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Disputes Boards: An Australian Experience

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Contents

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INTRODUCTION

A stitch in time saves nine.[2]

Disputes in the most complex, technical and document-intensive construction projects are recurring and unavoidable. It comes as no surprise that the costs associated with construction disputation are often disproportionate to the actual amount in dispute.[3] This is not to mention their serious implications for the project. [4] Attempts should be made at the project's outset to mitigate the impact of disputes. One effective way to do so is by embracing the dispute board, a dispute resolution process deployed in various forms around the globe.

In 2001, the dispute avoidance process was viewed as 'the most exciting development in the construction industry'.[5] The dispute board concept was developed as an intermediate step between inter-party negotiations and arbitrations.[6] Despite wide adoption in the United States and elsewhere, Australia's enthusiasm for dispute review boards, dispute adjudication boards and combined dispute boards has remained low. This is despite the astonishing fact that for every single Australian project with a dispute board, not a single dispute has progressed to arbitration or litigation.

There is the serious question to be asked as to why dispute boards are not more commonly used in the Australian construction sector, where construction is the 'backbone of Australia's economy'.[7]
The thesis of this paper is that dispute boards are an effective, flexible and tested method for disputes to be proactively resolved in their early stages. Australia is useful as a case study in the context of their use in Canada.

This paper is divided into three parts:

1) **Part I: Origins and Development** provides an overview of the evolution and permutation of the dispute board concept, and its perceived benefits and challenges.

2) **Part II: FIDIC forms of contract** discusses the adoption of dispute boards for International projects, the changes between the 1st and 2nd editions, and also the question of enforceability of dispute board decisions.

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[2] English proverb, quoted by Robert Hunt, 'Dispute Resolution Boards', (August 2004) 23(2) *The Arbitrator and Mediator* 13, 14.
[3] Paula Gerber, 'Alliance and Dispute Review Boards: Best Friends or Worst Enemies?', (2012) 10(1) *Australian Journal of Civil Engineering* 57, 58.
[4] Umair Baig et al, 'Crucial Causes of Delay in Completion and Performance Management of the Construction Work: Study on the Base of Relative Importance Index', (April 2022) 11(5) *Journal of Tianjin University Science and Technology* 75, 75–76.
[5] Paula Gerber, 'Dispute Avoidance Procedures – The Changing Face of Construction Dispute Management Part 1', (2001) *International Construction Law Review* 122, 129.
[6] Nick Gillies, 'Rebuilding New Zealand: A Case for Dispute Resolution Boards', (December 2014) 33(2) *The Arbitrator & Mediator* 121, 124.
[7] Master Builders Association New South Wales, 'Future-Proofing Australia's Building and Construction Industry Workforce', (News Release, 21 April 2023) <https://www.mbansw.asn.au/media/industry-news/future-proofing-australias-building-and-construction-industry-workforce>.

3) **Part III: The Australian Experience** introduces Australia as a case study of how, when utilised, dispute boards have contributed to the success of high-risk complex projects.

PART I: ORIGINS AND DEVELOPMENTS

Every construction project is unique, which may be why there is generally an absence of 'corporate memory' in the construction industry.[8] Similar issues often arise in construction disputes, yet it is naïve to think that disputes can be avoided by rigorous and precise contract drafting.[9] Parties would inherently, and within reason, want access to practical dispute review devices which are fair, economic and minimizes project disputes. This is especially so as construction projects continue to become larger, more complex and expensive.

The dispute board concept can best be described as a 'job-site' dispute adjudication device.[10] It serves as an intermediate step prior to arbitration or litigation.[11] At its heart, it is:[12]

> [a p]anel of one or three suitably qualified and experienced independent persons appointed under the Contract. Its function is to become and remain familiar with the project at all stages, and to be available at regular intervals to confer with the parties to assist in the avoidance of disputes, or if necessary to provide a determination on a dispute referred to it.

Three important points from this definition should be emphasised. First, various commentators have, in varying ways, miscategorised the dispute board concept as an alternative dispute resolution procedure.[13] This is not so. Dispute boards are a category of a *dispute avoidance process*. Distinguishing from traditional alternative dispute resolution ('ADR') devices, dispute boards are typically established at the project's outset and are designed to proactively settle conflicts before they deteriorate into active dispute. The dispute board becomes an active part of the project team and undertakes regular visits to site. They can act in 'real time', rather than dealing with events that happened in the past.[14] Simply put, it is a *proactive* rather than *reactive* approach designed to avoid potential disputes and to ensure that commercial and technical differences can be resolved in an efficient and cost-effective manner.[15] It is not merely resolving them at a lower cost than alternative processes.[16]

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[8] Cyril Chern, 'The Dispute Board Federation and the role of Dispute Boards in Construction: Benefits without Burden', (2010) *Revista del Club Espanol del Arbitraje* 9, 5–10.
[9] Ibid.
[10] Peter H.J. Chapman, 'Dispute Boards', *International Federation of Consulting Engineers* 1, (online) <https://www.fidic.org/sites/default/files/25%20Dispute%20Boards.pdf>.
[11] Carol Menassa and Pena Mora Feniosky, 'Analysis of Dispute Review Boards Application in US Construction Projects from 1975 to 2007', (2010) 26 *Journal of Management in Engineering* 65, 74.
[12] Philip Loots and Donald Charrett, *Practical Guide to Engineering and Construction Contracts,* (CCH, Sydney, 2009) 312.
[13] Gerber and Ong, '21 today! Dispute review boards in Australia: Past, present and future', (2011) 22 *Australian Dispute Resolution Journal* 160, 161.
[14] Nicholas Gould and Christina Lockwood: 'Dispute Boards' in Renato Nazzini, *Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes* (Routledge, 1st ed, 2017) 193.
[15] Kristina Botsis, 'A Novel Approach to Construction Disputes: An Overview of Dispute Adjudication Boards', (October 2011) 30(2) *The Arbitrator & Mediator* 37, 37.
[16] Graeme Peck and Peter Dalland, 'The Benefits of Dispute Resolution Boards for Issue Management of Medium to Large Construction Projects', (September 2007) (26)(1) *The Arbitrator and Mediator* 13, 15.

Second, Dispute Boards are a creature of contract.[17] Accordingly, the Dispute Board only has powers expressly given to it by agreement. There is no room for implied powers. The overall process is not underpinned by legislation or conventions, as opposed to arbitration.[18] The contractual provisions in the underlying contract will state fundamentals, such as how and when the dispute board is to be formed and what are the board's powers.[19]

Third, Dispute Boards are the product of the parties' commitment to avoid disputes. Dispute Boards are only effective if the parties remain committed to utilising the contractually enshrined dispute board framework. Otherwise, an ineffective or an inconsistent use of dispute boards can be worse than not having one at all.[20] Even the most draconian contract may not cause issues if the parties 'work together to achieve the contractual aim'.[21]

A. THE FIRST DISPUTE BOARD

Dispute Boards were first conceived within the United States construction industry. In the 1950s, competition for public construction contracts in the US was intense. Contractors were forced to accept lower profit margins to remain get work.[22] Construction projects became larger, more expensive and more complex with many contractors and subcontractors performing different aspects of the project. Many contracting parties worked with tight margins and was therefore required to protect their commercial positions through all available means. Especially in tunnelling and dam projects, the potential for unforeseen ground conditions led to a high incidence of disputes.[23] The trend for disputes to be escalated to formal litigation increased and relationships became more adversarial. The industry sought to find more cost-effective, prompt and practical solutions.[24]

The Dispute Board concept has its genesis in the US Boundary Dam project during the 1960s.[25] After consistent issues arising in the project, the employer and contractor agreed to appoint two technical individuals each to a four-person 'Joint Consulting Board', which would provide non-

[17] See, eg, Dispute Resolution Board Foundation, 'Pro Forma DAB Clauses (Simple) – Updated February 2024', <https://www.drbf.org.au/drbfr3-precedents>.
[18] Except for Honduras and Peru, where there is supporting legislation.
[19] Lindy Patterson KC and Nicholas Higgs, 'Dispute Boards', *Global Arbitration Review* (12 October 2023) <https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/fifth-edition/article/dispute-boards> in Global Arbitration Review, *The Guide to Construction Arbitration – 5th Edition*, ch 10.
[20] Gillies (n 6) 130. See, eg, *MI-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC) per Akenhead J at 16.
[21] Paula Gerber and Brennan Ong, 'DAPs: When will Australia Jump on Board?', (2011) 27 *Building and Construction Law Journal* 4, 29.
[22] Doug Jones and Ron Finlay, 'Disputes Arising from Government-funded Infrastructure Projects: Application to India of the Australian State and Commonwealth Experience', (Paper, SCL India International Conference, 8 December 2023) 44.
[23] JE Duran and JK Yates, 'Dispute Review Boards – One View', (2000) 42 *Cost Engineering* 31, 31.
[24] Jones and Finlay (n 22) 44. See also Chapman (n 10) 2.
[25] Gillies (n 6) 126.

binding recommendations on its operations and make decisions regarding conflicts.[26] The idea worked well[27] and was used as a preliminary model for later Dispute Board developments.

In 1972, the US National Committee on Tunnelling Technology sponsored a study of contracting practices throughout the world, to develop recommendations for improved contracting methods in the United States.[28] The study found that the 'deleterious effect' of litigation upon the efficiency of a construction process was a major cause of rapidly escalating construction costs.[29] The paper was presented in 1974, titled 'Better Contracting for Underground Construction'.[30]

The paper suggested that arbitration should be used in construction disputes over litigation. However, it lamented the lack of qualified arbitrators with sufficient time to hear the vast number of disputes. The Committee proposed two differing solutions. First, a panel of "competent, adequately paid, full-time arbitrators" would sit on the panel for the duration of the project and conduct hearings, and immediately resolve any issues as they arise. Second, a European method of implementing non-binding arbitrations was recommended. Even though decisions were not binding, the Committee noted that it was often effective as parties who were non-compliant or proceeded to formal litigation afterwards suffered reputational damage. Thus, the Dispute Board concept was born.

