



Forum

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Dispute Resolution Takes Hold in Australia and New Zealand



By Graeme Peck

Australia and New Zealand are geographically separated by the Tasman Sea. While fiercely competitive in sporting matters such as Rugby Union, they maintain close commercial and social ties. The two countries are locally referred to as 'Australasia,' hence the choice of name for the subgroup of DRBF. Both countries have legal systems which are firmly founded on the English common law system.

The Australian population is 21 million spread over an area of 3 million square miles. New Zealand has a population of 4 million spread over an area of 269,000 square miles. Population density is approximately one twelfth of the U.S. average and one twenty-fifth of that in Europe. Gross construction expenditure in 2005 for Australia was A\$91 Bn (1A\$ = .75 US\$), of which 36% was engineering construction (heavy construction).¹ Remote area construction, infrastructure and logistics form a large part of the construction industry in the area.

The Australasian Chapter of the Dispute Resolution Board Foundation (DRBA) has repre-

sentation from the majority of industry groups with an interest in efficient **dispute avoidance** processes in project delivery in both Australia and New Zealand.

Background to DRBA formation

In early May 2000 a small group of individuals with exposure to the DRB concepts decided to endeavour to convince the local industry that the DRB concept was one of the most effective risk management tools for effective delivery of construction projects.

Financial support was obtained from the Australian Constructors Association (ACA) leading to a formal launch of the DRBA in Australia in 2003, supported by Larry Rogers from DRBF headquarters.

Because of New Zealand's much smaller population base, it was agreed between the two countries that DRBA would constitute member representatives of both countries.

The wide geographical spread of the membership demands regional representation. Time difference from West Australia to New Zealand is four hours. Australia spans 33^o of latitude north to south. The DRBA

(continued on page 17)

*"The Australasian Chapter... has representation from the majority of industry groups with an interest in efficient **dispute avoidance** processes in project delivery..."*

In this Issue of the Forum

DISPUTE RESOLUTION TAKES HOLD IN AUSTRALIA AND NEW ZEALAND	1
MEMORANDUM OF UNDERSTANDING SIGNED BETWEEN CI AND DRBF	8
ETHICS IN TODAY'S WORLD OF DRBs	10
INTERNATIONAL CONFERENCE SPREADS DRBF MESSAGE IN EUROPE	12
DRBF ANNUAL MEETING AND CONFERENCE: OCT. 7-8, 2006 IN ORLANDO	14

President's Page



Again I am obliged to open my presidential letter by referring to the death of another colleague and director of the DRBF. On May 26, 2006 John Nichols passed away. John was a charter member of the DRBF and a mighty advocate and tireless worker for the DRB process. We have lost a great supporter and a friend. In addition to being a director of the Foundation, John was our regional representative coordinator and was instrumental in rejuvenating the regional representatives this past year. He is remembered further in this issue.

In early May I and over one hundred others had the privilege of attending the DRBF International Conference in Budapest, Hungary, organized by past president Peter Chapman. The conference was a success on all accounts for the Foundation. At its conclusion in extending my congratulations to Peter, I commented that the conference was the best I had ever attended. It has inspired the Board to ensure that the Annual Conference in Orlando in October is organized with the same outward looking focus as that in Budapest. Although Orlando is still being finalized it will feature speakers from prominent users of the DRB process, both US and international, construction industry representatives, academia and case studies with practical applications for all DRBF members.

In Orlando the DRBF will offer two days of training featuring an updated version of the Administrative and Practice and Chaining workshops. Our recently conducted workshops for Caltrans and Ohio DOT have been very well received by those agencies and the trainees. Jim Donaldson and Kerry Lawrence ran a DRB Practice Procedures Proficiency Update workshop in Seattle in May. The workshop was a successful pilot that now will be used in other venues to keep our membership trained and current. A number of other training sessions are being organized in various parts of the US as this issue of the *Forum* goes to press, including one for Hartford, CT. With respect to international training, Gwyn Owen is heading up a committee whose charge is to develop training courses for our members who operate outside the US. Gwyn will present his committee's proposed plan to the DRBF Board of Directors at its October meeting.

On June 15th I signed a Memorandum of Understanding in Chicago with the Construction Institute (CI) of the American Society of Civil Engineers (*see page 8*). The DRBF and CI will pursue joint activities throughout the US including education, participation in each other's conferences and other activities of mutual benefit. We hope to develop similar agreements with other organizations that share mutual interests and goals.

By this time we have received your nominations for candidates for the Board of Directors and President Elect and suggestions for candidates for the Al Mathews Award. The latter are being processed by the Awards committee and, as is the custom of the DRBF, the presentation will be at our Annual Meeting and Conference dinner in October in Orlando. Unlike prior years however, the elections for office holders will be by email and mail in ballot included in this issue of the *Forum*. This opens the electoral process to the entire membership and not just the attendees at the Annual Meeting and Conference as in past years.

I again ask all members to submit a report on active DRBs. It is very important for the Foundation to keep current on active Boards and be able to present evidence of the continuing success of our process. The usual information submitted is the project name, type, value of the construction, names of the DRB members, how many disputes have been heard by the Board and whether the Board's recommendations have been accepted by the parties. If you feel uncomfortable with providing part of the information, at least advise us of the project name, location and any other information already available to the public.

