



Forum

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Compatibility of Dispute Boards with Australia's Security of Payment Regime

There are several types of Dispute Boards:

- **Dispute Review Boards:** those derived from the United States model that provide non binding recommendations
- **Dispute Adjudication Boards:** those derived from the FIDIC model that provide an interim binding decision and may either be established at contract commencement ('standing Board') or only when a dispute arises ('ad hoc Board')
- **Combined Dispute Boards:** a hybrid of Dispute Review Boards and Dispute Adjudication Boards included in the ICC rules published in September 2004

This article concentrates on Dispute Adjudication Boards that are established and operate from about the time of contract commencement.

By Doug Jones and Graeme Peck

Introduction

There appears to be an increasingly held view in certain areas that if there is a UK style statutory adjudication system in place, Dispute Boards are either incompatible with the regime and not able to be used or do not have any utility in the dispute management of significant construction contracts.

The Australian experience with the use of Dispute Boards against the background of a statutory adjudication regime modelled on that of the UK does not support this view. Instead, Australian practice demonstrates the ability of industry to overlook legal technicalities in favour of practical commercial considerations that take account of the real benefits available from a properly structured Dispute Board.

Australia's Security of Payment Regime

In Australia, like many other jurisdictions, various pieces of legislation have been introduced in an effort to provide a measure of protection to contractors and subcontractors who have historically faced difficulties in obtaining payment from a party further up the contractual chain.¹ The introduction of statutory adjudication in most Australian states, through security of payment legislation, represents the latest legislative attempt of this kind.

Security of payment legislation was introduced in New South Wales in 1999, and Victoria, Queensland, Tasmania, the Australian Capital Territory and South Australia have since followed suit with legislation closely modelled on the NSW Act. Western Australia and the Northern

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¹ See, eg. *Contractors' Debts Act 1897* (NSW), *Workers' Liens Act 1893* (SA), *Contractors' and Workmans' Liens Act 1906* (Qld), *Subcontractors' Charges Act 1974* (Qld).

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Territory have also introduced similar-legislation², although theirs are not as closely modelled on the NSW Act as the Acts of the other states and territories are.

In contrast to earlier legislation which focussed primarily on insolvency risk, but did little to streamline enforcement, the current legislation focuses on trying to ease the contractor's difficulty in getting paid by providing a quick enforcement process in the form of a statutory progress payment regime, backed by adjudication.³ It addresses the insolvency risk more indirectly, in that by use of the legislation a contractor can (hopefully) prevent a situation where it has not been paid for months or years by the time the owner becomes insolvent.

Importantly, parties cannot use the contract to exclude the operation of the Act.⁴ Though because the matter being adjudicated upon is the contractor's right to progress payments, not final liabilities, any injustice that may be done in the adjudication can theoretically be corrected in the determination of those final liabilities

in arbitration or litigation. Arguably all that really happens is that payment risk gets transferred to the upstream party until such time as the courts or arbitrators render a final determination.

Under the NSW Act, if a construction contract makes provision for progress payments, the legislation effectively turns the contractor's contractual entitlement into a statutory one.⁵ If the contract does not make such provision, then certain default provisions take effect so that the contractor is entitled to monthly progress payments.⁶ Armed with this statutory entitlement to progress payments, the contractor may make a "payment claim" setting out an amount it claims to be due.⁷ The owner must respond with a "payment schedule," setting out the amount the owner believes to be due and giving reasons for any difference from the payment claim.⁸

Where the amount shown in the schedule is less than the amount claimed (or if the owner fails to pay), the contractor may choose to apply for adjudication of the matter.⁹ The adjudication application must be made to an authorised nominating authority chosen by the contractor¹⁰,

² *Building and Construction Industry Security of Payment Act 1999* (NSW) ("NSW Act"); *Building and Construction Industry Security of Payment Act 2002* (Vic) ("Victorian Act"); *Building and Construction Industry Payments Act 2004* (Qld) ("Queensland Act"); *Building and Construction Industry Security of Payment Act 2009* (Tas) ("Tasmanian Act"); *Building and Construction Industry (Security of Payment) Act 2009* (ACT) ("ACT Act") (this Act does not commence until 1 July 2010); *Building and Construction Industry Security of Payment Act 2009* (SA) ("SA Act") (as at February 2010, this Act had no commencement date); *Construction Contracts Act 2004* (WA) ("WA Act") and *Construction Contracts (Security of Payment) Act 2004* (NT) ("NT Act") respectively.

³ For simplicity of expression this section refers to the operation of the legislation in the context of a contractor and an owner. It should, however, be noted that the Acts apply equally to owner/contractor and contractor/subcontractor contracts.

⁴ This provision is common to the security of payment legislation in all states and territories: NSW Act s 34, Victorian Act s 48, Queensland Act s 99, WA Act s 53, NT Act s 10, ACT Act s 42, SA Act s 33, Tasmanian Act s 11.

⁵ NSW Act s 11(1) (a).

⁶ NSW Act s 11(1) (b).

⁷ NSW Act s 13.

⁸ NSW Act s 14.

⁹ NSW Act s 17(1).

¹⁰ NSW Act s 17(3) (b). With the exception of the WA Act and NT Act, which allow parties to select a adjudicator by agreement, this provision is common to the security of payment legislation in all other states and territories: WA Act s 26(1)(c), NT Act s 28(1)(c), Victoria Act s 18(3)(b), Queensland Act s 21(3)(b), ACT Act s 19, SA Act s 17(3)(b), Tasmanian Act s 21(1).

which then refers the application to an eligible adjudicator.¹¹ While procedure is largely at the discretion of the adjudicator,¹² a determination must be made within 10 business days of the adjudicator's appointment, unless the parties agree otherwise.¹³

If the owner does not pay the amount due under the adjudicator's determination, the contractor may give notice of an intention to suspend work, and may also obtain an "adjudication certificate" which can be filed in court as a judgment for a debt.