One year after the paper's presentation, the Dispute Board concept reached maturity in its use in connection with the construction of the second bore of the Eisenhower Tunnel for Inter State 70 in Colorado.[31] The parties wished to avoid the 'financial disaster' of the first tunnel.[32] It was discovered that in the process of the implementation, 'disputes could be avoided by improving communications and problem understanding'.[33] The process was an overwhelming success. Although significant disputes surfaced, the Dispute Board ably dealt with the issues without damaging the Owner-Contractor relationship. All parties were satisfied with the final time and cost outcomes for the projects.[34]

B. EXAMPLES OF DISPUTE BOARD SUCCESSES

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[26] Chapman (n 10) 2.
[27] Peter H.J. Chapman, 'Dispute Boards on Major Infrastructure Projects', (February 2009) 162(1) *Proceedings of the Institution of Civil Engineers Management, Procurement and Law* 7, <https://www.icevirtuallibrary.com/doi/10.1680/mpal.2009.162.1.7>.
[28] The Dispute Resolution Board Foundation, 'History of the Dispute Board process and the DRBF', (Web Page, 2024) <https://www.drb.org/history>.
[29] Jones and Finlay (n 22) 44.
[30] See Standing Committee No 4, US National Committee on Tunnelling Technology, *Better Contracting for Underground Construction* (National Research Council, 1974) <https://ntrl.ntis.gov/NTRL/dashboard/searchResults/titleDetail/PB236973.xhtml>.
[31] J McVeigh and K Walters, 'Dispute Review Boards: Expensive or Priceless?', (APPEA Conference, Perth, 11-13 April 2011) 4 <https://www.disputeboard.org/wp-content/uploads/2016/02/Dispute-Review-Boards-Expensive-or-Priceless.pdf>. See also RA Shadbolt, 'Resolution of Construction Disputes by Disputes Review Boards', (1999) 16(1) *International Construction Law Review* 101, 104.
[32] Gillies (n 6) 126.
[33] Advisory Committee on Alternative Dispute Resolution, Law Council of Australia, 'The Use of Dispute Resolution Boards and their expansion beyond Construction Matters', (Report, 27 November 2012) <https://www.disputeboard.org/wp-content/uploads/2016/02/The_use_of_Dispute_Resolution_Boards_and_their_expansion_beyond_Construction_Matters.pdf>.
[34] Jones and Finlay (n 22) 45.

Inspired by the 'Eisenhower' example, other successful Dispute Boards in the US soon followed.[35] As the merits for the Dispute Board process became obvious, the use of Dispute Boards spread worldwide. The first reported international use of a Dispute Board was in the Honduran El Cajon Dam and Hydropower Project in 1980.[36] As one of the funders, the World Bank helped set up the Dispute Board for the $USD 775m project.[37] The project involved a diverse cultural mix of Honduran owner, Italian contractor and Swiss engineer. The Dispute Board was active throughout the project and provided non-binding recommendations to the parties. There was no recourse to litigation or arbitration on this 6-year long project.

Turning to Europe, a Dispute Board was present in the 1990s Anglo-French Channel Tunnel Project linking the UK and France. It had a Board of five persons. Whilst all five members heard all disputes, the decision was made by a three-man panel comprising the Chairman and two other members, based on their particular expertise.[38] Two panels had been established, a technical panel comprising engineers and a finance panel comprising accountants and financiers.[39] Only 13 disputes arose during the course of the project, 12 of which were settled without resorting to arbitration.[40]

In Asia, a prominent Dispute Board example is the construction of Hong Kong International Airport (also known as Chek Lap Kok International Airport) in the late 1980s, which utilised a quadruple-tiered dispute system. If there was a dispute, it was first referred to an engineer. If unresolved, the dispute then went to the project director. Failing that, parties have ten days to submit to the dispute board. If still unresolved, only then would the dispute go to arbitration.[41] The Dispute Board comprised of six members plus a convenor to cover the main contracts (roughly 20) awarded by the Hong Kong Airport Authority.[42] Board members met on site every three months to pre-emptively resolve any conflict. A panel of one or three members is selected depending on the nature or complexity of the dispute. This system was highly effective, with only one of the seven disputes referred making it to the final tier of arbitration.

Another example of the international success of the Dispute Board is the Ertan Hydroelectric Power project in Sichuan, China. This is believed to have been the first project in China to use a Dispute Board. It involved an 800 feet high double curvature arch dam and an underground

[35] Peck and Dalland (n 16) 16.
[36] Christopher R. Seppälä, 'Recent Case Law on Dispute Boards' in Filip De Ly and Paul-A. Gélinas, *Dispute Prevention and Settlement through Expert Determination – Institute Dossier XV* (ICC Institute Dossiers, 2017) <https://jusmundi.com/en/document/publication/en-recent-case-law-on-dispute-boards>.
[37] Steve Devereux, 'Oil Industry Dispute Boards – saving time and money', *LexisNexis* (online, 29 March 2023).
[38] Chapman (n 10) 4.
[39] Ibid.
[40] Chau Ee Lee and Ashley Ang, 'Avoidance – An Easy Way Out When It Comes to Dispute Boards', *Addleshaw Goddard LLP* (online, 15 March 2023) <https://www.lexology.com/library/detail.aspx?g=40e2ef6a-dc6e-41d3-a71d-2cf2e9d01fb9>.
[41] Keith Brandt and Sam Morten, 'Dispute Review Boards: A New Asian Dispute Resolution Tool? – Part 2', *Squire Patton Boggs*, (online, 13 October 2009) 2 < https://www.squirepattonboggs.com/en/news/2009/10/a-new-asian-dispute-resolution-tool-english-vers__>.
[42] Chapman (n 10) 4.

power plant housing six 550 MW units.[43] Costing around $USD2 billion, the project was constructed over a 9-year period within a difficult political and commercial environment. Both parties chose 1 member each for the Dispute Board, and the members chose a chairperson. Specialist advisors could be appointed if necessary, such as when local taxation was the subject of one dispute. The Board's recommendations were binding unless a party gave notice of a referral to arbitration within a specific time limit. Although the parties were initially wary of the process, they gradually came to see that it could usefully smoothen the project's flow by resolving difficult disputes.[44] As confidence in the process grew, the Dispute Board became more proactive.[45] Ultimately, all 40 of the Dispute Board's recommendations were adopted by the parties during the final negotiations, thus resulting in final account agreement within six months of substantial completion of the works.[46] No disputes went to arbitration. This success enjoyed considerable publicity and was influential in the use of Dispute Boards on other Chinese projects.[47]

C. GROWTH OF DISPUTE BOARD INSTRUMENTS

The development of Dispute Board accelerated from the 1990s. There are three main reasons why international popularity increased during this time. These developments gave rise to the existence of new types of Dispute Boards, such as Dispute Review Boards, Dispute Adjudication Boards and Combined Dispute Boards, which I will summarize shortly.

First, the World Bank, which is the foremost multilateral funding agency for large projects, published in 1995 a new edition of its standard bidding document titled 'Procurement of Works'. It comprised *inter alia* a modified FIDIC Contract which provided the borrower with three options for the settlement of disputes, including the use of a three-person Dispute Board. This would allow for publication of non-binding recommendations.[48] If a party did not accept the Dispute Board's recommendations, the parties would have to resort to arbitration for a final and binding resolution. Importantly, this provided for disputes to be submitted to the Dispute Board rather than to the Engineer.[49] The three-person Dispute Board was made mandatory for all World Bank-financed projects in excess of $USD 50 million. In 2000, the World Bank produced a new edition that made recommendations of the Dispute Board mandatory unless or until superseded by an arbitrator's award.[50]

Second, the Fédération Internationale Des Ingénieurs-Conseils (FIDIC) in the same year published the first edition of its 'Orange Book'. It introduced a new version of the Design-

[43] Gordon L Jaynes, 'In the Asia/Pacific Region, "Quo vadis" Dispute Boards', (Paper, DBRF International Conference 2012) sess 8, 2 "Future of Dispute Boards in the Asia/Pacific Region' <https://www.disputeboard.org/wp-content/uploads/2016/02/117c-gordon-jaynes.pdf>.
[44] Brandt and Morten (n 41).
[45] The Dispute Resolution Board Foundation, 'China's Ertan Hydroelectric Project', *The Dispute Resolution Board Foundation Forum* (May 2004) 8(2) <https://www.disputeboard.org/wp-content/uploads/2016/02/forum_2004-05_vol-08-02.pdf>.
[46] Chapman (n 27) 7.
[47] Jaynes (n 43) 2.
[48] Cyril Chern, *Chern on Dispute Boards: Practice and Procedure* (John Wiley & Sons Limited, 2nd ed, 2011) ch 1, 4, <https://catalogimages.wiley.com/images/db/pdf/9780470670330.excerpt.pdf>.
[49] Carroll S Dorgan, 'The ICC's New Dispute Board Rules', (2005) 22(2) *The International Construction Law Review* 142, 143.
[50] Peck and Dalland (n 16) 17.

