adopted the Dispute Resolution Board concept.

The Dispute Resolution Board process (or the equivalent Disputes Adjudication Board used by FIDIC and some European countries) is currently known to be in operation in the United States, United Kingdom, France, Denmark, Sweden, South Africa, Uganda, Hong Kong, China, India, New Zealand and Bangladesh.

There is little practical difference between a World Bank Dispute Resolution Board and a FIDIC Disputes Adjudication Board – in either case the findings become final unless disputed within one month.

In Australia the following Principals have utilised Dispute Resolution Boards with Success:

Water Corporation of WA;
Sydney Airports Corporation Pty Limited;
Docklands Authority; and,
Sydney Water.

The Australasian Chapter of the Dispute Resolution Board Foundation (DRBF) has recently been formed. The DRBF is the international body that has fostered the Dispute Resolution Board concept from its beginning.

The Australasian Chapter is able to assist with advice on all aspects of implementing a Dispute Resolution Board – including guidelines, procedures, contract clauses, agreements, available experts and training.

An Information Kit has been prepared which can be obtained from the office of the Australasian Chapter of the Dispute Resolution Board Foundation for a unit price of A\$110 (including GST).

This Kit includes the following:

A model clause for inclusion within a contract to establish a Dispute Resolution Board and define its function;

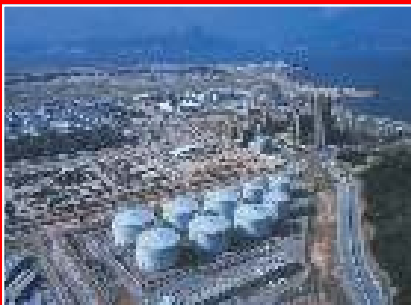
A model Three Party Agreement between the Dispute Resolution Board and the contracting Parties;

Draft Operating Guidelines for the Dispute Resolution Board;

Details of the Dispute Resolution Board Foundation and its Australasian Chapter; and,

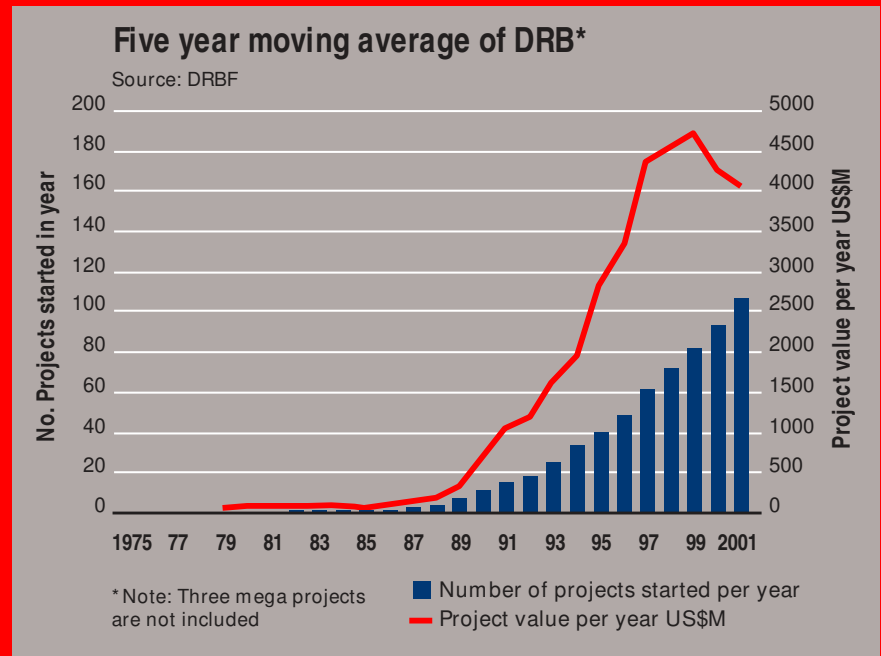
Details for gaining access to a panel of experts available for Dispute Resolution Boards in Australia.

It is expected that this information will later become available for downloading from a web page.



There were 22 contracts awarded for a total of US\$10 billion and a Dispute Resolution Board of seven members was established, with panels of three members to handle the various disputes.

Sixteen site visits were made during the construction period between 1994 and 1998. Six issues were referred to the Dispute Resolution Board, with five Board recommendations being accepted by the Parties, and one taken to arbitration, with the eventual result coming down in support of the recommendation of the Dispute Resolution Board.



The chart above demonstrates the steady increase of the DRB influence on both the number of Projects started and the US\$M value as a five year moving average



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