Is There a Place for Dispute Boards in a Security of Payment Regime?

A Dispute Board is a panel of (typically) three experts, existing from the outset of the project, which meets together at regular intervals throughout the course of the project so as to develop a familiarity with it, and which hears and resolves disputes both quickly and cheaply as they arise on site. The key difference to note between a Dispute Board and statutory adjudication under the security of payment regime, for the purposes of this discussion, is that a Dispute Board is contractually based and the panel of experts are usually chosen by the parties, while the adjudicator under the statutory regime is chosen by an authorised nominating authority. Both processes, however, are intended to be binding on the parties in the interim.

How then do these two dispute resolution processes operate when it comes to a payment dispute?

The first matter that must be considered is whether a Dispute Board can act as the adjudicator under the security of payment regime. The legislation requires that an adjudication application be made to an authorised nominating authority, which refers the dispute to an eligible adjudicator. This leaves no room for the parties to select their own adjudicator. It is therefore not possible for a Dispute Board, the members of which have been selected by the parties, to make a determination under the Act.¹⁴

Given a Dispute Board cannot act as an adjudicator under the Act, the second question is whether an interim binding determination on a payment dispute by a Dispute Board can replace adjudication pursuant to the Act. The Act explicitly states that parties cannot exclude its operation through contractual provisions. Thus a purportedly binding decision on a payment dispute by a Dispute Board cannot stand because the contractor retains the right to have that same payment dispute decided by an adjudicator under the statutory adjudication regime.

Does this make Dispute Boards redundant as far as payment disputes are concerned? In theory, yes. There seems to be little utility in establishing a Dispute Board if its decisions on payment disputes are effectively voidable upon application for adjudication.

In practice, however, experience is showing that where the parties have chosen to establish a Dispute Board they are preferring to allow the Dispute Board to make final and binding decisions on all

¹¹ NSW Act s 17(6).

¹² See NSW Act s 21.

¹³ NSW Act s 21(3).

¹⁴ Note that this differs from the position under the United Kingdom statutory adjudication regime, which does not stipulate how the adjudicator is to be selected, thereby leaving it open for the parties to appoint the Dispute Board as the adjudicator where the UK statutory scheme applies: *Housing Grants, Construction and Regeneration Act 1996* 108.

disputes under the contract, despite the apparent incompatibility with security of payment legislation. Since 2003, approximately AU\$5 billion actual construction turnover has been completed or is well underway with contracts utilising various forms of Dispute Boards. The type of contract has ranged across the full spectrum of Construct Only, Design & Construct, Early Contractor Involvement, Design, Construct & Maintain, Design, Construct, Operate & Maintain, and Hybrid Alliances. There have been three known disputes formally referred to Dispute Boards since 2003. None have gone beyond the Dispute Board and there has been no suggestion that the parties involved in these contracts considered an adjudication application.

This apparent preference for Dispute Boards can be attributed to certain benefits offered by Dispute Boards over statutory adjudication. In particular:

- Dispute Board panel members are generally chosen by the parties for their expertise and reputation, thereby automatically earning them the respect of the parties, while adjudicators under the statutory scheme are often unknown to the parties.
- The Dispute Board is involved in the project from the outset, whereas adjudicators will generally have no prior knowledge of the project and certainly have no prior involvement in the project or with any party. In addition, adjudicators are expressly limited to deciding a claim on information derived from the claim and response.
- Dispute Boards encourage early identification of potential issues and a procedure for the reporting and discussion of such issues at routine

Dispute Board meetings. At these meetings the Dispute Board encourages a collaborative approach to issue resolution on a "best for project" basis. This also promotes the maintenance of project relationships.

Conclusion

Australian experience strongly supports the argument that properly structured Dispute Boards, while technically inconsistent with the security of payment regime and apparently redundant in terms of payment disputes, can operate very successfully in a legal environment which incorporates a statutory adjudication system similar to that first developed in the United Kingdom. The statutory adjudication course remains open to any contract party but, from a common sense point of view, why would one choose a security of payment action when the contract provides an alternate that is substantially preferable on virtually every basis one can contemplate? It seems that practical commercial considerations are winning out over legal technicalities with parties favouring Dispute Boards over statutory adjudication. □

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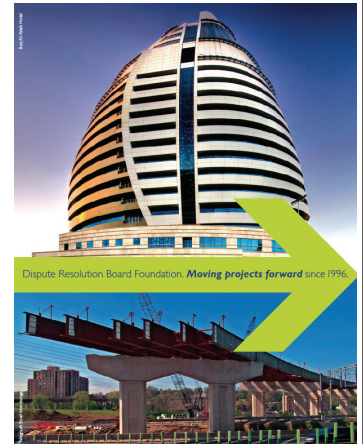


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DRBF Promotional Tools

New Brochures Available

The DRBF recently developed a new general information brochure to help spread information about the DRB/DB process, and the Foundation in general. The brochure features a fresh look with beautiful photos from projects with DBs. Copies will be available to view at all upcoming conferences and workshops. Members may request bulk quantity to use in promotional efforts. Contact the DRBF office for details.



Website Updates Underway

The DRBF will be updating the Foundation's website to reflect design changes consistent with the fresh look of the new brochures, as well as add updated content and user friendly tools. If you have ideas for the website update, please contact Committee Chair Ann McGough.

Call for Papers

If you have papers or articles that may be of interest to DRBF members, consider submitting them to the Website Coordinator Ann McGough. All submissions will be subject to peer review and must have any necessary approvals for distribution to our membership.

Contact Ann McGough at amcgough@drb.org