Build Contract which incorporated Dispute Adjudication Boards (DAB) as an option. Presently, it is sufficient to say that DABs followed the traditional Dispute Board concept except that the DAB decisions were interim-binding. FIDIC followed with Supplements to the Red Book in 1996 and the Yellow Book in 1997, where in both the DAB notably did not provide for an engineer as the first-tier decider to review and decide disputes.[51] In 1999, FIDIC revised its various forms of contract and the DAB was presented as the principal means of dispute resolution within the contractual mechanisms. It published its new 'rainbow' suite of model contracts, including the Dispute Adjudication Board in FIDIC Conditions of Contract for Plant and Design Build (Yellow Book) and the Dispute Avoidance Board in FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (Red Book). This introduced both standing and ad hoc Dispute Boards. In the Red Book, the DAB is to be established at the start, while in the Yellow Book the DAB establishment may be deferred until an actual dispute arises.[52] In 2017, all the FIDIC Rainbow Suite of Contracts underwent a significant review and now include the Dispute Board concept in its revised form of a Dispute Avoidance and Adjudication Board. I will also speak more on FIDIC forms of contract shortly.

Third, the International Chamber of Commerce (ICC) in 2004 introduced its Dispute Board Rules, which allows users to choose between a Dispute Review Board, Dispute Adjudication Board and a Combined Dispute Board.[53] This was barely two years after the ICC had formed a Task Force on Dispute Boards in 2002 to merely draw up standard Dispute Board clauses and a model Dispute Board member agreement.[54] The Rules do not contain a default provision that would set up one type of Board if the parties' intentions were not clearly manifested in the clause. The ICC in 2015 updated its rules to incorporate, among other things, the concepts of Dispute Avoidance and Facilitation as part of the process.

Other key developments should also be noted. One is the establishment of the Dispute Resolution Board Foundation (DRBF) in 1996. DRBF's goal was to promote the use of the Dispute Board process and to serve as an educational resource and information exchange for owners, contractors and Dispute Board Members.[55] Resources include scholarly articles, presentation papers and its updated Practices and Procedures Manual which reflects current best practices.[56] The Dispute Resolution Board of Australasia Inc (DRBA) is the local Australian chapter of the DRBF, and was established in 2003. Internationally, the DRBF project database had tracked the use of Dispute Boards on projects worth in total more than $USD275 billion. Each project recorded in the DRBF system has the total number of disputes heard, the number of disputes referred to for formal Dispute Board hearing, and the number of disputes that proceeded to litigation or arbitration. The DRBF continues to serve as an important marketing tool for the adoption of Dispute Boards in future projects.

[51] Dorgan (n 49) 144.
[52] Chern (n 48) 9.
[53] *ICC Dispute Board Rules* arts 4, 5.
[54] Christopher Koch, 'ICC's New Dispute Board Rules', (2004) 15(2) *ICC International Court of Arbitration Bulletin* 10 <https://www.landoltandkoch.com/medias/icc-db-rules-iccbul-15-2-04-off-print-english.pdf>.
[55] Jones and Finlay (n 22) 45.
[56] Gerber and Ong: 'DAPs: When will Australia Jump on Board?' (n 21) 28.

Another milestone was the adoption of the Dispute Board process by multilateral banks in the 1990s. In 1997, the Asian Development Bank and the European Bank for Reconstruction & Development integrated Dispute Boards for their internationally funded projects. When the World Bank and FIDIC embarked upon a process to harmonise the DRB/DAB provisions, the aforementioned banks alongside the Black Sea Trade and Development Bank, Caribbean Development Bank, Council of Europe Development Bank and Inter-American Development Bank were involved in this harmonisation. The 2005 FIDIC set of contract conditions was adopted by all leading development banks at the time, and has been aligned since.[57]

D. TYPES OF DISPUTE BOARDS

I. Dispute Boards

Standing and Ad Hoc Boards

There are two different forms of Dispute Boards: standing and ad hoc. A Standing Dispute Board, which is present in most standard form contracts, provides that the board is to be appointed at the beginning of the contract, and is to proactively operate throughout the contract's lifetime.[58] The main functions of a Standing Dispute Board is to:[59]

- Become & remain conversant with the contract & periodically visit the site;
- Keep up to date with progress, developments and (potential) problems at site;
- Encourage parties to resolve issues before they become disputes, to give opinions; and
- Adjudicate a dispute that is referred to it.

An ad hoc Dispute Board is where the board is appointed upon a dispute arising. The sole function of the ad hoc Dispute Board is to decide the referred disputes, and the appointment of the board will normally expire once the board has given its decision. Ad hoc boards are often perceived as less expensive than a standing board, but it importantly cannot perform the role of assisting the parties in avoiding disputes.[60] However such a Board is preferable to no Dispute Board at all, as it still provides a mechanism for dispute resolution that is substantially quicker and cheaper than the alternatives of litigation or arbitration.[61]

How does a Dispute Board work?

Although the parties are contractually free to constitute the Dispute Board as they wish, the panel will usually consist of three impartial panel members, one appointed by each party and the third chosen by the selected members to ensure neutrality. The third person is often the chairperson and a lawyer.[62] The panel has a general mandate to assist the parties in resolving and avoiding disputes that may occur throughout the project's duration. For smaller projects a single expert can be used to reduce costs. For construction projects, the board members should

[57] Chern (n 48)10.
[58] Wolf von Kumberg, 'Conducting conflict aware business management – a user's perspective on dispute boards', (2015) 31 *Construction Law Journal* 375. See also Nick Greiner, 'Conference Boosts Dispute Resolution Boards in Australia', (2012) 84(6) *Engineers Australia* 74, 75.
[59] Dispute Resolution Board Foundation, 'Fostering Best Practices in Dispute Avoidance and Resolution Worldwide' (Presentation, 2023) slide 18 <https://appn-racop.org/wp-content/uploads/2023/11/231024-Introduction-to-DBs_APPN_Final_R2-1.pdf>.
[60] Donald Charrett, *Contracts for Construction and Engineering Projects* (Routledge, 2nd ed, 2021) 351.
[61] Ibid.
[62] Patterson and Higgs (n 19).

have experience in major construction projects with expertise in navigating the various technical or legal issues that tend to arise. It is common, and advisable, that Dispute Boards draw upon the skills of both lawyers and experienced industry professionals to deliver the most satisfactory results.[63]

Dispute Board members in a Standing Dispute Board fulfil a dual function of inquisitor and dispute avoider. Dispute Board members do not simply listen to the evidence presented to them, but also work with the parties to identify the relevant facts about an emerging dispute.[64] The "dispute avoidance" role has many similarities with mediation – a "without prejudice" process in which the dispute board assists the parties with to find a "best-for-project" outcome.[65]

Standing Dispute Boards become part of the project administration and can thereby influence the performance of the contracting parties. It has "real-time" value and great commercial potential.[66] Dispute Board meetings will often be held on-site, and it is common for off-site executives from each party to be present at all Dispute Board meetings. This allows the panel to inspect the progress of the project and receive briefings from the parties, and ensures that important decisions can be made without delay. Importantly, the Dispute Board will perform these regular functions regardless of whether a dispute has actually arisen. Through ongoing contact, the Dispute Board is able to develop a familiarity and a close understanding of the parties and issues involved in the project throughout its lifetime.

The aim is to resolve issues at the job level using the Dispute Board's firsthand knowledge of the project. The dispute resolution function of the Dispute Board is engaged where disagreements cannot be resolved through party negotiations. Where appropriate, a hearing may be conducted by the board. This will proceed in an informal manner, without adherence to the rules of evidence and with minimal reliance upon legal representation. The parties may submit position papers outlining their views to the Dispute Board for consideration prior to the hearing. During the hearing, the Dispute Board will undertake orderly questioning and facilitate discussions between parties. Once each party has presented its position, the Dispute Board will then meet in private to formulate its conclusions. Its existing familiarity with the project will enable it to deliver timely and appropriate recommendations to overcome conflicts in a speedy and efficient manner.

Dispute Board Opinions, Recommendations and Decisions

The Dispute Board can promptly hold informal hearings to provide advisory opinions, or if necessary, hold full hearings and provide written recommendations.[67] An advisory opinion is a verbal opinion given by the Dispute Board on issues after an informal hearing, before they develop into disputes. Recommendations and decisions are provided in writing with supporting rationale after a full hearing by the Dispute Board. A typical Dispute Board clause will provide that parties shall comply with a Dispute Board decision, and provide a period within which the dissatisfied party can issue a notice of dissatisfaction. Where a notice of dissatisfaction is issued in accordance with the contract, the dispute is escalated to litigation or arbitration for final determination.

[63] Doug Jones, 'Dispute Boards: Preventing and Resolving Disputes', (Paper, Construction Law International Conference, 18-20 September 2014) 2.
[64] Gould and Lockwood (n 14) 193.
[65] Donald Charrett, 'Dispute Boards and Dispute Resolution', (2013) 16(4) *Inhouse Counsel* 59.
[66] Lukas Clee, *International Construction Contract Law* (John Wiley & Sons Ltd, 2nd ed, 2018) 453 [11.2.2].
[67] Dispute Resolution Board Foundation (n 59) slide 22.

Why use a Standing Dispute Board?

The potential for a Dispute Board to resolve issues before they become disputes in an efficient, informal manner delivers significant cost-savings to a project. Disputes and claims can easily threaten budget and schedules, carry transactional costs, sour relationships and create a breeding ground for "end of contract claims". Early intervention is key as parties are most amenable to resolution at the beginning stages of a dispute. The familiarity of a Dispute Board with the project increases the likelihood that the Dispute Board will 'get it right' the first time, thus avoiding expensive post-complete arbitration. Dispute Board members can develop relationships built on confidence and trust with the contracting parties, which increases the likelihood of the parties accepting the Dispute Board's advisory opinions and decisions if formal disputes arise.[68] This also makes it harder for people to bring claims, particularly frivolous ones for fear of damaging their credibility to the Dispute Board. An underlying but important point is that the written recommendations/decisions of the Dispute Board are admissible later in arbitration or litigation. Dispute Boards use a merit-based process that maintains integrity and procedural fairness, given that Dispute Board members have signed a three-party agreement obligating them to serve both parties equally. The parties can concentrate on the project confident that the dispute will be resolved fairly by the neutral Dispute Board.[69]

Cost is always a sensitive issue in the construction party. Anecdotal evidence from Australia indicates that 50% of all legal costs associated with construction is expended on disputes. In 10% of projects, between 8-10% of the total project cost was legal cost.[70] There is a view that retaining a standing Dispute Board is too expensive compared to other dispute mechanisms due to its extensive and ongoing duties throughout the course of a project. It can also give the impression that Dispute Board members are comparatively doing little work for the considerable amounts payable to them. When a project is smaller, less complex or otherwise less likely to give rise to disputes, a Dispute Board may not pass the cost-benefit analysis test. Where a Dispute Board is used throughout a project, the costs include:

- A fixed (usually monthly) retainer for each Dispute Board member to ensure availability;
- A daily fee for each Dispute Board member for site visits, travel, attending hearings, writing documents and reviewing documents;
- Indirect internal expenses incurred by the parties for tasks including preparation for Dispute Board meetings, maintaining documentation and ongoing correspondence between the parties and the board.

The costs are equally shared between the parties. On the rare occasion where one party is reluctant to be involved in the Dispute Board process, in practice one party may pay the board's fees in their entirety.[71]

When put in the context of the hundreds of millions of dollars of a major international construction contract, the cost of a Dispute Board is usually considerably less than 0.15% of the final contract price. By contrast, it would not be unusual for the total costs of a major

[68] Graham Easton and Ann Russo (eds), *Dispute Board Manual: A Guide to Best Practices and Procedures,* (SPARK Publications, 2019).
[69] JD Coffee, 'Dispute Review Boards in Washington State', (1988) 43 *Arbitration Journal* 58.
[70] Chapman (n 10) 3.
[71] Patterson and Higgs (n 19).

arbitration in a large project to exceed 15%.[72] Note that the informal nature of the Dispute Board also minimizes the use of external consultants or legal counsel and doesn't require document discovery or event reconstruction, as real-time information is readily available to the Dispute Board.

Further, Dispute Boards may be viewed as a type of "insurance policy" against disputes. Charrett states that without a Dispute Board, there is a 10% chance that the legal costs of disputes will amount of 4-5% of the project cost.[73] Thus, their costs should not be compared against arbitration and litigation as a simple comparative dollar figure for the cost of dispute resolution in any given project. Rather, their value lies in the heavy arbitration or litigation costs that they circumvent by avoiding disputes in the first place. Seen in this light, a Dispute Board can provide a very effective safeguard against disputes that is well worth the initial outlay when used in projects that are complex or high risk.

If there is insufficient project funding for a three-member standing Dispute Board, the parties could contemplate a single member for smaller projects, such as projects valued between $10m and $100m. Less than 2% of all disputes referred to Dispute Boards have gone to arbitration or litigation, demonstrating that they are a very effective form of insurance policy.[74] In some jurisdictions, prevailing ideologies have tended to regard Dispute Boards as a tool for only big projects. The international experience, however, demonstrates that Dispute Boards are suitable, not only for large-scale construction, but are also gaining strong popularity in smaller projects as well.

II. Dispute Review Boards (DRBs)

The first form of Dispute Board was known as a Dispute Review Board. The primary distinguishing characteristic is that the Dispute Review Board's jurisdiction is limited to providing non-binding recommendations at the end of any dispute resolution process. Although DRB recommendations do not legally bind the parties to comply, mutual acceptance is facilitated by 'their confidence in the DRB, in its members' technical expertise, first-hand understanding of the project conditions and practical judgement, as well as by the parties' opportunity to be heard.' [75]

While contracts may contain provisions to allow parties to submit disputes to arbitration if they are dissatisfied with a DRB recommendation, parties are unlikely to do so. It is likely over the project's course that each party will be pleased with certain decisions and expect the other party to accept the unfavourable.[76] As a result, DRBs can deliver greater finality than may be anticipated at first glance. There are certain features, unique to the DRB concept, that make it suitable as an efficient means of dispute avoidance.

DRB hearings provide a less adversarial and a more conversational option to parties. It is more like a site-meeting than a trial.[77] DRB members are free to investigate and consider issues in a

[72] Andrew Stephenson, 'Time for Australia to embrace Dispute Resolution boards in the Construction Industry?' *Mondaq Business Briefing* (online, 25 June 2021).
[73] Charrett (n 60) 351.
[74] Patterson and Higgs (n 19).
[75] Dispute Resolution Board Australasia Inc, 'The DRBA Concept', (Web Page, 2024) <http://www.drba.com.au/concept-mainmenu26>.
[76] Chapman (n 10) 3.
[77] Gerber and Ong: 'DAPs: When will Australia Jump on Board?' (n 21) 13.

flexible and open way.[78] This has an important psychological influence upon parties as they are encouraged to interact directly with one another, and with the DRB, without relying upon legal representation. The damaging 'dual of egos' is avoided.[79] The curial rules of evidence do not apply to DRB meetings or hearings, marking an important contribution to the informality of proceedings.[80] It is therefore unnecessary to prepare and present elaborate cases that require documentation beyond position papers submitted by each party, normal project records, and any other relevant background documents. This allows for a faster, less legalistic process that is more likely to preserve relationships. A standing DRB that operates throughout the lifetime of the project is familiar with its characteristics. Regular site visits and meetings allow for the early identification of issues and swift action to ventilate concerns and defuse conflict as it arises. By virtue of this process, the model represents a superior option to arbitral tribunals that are constituted as a retrospective response to a dispute that has already erupted.

Furthermore, this proactive role extends to allow the DRB to cast 'a long shadow over the project, modifying the behaviour of the parties in a positive manner through its mere presence'.[81] Through close contact with project supervisors on the ground, DRB members can use their legal and technical expertise to guide parties along a more harmonious path. This ongoing neutral oversight is invaluable in preserving relationships and achieving best-for-project outcomes. A trend in DRB contracting has been to include 'without prejudice' clauses that relate to communications involving the DRB. By removing the anxiety that submissions made to a DRB may be later used against them in litigation or arbitration, parties feel at greater liberty to explore options in open discussion. This contributes to a more co-operative approach to resolving issues during a project and is an important feature in removing an 'us-versus-them' mentality in favour of more amicable party relations. Of course, despite all reasonable precautions, there will be occasions where disputes are unavoidable. Where this is the case, DRBs shift to their secondary responsibility of dispute resolution. As a result of their ongoing familiarity with the project, they can recommend solutions to conflicts quickly before the parties become entrenched in their positions and ill-will undermines the existing commercial relationship.[82] This 'on-the-run' dispute resolution procedure maximises the potential for disputes to be resolved in their early stages while the project is still in progress. The cost-savings achieved by nipping disputes in the bud are potentially significant and are clearly beneficial for all parties involved.

Worldwide, the international record through 2013 includes over 2,700 projects with a value approaching $300 billion. Over the past 10 years, between 70-80% of all projects utilising Dispute Boards had no referrals to the Dispute Board. Where referrals have occurred, 98% of the decisions have been accepted.[83]

These high rates of successful resolution demonstrate the unique and remarkable effectiveness of DRBs in construction projects throughout the world. Industry experts consider that similar levels of effectiveness are unattainable with arbitration or litigation, or with the various ADR options.

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[78] Gillies (n 6) 125.
[79] Charrett (n 60) 351.
[80] Gillies (n 6) 125.
[81] Benjamin JW Teo, 'Proactive Dispute Resolution: The Value of Dispute Review Boards to the Construction Industry', (2011) 27 *Building and Construction Law Journal* 233, 237.
[82] D Griffiths, 'Do DRBs Trump DABs in Creating More Successful Construction Projects?', (2010) 14 *Dispute Resolution Board Foundation Forum* 1.
[83] Dispute Resolution Board Foundation, 'FAQs', (Web Page, 2024) <https://www.drbf.org.au/concept/faqs>.

III. Dispute Adjudication Boards (DABs)

FIDIC developed the DRB concept further, with the introduction in its 1995 Orange Book of the concept of the Dispute Adjudication Board (DAB). A DAB is similar to a DRB, with the exception that a DAB's determination is binding on the parties. Instead of issuing non-binding recommendations, a DAB issues interim decisions that are binding on the parties as a term of the contract, unless and until overturned by a formal dispute process such as arbitration or litigation. A successful party that seeks to enforce a decision of a DAB must rely on further dispute resolution procedures outlined in the contract or, failing that, an action for breach of contract. Other than this, the DAB is effectively the 'European cousin' of the DRB and mirrors its aims, objectives and procedural practices in avoiding disputes.[84]

Consequently, the DAB procedure involves a more formal approach than DRBs. To invoke the DAB's power to resolve the dispute, there must be in the first instance be a relevant 'dispute' for referral to the DAB.[85] When seeking assistance:

- a formal notice of dispute must be issued to the DAB by either party;
- the DAB has 84 days to makes its investigations, conducting a hearing (if required) and provide a decision;
- if either party is dissatisfied with the decision, a notice of dissatisfaction to be served within 28 days; and
- if notice is served, parties are required to attempt to settle the dispute amicably before the commencement of arbitration.

Some contracts provide for a special dispute resolution procedure that will apply if a DAB decision is not complied with. For example, cl 20.7 of the 1999 FIDIC Red Book provides that if a DAB decision is not disputed within the required timeframe and is not complied with, then the failure to comply with the DAB decision can be referred to arbitration. I discuss the FIDIC form of contract in greater detail shortly.

IV. Combined Dispute Boards (CDBs)

In 2004, the ICC Dispute Board Rules were introduced.[86] The ICC rules are industry agnostic, and can be applied to any long-term project for which a Dispute Board is appropriate. What was once exclusively a feature of the US domestic construction industry expanded to the international construction sphere with the FIDIC forms of contract, only to outgrow the construction industry in this latest development.

A new category of Dispute Boards was also introduced: Combined Dispute Boards (CDBs). CDBs occupy a middle ground between DABs and DRBs. As noted earlier, the key difference between DABs and DRBs is that the former makes binding determinations while the latter makes non-binding recommendations. CDBs may do both. While the default position for CDBs is that they make non-binding recommendations, a party can specifically request for a binding

[84] Gerber and Ong: 'DAPs: When will Australia Jump on Board?' (n 21) 14.
[85] Botsis (n 15) 38.
[86] *ICC Dispute Board Rules.*

decision. Unless the other party objects, the CDB must then comply with the request, and the decision will be binding upon the parties.[87]

In the event of an objection to a request for a binding decision, the CDB must decide whether to make a decision or a recommendation and may take into account the following factors: [88]

- whether, due to the urgency of the situation or other relevant considerations, a decision would facilitate the performance of the contract or prevent substantial loss or harm to any party;
- whether a decision would prevent disruption of the contract; and
- whether a decision is necessary to preserve evidence.

Parties are given the option of selecting which type of Dispute Board to utilise. CDBs may prove useful for parties who cannot decide if they need a DRB or DAB, but combining the DRB/DABs into a CDB could make the dispute board procedure somewhat cumbersome. The ICC Dispute Board Centre provides a number of administrative services to parties, including appointing Dispute Board members, deciding upon challenges to Dispute Board members, and reviewing the form (as opposed to merits) of the Dispute Board's decisions (subject to the parties' agreement to the contrary).

PART II: FIDIC FORM OF CONTRACT

The FIDIC suite of construction contracts are the most commonly used standard form of international construction contracts in the world today. FIDIC's intention is to promote efficient and proactive contract management. It has become tradition that FIDIC contracts are known in popular parlance by the colour of their cover. The key ingredient for FIDIC's success is its balanced approach to the roles and responsibilities of the main parties, as well as the allocation and management of risk.[89] All FIDIC Contracts contain the use of General Conditions of Contract, deemed to be suitable in all cases. Guidance is also provided on the preparation of Particular Conditions to address project-specific issues on a case-by-case basis. FIDIC introduced the DAB in response to the condemnation of the dual role being performed by the Engineer as both the employer's agent and independent certifier/decision-maker.[90] It was also at this stage that the divide first occurred between traditional dispute review boards, which gave non-binding recommendations, and DABs, with their interim-binding decisions. In 1999, FIDIC published three major sets of Conditions of Contract (the Red, Yellow and Silver Books), all of which contained DAB provisions.[91] I will focus on the Conditions of Contract for Plant and Design Building (Yellow Book) and the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (Red Book). The Red Book is intended for use on projects where the employer carries out the design but also allows for some elements of the project to be Contractor designed. The Yellow Book is applicable for electrical, mechanical and building works designed by the Contractor.[92]

[87] Ibid art 6.
[88] Ibid art 6.3.
[89] FIDIC, 'Why use FIDIC Contracts?' (Web Page, 2024).
[90] Gordon L Jaynes, 'FIDIC's 1999 Editions of Contract for "Plant and Design-Build" and "EPC Turnkey Contract": Is the "DAB" Still a Star?' (2000) 17 *International Construction Law Review* 42, 45.
[91] Gerber and Ong: 'DAPs: When will Australia Jump on Board?' (n 21) 14.
[92] FIDIC, 'The FIDIC Suite of Contracts', (Web Page, 2024).

1999 – First Edition

In the first edition, under the Red Book the DAB is to be established *at the start*, and is thus a true dispute board. A different 'ad hoc' approach was taken in the Yellow Book, where the establishment of the DAB may be deferred until an actual dispute arises.

Irrespective of Red or Yellow Book, under cl 20.4, if a dispute arises between the parties to that contract in connection with the contract or the works performed thereunder, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, further to the appointment of the DAB, either party may refer that particular dispute in writing to the DAB for its decision.

After the Contractor has made its claim (Clause 20.1), the first stage of dispute resolution is before a DAB of one or three members (as nominated in the Particular Conditions of Contract) (Clauses 20.2 – 20.4). Once the DAB has made its decision, unless a party provides a "notice of dissatisfaction" within 28 days after receiving the decision, it is expressed to be final and binding. Enforceability of the DAB's decision is discussed below. If a notice of dissatisfaction has been given and within time, thereafter, the parties are then obliged to attempt to settle the dispute amicably, however arbitration may be commenced within 56 days after the day the notice of dissatisfaction has been given, even if no attempt at amicable settlement has been made (Clause 20.5). An arbitration under the FIDIC Contracts is finally settled by three arbitrators under the ICC Rules (Clause 20.6). A failure to comply with the decision may itself be also referred to arbitration (Clause 20.7).

2017 – Revised Edition

The introduction of the 2017 2nd edition of the FIDIC Rainbow Suite of Contracts is a very significant event. Following significant review, the Contracts had approximately 70% more text and are much more detailed than the 1999 edition.[93] Indeed, many clauses have been completely redrafted.

Focusing just on the revised claims and disputes procedure, "Claims" by the Employer or Contractor are now treated equally, with the amendments requiring both to be determined under the same procedure. Subjecting the Employer's and Contractor's claims to the same time limits and the same level of detail addresses the significant imbalance in the determination of claims under the 1999 Edition, whereby the Contractor's claim process was much more onerous.[94] The claim submission period has been extended from 42 days to 84 days, but submission has now become a condition precedent to entitlement.

[93] David Heslett, 'Comparison of 2017 2nd Edition FIDIC Contracts with 1999 Edition Contracts Concentrating on Construction & Plant & Design Build Contracts', FIDIC with CCM GmbH and ECV Consultancy Ltd UK (Presentation, 18 June 2018).

[94] Previously, the Contractor was required to issue its notice within 28 days of it becoming aware of an event or circumstance giving rise to the claim, and to submit a fully detailed claim within 42 days. By contrast, the Employer was merely required to notify the engineer "as soon as reasonably practicable after [it] became aware of the event or circumstance giving rise to the claim" (sub-clause 2.5).

The creation of a new clause 21 "Disputes and Arbitration" distinct from clause 20 "Employer's and Contractor's Claims' is symbolically significant as it reinforces the concept that claims are not the same as disputes – a notion which was obfuscated in the 1999 Edition.[95] This separation is achieved by defining "Claim" as a simple request for something that a party is entitled to, and by defining "Dispute" as a disagreement under the contract which had not been resolved.

The 2017 Edition recognizes that the Dispute Board should pay a more active role in dispute avoidance. This is reflected as the Dispute Adjudication Board is now referred to as the Dispute Avoidance / Adjudication Board (DAAB). Beyond this cosmetic change, the 2017 Edition also requires that the DAAB be appointed at the start of the project, unless the parties agree otherwise. This marks a departure of the ad hoc nature of the DAB under the 1999 Edition of the Yellow Book, and represents an important shift in the way in which the DAAB is intended to operate. It fixes the significant deadlock of ad hoc boards failing to be utilised as parties struggle to appoint DAB members once the dispute has arisen due to a lack of cooperation.

The 2017 Edition has also formalised the possibility for the DAAB to assist the Parties/or informally discuss and attempt to resolve any issue or disagreement arising under the contract in subclause 21.3 'Avoidance of Disputes'. In the 1999 Red Book, DABs could perform this role if the parties agreed to jointly refer the matter to the DAB. This is contrasted to the 2017 Edition, where the DAAB can invite the parties to make such a joint request if it becomes aware of an issue or disagreement.

FIDIC has continued to emphasise and raise awareness of the dispute avoidance function in DAABs. For example, in 2023 FIDIC published a practice note providing project participants and the DAAB with strategies to maximize the DAAB's effectiveness to resolve disputes at an early stage.[96] Sir Vivian Ramsay further emphasises that avoidance as critical:[97]

> " *The avoidance role of dispute avoidance/adjudication boards (DAAB) is critical and no major project can be contemplated without a DAAB in place*."

Enforcement of DAAB Decisions

Under the 1999 Edition, I have earlier stated that enforcement under the FIDIC regime had a practical problem, as the DAB's decision at that point is not 'final' – in the sense that it may be modified by the arbitral tribunal. Thus, where a losing party issues a Notice of Determination and that party refuses to comply with the DAB's decision, the winning party's options for immediate enforcement are limited. It was argued that the safest way in which a DAB's

[95]Frédéric Gillion et al, 'The New FIDIC Suite 2017: Significant Developments and Key Changes' (2018) *International Construction Law Review* 384.
[96] International Federation of Consulting Engineers, *Practice Note 1: Dispute Avoidance – Focusing on Dispute Boards* (1st edition, 2023) <https://issuu.com/fidic/docs/2023_practice_note_on_dispute_avoidance_e-brochure?fr=xKAE9_zU1NQ>.
[97] Dispute Resolution Board Foundation (n 59) slide 60.

decision can be enforced under clause 20.6 of the 1999 FIDIC Red Book is by way of interim award.[98]

The inclusion of a new sub-clause 21.7 'Failure to Comply with DAAB's Decision' in the 2017 Edition is fundamental to the enforcement of DAAB decisions, which greatly expands the scope from the 1999 Edition. This sub-clause allows for non-compliance with a DAAB decision to be referred directly to arbitration (sub-clause 21.6) without the need to first refer it to a DAAB or other dispute escalation provisions. This resolves the question as to whether a party must obtain a further DAAB decision or undertake amicable settlement discussions before enforcing a decision.[99] The sub-clause empowers the Tribunal to enforce a DAAB decision through the use of "summary or other expedited procedure" by means of "an interim or provisional measure". This helpfully resolves much of the issues faced in the 1999 Edition when attempting to enforce DAB decisions that were final but not yet binding.[100] Further, such interim or provisional measures are subject to an express term that the rights of parties as to the merits of the award are expressly reserved until finally resolved by an arbitral award.

PART III: THE AUSTRALIAN EXPERIENCE

A. Background on Australia's Construction Industry

Despite Australia's small population size, the Australian construction industry continues to 'punch well above its weight'.[101] The Australian construction industry is also in many ways similar to Canada's. In terms of economic importance, the construction industry in both countries makes up close to 10% of their national GDP. Yet, both nations are 1st world economies that are in desperate need for professionals within the development, construction and building sector. Post-COVID strains on the construction industry are still being felt in both nations. Infrastructure Australia has identified that 'trades and labourer shortages are growing at the fastest rate and will remain acute until 2025 – a forecast deficit of 131,000 full-time workers by 2024'.[102] There are chronic skills shortages and cost blowouts as energy projects needed to deliver Australia's ambitious 2030 renewable energy target overtake transport and form the bulk of work in an $894 billion infrastructure pipeline.[103] A similar shortage issue is prevalent in Canada, with 245,100 people expected to retire from construction jobs over the next decade (20% of Canada's current construction workforce).[104] Australia had also commissioned an Independent Strategic Review of the Infrastructure Investment Program in May 2023. Over 738 infrastructure projects in Australia's $120bn infrastructure program are

[98] Jones, 'Dispute Boards: Preventing and Resolving Disputes' (n 63) 20. See also a discussion of dispute resolution under FIDIC Contracts in Reece J Allen, 'Internationalisation of the Australian Construction Market: Case for Using FIDIC Contracts', (Paper, Society of Construction Law, Australia National Conference 2015).
[99] Patterson and Higgs (n 19).
[100] A well-known case is Persero II. See Frederic Gillion, '*Persero II:* Are we now clear about the steps to enforce a non-final DAB decision under FIDIC?', (2016) *International Construction Law Review*.
[101] Ron Finlay, 'Dispute Board Concepts Internationally – Divergence or Convergence – Australasian Perspective' (Paper, 12th Annual DRBF Conference, 4 May 2012) 1.
[102] Paul Karp, 'Massive worker shortfall threatens plans to build 1.2m new homes, Infrastructure Australia warns', *The Guardian* (online, 12 December 2023).
[103] Mark Ludlow, 'Fears energy projects could push roads, rail out of $894b pipeline', *Australian Financial Review* (online, 31 July 2023) < https://www.afr.com/companies/energy/fears-energy-projects-could-push-roads-rail-out-of-894b-pipeline-20230727-p5drt6>.
[104] BuildForce Canada, 'Forecast Summary Reports 2023 Highlights', (Web Page, 2024).

being reviewed for value and significance.[105] All 2023/24 budgets have refrained from new project announcements pending the results of the review.[106] Many major Australian energy projects are significantly over budget and have delayed timelines. For example, Snowy Hydro 2.0 currently has a cost blowout of $AUD 13 billion and is estimated to be delivered five years behind schedule.[107]

This is ripe brewing ground for a storm of construction disputes. The topic of Dispute Boards and its Australian applicability is therefore timely and hopefully, makes compelling argument for its greater adoption.

B. Overview

As will be made apparent, dispute boards do not seem to have been as enthusiastically embraced in the Asia-Pacific regions. Australia is no exception, but it is getting warmer. 80 of the 117 recorded uses of Dispute Boards in Australia were implemented in the last decade. The increasing industry emphasis on prevention and avoidance may mean greater utilisation in the future.

According to the DBRF, there have been 117 Australian projects completed or in progress which have had a Dispute Board. The value of those projects in AUD (excluding inflation) ranged from $22 million to $8 billion. The approximate total contract value is in excess of $73 billion.[108] When utilised, Dispute Boards in Australia have been a key success. Every dispute has been resolved within the Dispute Board process. In other words, no Decision from the Dispute Boards for the 117 projects has proceeded to a litigation judgment or arbitral award. This means that all disputes on projects with a Dispute Board in Australia have been resolved within the Project itself. Bearing in mind the litigious nature of the Australian construction industry, such results are outstanding.[109] If one were to compare projects with a Dispute Board with projects with no Dispute Board, it is inevitable that the projects with no Dispute Board will have disputes that proceeded to arbitration or litigation. It is an enviable record worth focusing on.

I. Early Beginnings

Prior to the introduction of Dispute Boards, arbitration, expert determination and mediation were the most common forms of construction dispute resolution. All were retrospective and brought after a dispute has matured.[110] The first Australian use of a Dispute Board was in 1987 when a Dispute Board was used on the Ocean Outfalls Tunnel project in Sydney, which had a contract value of $AUD 320 million. It was used because the contractor was American and had familiarity with the use of Dispute Boards from the United States. Although (and possibly

[105] Department of Infrastructure, Transport, Regional Development, Communication and the Arts, "Infrastructure Investment Program Strategic Review", Australian Government, online at <https://investment.infrastructure.gov.au/about/budget-announcements/infrastructure-investment-program-strategic-review>.
[106] See eg, Infrastructure Australia, *2023 Infrastructure Market Capacity Report* (Report, 12 December 2023).
[107] Peter Hannam, 'Snowy Hydro 2.0 costs blowout confirmed to be almost $13bn', *The Guardian* (online, 31 August 2023). See also Snowy Hydro, 'Snowy 2.0 Project Update – December 2023' (online, 19 December 2023).
[108] Dispute Resolution Board Foundation, 'Projects – Australia' (Web Page, 2024).
[109] Paula Gerber and Brennan J Ong, '21 today! Dispute review boards in Australia: Past, present and future' (n 13) 182.
[110] Finlay (n 101) 2.

because) there was no serious dispute arising during the project, the Australian construction industry was not immediately converted to Dispute Boards.[111] Throughout the 1990s, Dispute Boards on major projects were few and far between. The industry remained fertile ground for adversarial resolution practices. In a 1998 Institute of Arbitrators and Mediators Australia Journal Survey, only 8% of respondents had any direct experience with Dispute Boards, compared to 80-90% of respondents who were familiar with arbitration, mediation and expert determination.[112]

II. Renewed Interest in the 21st Century

A resurgence of Australian interest in Dispute Boards began in the 21st century. Several high-profile disputes on major public projects had contributed to widespread dissatisfaction with traditional, reactive dispute resolution methods. The industry view was that there must be a better way.[113] In 2003, the Australasian chapter of the US-based DBRF was formed, and the promotion of Dispute Boards was undertaken in a comprehensive manner. The Co-operative Research Centre in 2009 also recommended the establishment of Dispute Boards in Australia, primarily due to its proactive nature to solve potential problems before they reached the dispute stage.[114] Most Australian literature covering Dispute Boards was published in 2008–11, possibly due to the Global Financial Crisis and its aftershocks.[115] Even the High Court noted the 'increasing diversity of dispute avoidance and resolution mechanisms in modern contracts'.[116] The Law Council of Australia recognized that 'there is a tremendous opportunity for the use of DRBs in appropriate commercial contracts generally'.[117]

III. Current Role of Dispute Boards in Australia

The main activity of Dispute Boards in Australia is one of avoidance and prevention. George Golvan QC, the Chairman of the DRB for the Sydney Desalination Plant, wrote that the purpose of the DRB in that project was to 'prevent disputes arising in the first place and if this is not successful to assist and facilitate the parties in the equitable resolution of disputes.' [118] This brilliantly conveys the intended objectives of a DRB – only when dispute avoidance fails and the conflict is escalated should the DRB adopt its secondary role of dispute resolution. DRBs are proactive, not reactive. Primarily they are set up not to respond to disputes once they have developed, but to address sources of conflict between parties before they can crystallise into disputes. Importantly, where disputes are referred to herein, the reference is to the nexus where parties assert competing legal rights. A dispute is thus more serious than an area of mere psychological contention between parties, as it involves legal contention.[119]

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[111] Graham R Easton, 'The Future for Dispute Boards in Australia and New Zealand', (Paper, DRBF Annual International Conference, 3-5 May 2012) 2.
[112] Ibid.
[113] Finlay (n 101) 2.
[114] Ibid.
[115] See, for example, Botsis (n 15); Gerber and Ong: 'DAPs: When will Australia Jump on Board?' (n 21); Teo (n 81).
[116] *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305, 314–15 [25] (French CJ, Crennan and Kiefel JJ).
[117] Advisory Committee on Alternative Dispute Resolution, Law Council of Australia, 'The Use of Dispute Resolution and their expansion beyond Construction Matters', (Report, 27 November 2012) 5 [10].
[118] George Golvan, 'Practical Issues in the Establishment and Operation of a Dispute Resolution Board: Some Reflections on the Operation of Sydney's Desalination Plant Project Dispute Resolution Board', (2009) 132 *Australian Construction Law Newsletter* 30, 31.
[119] Doug Jones, 'Dispute Boards: Preventing and Resolving Disputes' (Paper, DRBF Singapore Conference, 16 May 2014) 13.

The dispute avoidance and prevention role undertaken by Dispute Boards in Australia is founded on the professionalism of the Dispute Board members and the trust generated between the parties' representatives and the Dispute Board members. Decision makers are highly likely to accept the reasoned Advisory Opinion or Decision and use that Advisory Opinion or Decision as a basis to settle the Issue or Dispute between the parties.

C. Dispute Board Success in Australia

A number of trends have emerged when incorporating Dispute Boards in Australian construction projects. Some are unique and this is reflective of Australia's preference to heavily customize the contracts.

I. Availability of Advisory Opinions

One of the most common forms of Dispute Avoidance is for the parties to request the Dispute Board to prepare an In Confidence Advisory Opinion. This is a quite formal process where the questions relating to an Issue are agreed, the parties make formal submissions in relation to those Issues and the Dispute Board issues a reasoned Advisory Opinion. It is quite common for Advisory Opinions to address only liability or entitlement questions and not proceed to determine quantum.

In the event an Issue or potential Dispute cannot be avoided or prevented and is referred to the Dispute Board for determination, the Dispute Board acts like an expert determination panel and provides a decision that is based on the contract between the parties, and the law.

There is no consistency in dispute board contracts on whether to adopt binding, non-binding or interim binding determinations. It is more common in Australian projects for the Decision to be 'interim binding' in some form. Interim binding means the Dispute Board's decision is final and binding on the parties unless challenged through a lodgement of a Notice of Dissatisfaction within a specified period, ordinarily 30 business days. When a party lodges a Notice of Dissatisfaction, the party giving the notice may proceed to the next stage of dispute resolution which, depending on the form of Contract, is either litigation (through the Courts) or arbitration.

Finlay has also observed that in some contracts, the parties have agreed for the Dispute Board's determination to be binding where the outcome is less than some agreed figure, for example $500,000 or $5 million. The Government of New South Wales has utilised this approach in the GC21 Contract, which provides for disputes to be resolved by binding expert determination in the event the amount is <$500,000.[120] Another more radical modification is parties agreeing for the DRB's determination not to be enforceable or challenged until the project has reached completion. This process is not promoted by the DRBA, and is implemented rarely.[121]

II. Promotion and Regular Dispute Board Procedures

Targeted Promotion

[120] James Braithwaite and Kylie Day, 'New South Wales Court of Appeal: June 2021', *LSJ Online* (online, 1 June 2021) <https://lsj.com.au/articles/new-south-wales-court-of-appeal-june-2021/>.
[121] Finlay (n 101) 7.

The DRBA has actively promoted dispute avoidance and has made the following procedures for regular Dispute Board meetings more commonly implemented in Australia. Arguably, it has succeeded in conveying the concept as the most cost-effective dispute prevention process for major contracts.[122] The DRBA has utilised the specific experience of local members and the broader skillset and knowledge possessed by the DRBF through its international membership. People responsible for contract drafting, tender documentation and project procurement can freely seek assistance from the DRBA, which retains a wealth of resources and summaries. Targeted promotional efforts have undoubtedly increased the Dispute Board adoption rate in Australia. Virtual educational workshops have been successfully organised. As of 2021, there are also potentially three DBRF R3 Mentoring arrangements underway.[123]

First Meeting

The first dispute meeting with project participants often is an education seminar conducted by the Dispute Board members to familiarize the parties with the Dispute board procedures.[124] This is critical as many project participants would often have little to no Dispute Board experience. The first meeting is also where the agreed contractual provisions and procedures relating to the operation of the Dispute Board is reviewed and supplemented if required to provide flexibility.

Without Prejudice

A key adoption is to designate the standard dispute board meetings and communications as without prejudice or privilege. This is to encourage openness and frankness of communication in the regular meetings to find 'best-for-project' outcomes.[125]

Participation of Senior Executives and Debriefing

Regular Dispute Board meetings are often attended by senior offsite executives of both parties, in addition to the site representatives that have day-to-day responsibility for the project. Maintaining leadership relationships fosters trust and collaboration between the contractor and employer. It is also not unusual at the conclusion of a project for the Dispute Board to hold a debrief meeting. This is a valuable opportunity for the parties to reflect on how well the dispute board process has worked and how it can be better improved for the future.

One-Person Dispute Boards for High-risk Projects

Another bespoke element of dispute boards in Australia is the recent use of One-person DABs by Transport for NSW. This has been utilised on the $2.2 billion Coffs Harbour Project and two D&C Contracts for the $2.1 billion M1 Extension. The DAB in these contracts notes the dual dispute avoidance and decision-making functions. This model is clearly aimed at minimising the cost of a Dispute Board, and may suffer from providing diversity and speciality of dispute board members.[126]

D. Case Studies

I. Sydney Desalination Plant (2007–10)

[122] Easton (n 112) 3.
[123] Dispute Resolution Board Foundation, 'R3 Breakfast Briefings', (Web Page, 2021).
[124] Donald Charrett, 'Dispute Boards in Australia – The Story so Far?' (2012) 12 *Buildlaw* 10, 13.
[125] Charrett (n 65) 59.
[126] Owen Hayford, 'Best Practice Dispute Board Models' (Blog Post, 2023) <https://www.infralegal.com.au/dispute-avoidance-and-resolution/best-practice-dispute-board-m>.

The Sydney Desalination Plant was a major project built upon the Kurnell Peninsula on Botany Bay in Sydney's southern suburbs. The plant was designed to produce 250 megalitres per day of clean drinking water to Sydney residents. This was part of the broader NSW Government strategy to relieve strain on the Warragamba Dam following extreme drought. Sydney Water contracted with Veolia Water and John Holland as preferred tenderer to Design, Build, Operation and Maintain the plant. At the time of construction, Sydney Desalination Plant was the largest plant in Australia and the second largest in the world.[127] The contract value was near $1.9 billion but the project was delivered under budget by approximately $60 million.

The three-member DRB comprised of an experienced consulting engineer of large infrastructure projects, a senior consultant on infrastructure projects and a Senior Counsel with construction law and ADR expertise.[128] Chairman George Golvan QC explained that the DRB's purpose was to 'identify, discuss and resolve potential issues of concern between themselves, at the earliest possible stage, in a frank and open environment to avoid potentially acrimonious disputes. With the cooperation of the parties a range of potential issues were raised and discussed in a frank and open environment at DRB Meetings with the focus on successful Project delivery and dispute avoidance. The discussions invariably resulted in rapid and pragmatic solutions to all problems or potential problems within a relatively short time after they were identified'. The DRB used in the project was highly successful, as no dispute progressed to hearing stage.

II. Sydney Metro (2013-2032)

Sydney Metro is Australia's biggest public transport project. It is a new standalone railway which will add 39 metro stations and more than 90km of metro rail.[129] The fully automated metro system is the first in Australia and was predicted to increase Sydney's rail capacity by up to 60% by 2024.[130] The first component, the Metro Northwest Line, opened in 2019 and consists of 13 stations and 36km of twin tracks. This line is being extended to run to Sydney CBD, which is due to launch in mid-2024.[131] Initial works also commenced on the Sydney Metrowest and Metro Western Sydney Airport projects in 2020. The whole project is expected to finish in 2032.[132] Whilst the Federal and NSW Governments have funded a total of $46.1 billion to date,[133] the Metro program underwent a major review after it was revealed the whole project had blown out by $21 billion.[134]

Northwest Project

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[127] Stephenson (n 72).
[128] Golvan G, *Dispute Boards and Construction Contracts*, Paper presented to the Victorian Bar Association (20 October 2009) p 5.
[129] New South Wales Government Planning, 'Sydney Metro' (Web Page, 2024) <https://www.planning.nsw.gov.au/assess-and-regulate/state-significant-projects/sydney-metro>.
[130] Australia New Zealand Infrastructure Pipeline, 'Project Sydney Metro' (Web Page, 2024) <https://infrastructurepipeline.org/project/sydney-metro>.
[131] New South Wales Government, 'Metro testing ramps up in 2024', (Media Release, 10 January 2024) <https://www.nsw.gov.au/media-releases/metro-testing-ramps-up-2024#:~:text=Six%20new%20stations%20will%20open,historic%20moment%20in%20transport%20history>.
[132] Maeve Bannister and Samantha Lock, 'Reset for troubled rail project with late launch date', *St George and Sutherland Shire Leader* (online, 7 December 2023) <https://www.theleader.com.au/story/8450845/reset-for-troubled-rail-project-with-late-launch-date/>.
[133] Australia New Zealand Infrastructure Pipeline (n 130).
[134] Australia Associated Press, 'NSW government launches Sydney Metro review amid $21bn cost blowout', *The Guardian* (online, 13 April 2023) <https://www.theguardian.com/australia-news/2023/apr/13/nsw-government-launches-sydney-metro-review-amid-21bn-cost-blowout>.

There were various dispute board variants utilised in each stage. In the Sydney Metro Northwest project, a dispute 'avoidance-only' model was adopted on a Public Private Partnership contract for the first time.[135] This variant preserves the distinguishing feature of the DAB model – it is real-time, proactive, inquisitive and pre-emptive dispute avoidance in a 'without prejudice' environment.[136] Importantly, the PPP contract requires the SPV to ensure the D&C contractor and O&M contractor attend dispute board meetings, if Transport for NSW requests this. It was contracted to an independent expert, and the dispute board on this PPP project discussed emerging issues with all involved parties and facilitated the resolution of issues in a manner that was accessible to all parties. Consequently, integrative methods of resolving disputes prevailed.[137] The project was delivered on time and under-budget by $0.9 billion ($8.3 billion initially budgeted, $7.4 billion final cost).[138]

Sydney Metro's IDAR Panel

The success of the avoidance-only model in the Northwest Project resulted in Sydney Metro creating an Independent Dispute Avoidance and Resolution (IDAR) Panel that can be engaged as part of the dispute resolution process under any delivery contract for the new metro projects. Interestingly, some delivery contracts have an even number of members on the panel (four on the Southwest OTS2 PPP).[139] All IDAR panels only have a dispute avoidance role and has no decision-making function. Any disputes that require a decision is referred to expert determination, which will become immediately binding.

One distinguishing feature from the Northwest project is that subsequent delivery contracts, for example the Stations, Systems, Trains, Operations and Maintenance PPP contract for the Western Sydney Airport project, require the parties to provide a formal notice of potential issues before the parties can call on a member of the IDAR panel to assist. Both parties have to agree to this on an issue-by-issue basis. The parties are not to solicit advice or consult with a member of the Panel otherwise to preserve the Panel's integrity.[140]

Each delivery contract has regular Project Briefings for members required from the IDAR Panel, and those member/s may also attend working group meetings and the Senior Project Group. It remains to be seen whether this process will provide sufficient opportunity for panel members to proactively deploy dispute avoidance techniques with the same effect if the meeting was chaired by a panel member.[141]

III. Western Harbour Tunnel (2021-2028)

[135] Owen Hayford, 'Improving Public Private Partnerships: Lessons from Australia', (Report, 5 December 2023) <https://static1.squarespace.com/static/6188bfb45ec516542de06544/t/61a4af002b1c155d951ae913/1638182685295/Improving-Public-Private-Partnerships-Lessons-From-Australia+%28Infralegal%29.pdf>.
[136] Hayford (n 126).
[137] Leah Musenero, 'Development of an Integrated Framework for Constructive Dispute Resolution in Infrastructure Public-Private Partnership Projects' (Thesis, University of Adelaide, 2023) <https://digital.library.adelaide.edu.au/dspace/bitstream/2440/138940/1/Musenero2023_PhD.pdf>.
[138] Chris O'Keefe, 'Exclusive: Promising Update on Sydney's North West Metro', *9News* (online, 4 March 2019).
[139] New South Wales Government Sydney Metro, 'Project Summary City & Southwest OST2 PPP', (Paper, 3 March 2020) 102 [27.1].
[140] Ibid.
[141] Hayford (n 126).

Another example of the use of Dispute Boards is the $6.3 billion second stage of the Western Harbour Tunnel, which involves using two giant tunnel boring machines to dig part of the motorway. The new tunnel will provide a western bypass of Sydney CBD and is expected to significantly reduce traffic on the Sydney Harbour Bridge and Sydney Harbour Tunnel.[142]

The three members of the DAB may receive information from the parties and must participate in meetings and act as a conciliator to help prevent disputes from arising.[143] During the first DAB meeting, the board will establish procedures for the conduct of routine site visits and regular meetings. The communications between the parties and the DAB are without prejudice, and the DAB has liberty to provide advisory opinions, hold issue-specific meetings or facilitate workshops to carry out its dispute prevention role.

It is the chairperson's role to develop an agenda for each DAB meeting and to prepare the minutes. The contract had also already outlined pre-approved DAB replacements and pre-approved experts. As of current, no disputes have been referred to arbitration.

IV. Snowy Hydro 2.0 Project (2019-2027)

The use of the FIDIC forms of contract has not been widely utilised in Australia, but was adopted in the $4.6 billion Snowy Hydro 2.0 project with a Dispute Avoidance and Adjudication Board. It is the largest renewable energy project under construction in Australia and is expected to supply 2.2 gigawatts of capacity and 350,000 megawatt hours of large-scale storage to the national electricity market.[144]

Snowy Hydro Limited is using an EPC contract based on FIDIC's 'Conditions of Contract for EPC/Turnkey Projects. Importantly, the EPC Contract also establishes a DAAB. The DAAB's purpose is to facilitate the avoidance of disputes and act as a decision-making body when disputes arise. It is comprised of nominated legal experts intended to provide impartial advice. So far, the DAAB has been used to provide guidance in negotiations in variations which came into effect in May 2021. Five workshops had also been facilitated in 2020.[145]

E. Challenges

Challenges to the use, familiarity and penetration of Dispute Boards in Australia can be best understood through a short explanation of Australia's approaches to procurement. Although use of dispute boards in large Australian infrastructure contracts has increased, growth still does not match that of the international position.[146]

FIDIC is the most used standard form contract for major international construction projects. Australia's more conservative use of dispute boards may be that Australia prefers home growing its own contract forms. Most Australian contract documents have bespoke elements, as evinced in the case examples, which are purpose-written for the project instead of using

[142] 'ACCIONA wins $4.24bn contract for Western Harbour Tunnel', *Roads Australia*, (2 December 2022) <https://roads.org.au/acciona-wins-4-24bn-contract-for-western-harbour-tunnel/>.
[143] New South Wales Government, 'Western Harbour Tunnel: Package 2: WHT Tunnels and Mechanical and Electrical Fitout Incentivised Target Cost Contract', (online, 2023).
[144]Alexandre RA Gomes et al, 'Development of the Geotechnical Baseline Report for the Snowy 2.0 Pumped Storage Project', (Conference Paper, 10–13 May 2021) 1.
[145] Australian National Audit Office, 'Snowy 2.0 Governance of Early Implementation,' (Report 33, 2021–22) 47 [3.60] <https://www.anao.gov.au/sites/default/files/Auditor-General_Report_2021-22_33.pdf>.
[146] Stephenson (n 72).

standard forms of contract. Standards Australia's AS4000:1997 series were the most used form of contract which did not contain a Dispute Board clause. A 2024 update to AS4000 now included the option for a dispute avoidance board, but otherwise the update was regarded as 'minimalist' to ensure there was no change to the contract's 1997 risk allocation.[147] In 2015, a proposed draft of AS110000 which contained the option of a DRB failed to be released, stating that the contract "was not supported by the full spectrum of interests".[148] Thus, it is unlikely that FIDIC contracts will be adopted generally or in a widespread manner in Australia. It is equally unlikely that there will be a new standard form of contract acceptable to all parties in the Australian construction industry any time soon.[149] For example, there has been nascent use of NEC contracts in Australia, with Sydney Water being the first major infrastructure provider to use NEC as its standard procurement route in 2021.[150]

Perceptions of High Cost

There remains a perception that the costs of establishing, maintaining, and utilising a dispute board are too large to be justified on many projects. Even if parties are aware of the strong evidence that Dispute Boards cost less than an eventual legal dispute, there are still attempts to minimise the costs which may endanger proper fulfilment of the Dispute Board's functions. Previous literature has suggested that whether the cost-benefit analysis of a dispute board fails for a small construction project, a one-person dispute board may still reap great benefits. Almost antithetically, one-person dispute boards have been adopted on major projects with a value of over $2 billion.

Reluctance of the Private Sector

There is also a considerable reluctance from the Australian private sector to use Dispute Boards. This is particularly troublesome given that the value of private sector construction work is significantly higher than that in the public sector.[151] To date, the committed users amongst employers are confined to government organisations, such as Transport & Main Roads, Transport for NSW and Roads & Maritime Services. Only 14 of the 117 recorded dispute boards have private owners. Perhaps this may be that there is a reluctance to raise the possibility of including a Dispute Board at tender stage, as it may indicate a confrontational attitude to the contract's administration.[152]

Competition from Statutory Adjudication

Another constraint on the wider use of Dispute Boards in Australia is the misperception that their sole function is to resolve disputes. As many dispute board decisions can be appealed to arbitration or litigation or expert determination, the cost of having a dispute board involved from the outset may be seen as an unnecessary expense. This has some validity due to extensive use of statutory adjudication in Australia. Adjudication is both a contractual and statutory means of dispute resolution. Every Australian state provides a right to statutory adjudication only for progress payment claims.[153] Appointing a dispute board could potentially remove this statutory right. However, in a well-oiled dispute board that manages to effectively avoid

[147] Owen Hayford, 'Standards Australia's 2024 Update to AS4000: A Missed Opportunity', *Infralegal* (Web Page, 26 March 2024).
[148] Stephenson (n 72).
[149] Finlay (n 101) 7.
[150] 'Partnering for Success (P4S), Sydney Water, Australia', *NEC* (Web Page, 2024).
[151] Statista, 'Construction industry in Australia – Statistics & Facts' (Web Page, 2024) <https://www.statista.com/topics/6374/construction-industry-in-australia/#topicOverview>.
[152] Charrett (n 124) 16–17.
[153] *Building and Construction Industry Security of Payment Act 1999* (NSW).

disputes, there is no need to resort to this statutory right. Even then, I have previously written on how dispute boards can happily co-exist with statutory adjudication regimes.[154]

CONCLUSION

Dispute Boards and their several forms clearly have a valuable role to play in the minimisation of dispute costs and achieving maximum value, both in the construction industry and more broadly. DRBs offer a non-binding method of dispute avoidance that attempts to provide a 'release valve' for contractual tension to prevent disputes erupting altogether combined with persuasive recommendations for their resolution if they do. DABs provide a binding method of dispute resolution with the special benefits of ongoing close familiarity with the project and party-controlled selection of the panel. CDBs allow parties to avail themselves of these benefits, while retaining the flexibility to decide at a later time whether the recommendations of the board will be binding or persuasive.

While dispute boards in Australia are yet to be readily utilised, they have been increasingly adopted by the public sector, where the obvious benefits of dispute boards have been realised. The efficiencies achieved through minimising dispute costs in major projects are not to be understated and each of the models discussed herein may deliver upon this objective when used in projects for which they are appropriate. They are thus a valuable tool in the inventory of any party seeking to improve outcomes in the projects they undertake. With Canada facing a similar outlook in the construction industry of labour shortage and likely cost blowouts, an investment in dispute boards will be well worthwhile.

[154] Jones, 'Dispute Boards: Preventing and Resolving Disputes' (n 119) 19–20.