As hard as it is for me to believe, this is my last letter as President of the DRBF. It has been a pleasure to work with the people who make the Foundation a success whether it be staff or members like yourselves who volunteer their time as directors, regional and country representatives or committees members. A lot has happened this year and I am sure many good things are in store for you and the Foundation in the years ahead.

Sincerely,

**THE DISPUTE
RESOLUTION BOARD
FOUNDATION**

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Board of Directors Elections

The Board of Directors has decided to change the method for electing new members. Previously, members had the opportunity to vote at the opening of the DRBF Annual Meeting. In an effort to give all members the opportunity to have a voice in the election process, the DRBF is distributing a ballot with brief bios of the nominees prior to the meeting. Once the votes are tallied, the new members to the Board of Directors will be announced at the Annual Meeting. The ballot is included as an insert to the *Forum*, and an electronic copy will be sent by email. Be a part of the process and return your ballot today!

DRBF Board of Directors Meeting Overview

The DRBF Board of Directors met in Chicago May 19 and 20, 2006 and by conference call on June 23, 2006. A complete review of the discussions and actions taken can be downloaded from the DRBF website, www.drb.org. Following is a brief overview of the actions taken:

- The decision was made to shift the focus of the DRBF Annual Meeting and Conference to provide a better balance of speakers from outside the organization and hands-on sessions that address the needs of the membership.
- A new coordinator has been named for the Regional Representatives Committee.
- The Multi-National Training Committee is pursuing various methods to ensure effective, affordable training across the globe.

All DRBF members are encouraged to read the summary minutes and submit any comments or suggestions to the president of the Board, Harold McKittrick. The Board's meeting schedule is published in the *Forum*, and can be found on the Calendar of Events on the DRBF website.

**How to Access the Board of Directors
Meeting Minutes Summary:**

- Go to www.drb.org
- Login through the **Member Login** button
- Click on **DRBF Board of Directors**

Board of Directors Meeting Schedule:
August 11 by conference call
September 8 by conference call
October 6 in Orlando, Florida

Other News

DRB Talk Given to Washington DC Bar Association

On May 16, 2006 a lunchtime talk on Dispute Boards - particularly in the context of international application - was presented to the DC Bar Association.

Speakers were Peter Chapman, past president of the DRBF; Nancy Thevenin, assistant director, U.S. Council for International Business and representative of the International Chamber of Commerce; and Debra Alligood White, partner, Milbank, Tweed, Hadley & McCloy LLP in Washington.

Peter Chapman outlined how from US origins the dispute board concept outside the US had moved towards dispute adjudication with decisions from the board that are binding and enforceable and which stand unless and until a higher tribunal gives a decision to the contrary. He explained about the UK statutory right to adjudication and how the nature of construction dispute resolution had changed in the UK over recent years. To this mainly legal audience, Peter gave assurances that the advent of statutory adjudication in the UK had not put the legal fraternity out of business – quite the opposite. Law firms in the UK have seen a positive shift in the nature of their work with a greater number of cases, albeit smaller and generally more manageable. Peter assured the audience that he had seen no construction lawyers any less busy than before the statutory scheme was commenced. Furthermore, the ‘health’ of the UK construction industry was in far better shape with final accounts being settled more expeditiously and with fewer disputes becoming embroiled in lengthy and expensive arbitration and litigation.

Nancy Thevenin then outlined the role of the ICC and the recently published ICC Dispute Board procedures. Finally, Debra Alligood White explained how disputes boards might be used in a wider context than construction, giving examples of

where her firm had investigated the use of the dispute board model in complex commercial relationships.

Vigorous and interesting discussions then followed with DRBF member Jerry Howell moderating the session.

DRBF Executive Director Larry Delmore was present at the meeting and, from the floor, was able to make a number of contributions to the discussion with examples from dispute boards being used in the US, particularly on the Boston Central Artery project.

The lunchtime meeting and discussion was very enjoyable with those attending leaving the session with a wider knowledge of the use and operation of dispute boards.

Robert Rubin Receives Award of Excellence from Chambers USA

DRBF Past President Robert A. Rubin received the Chambers USA “Award of Excellence 2006” in the Construction Category at a gala reception in New York on June 1, 2006. The event is hosted by Chambers and Partners, publishers of guides to law firms and lawyers: Chambers UK, Chambers USA, Chambers Global and Chambers Student. The annual event is designed to bring hundreds of the top U.S. attorneys together to recognize the best in their fields.

Congratulations Bob!



Charlotte and Bob Rubin at the Chambers USA gala

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The *Forum* welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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FIDIC Adjudicator's Assessment

By Peter Chapman

Over a three-day period in late April, FIDIC held an adjudicator's assessment program in the heart of the Surrey countryside in the UK. Twelve candidates from Europe, the Middle East, Australasia and Africa sat the written and oral examinations after first having been pre-selected on the basis of their experience in dispute resolution on major projects.

At the end of the three days during which candidates were set papers on the application of the FIDIC Contracts, the operation of Dispute Boards and over 10 case studies for oral and written dispute board decisions, candidates were heard to say that the assessment was more nerve-racking than university finals and very tough. Candidates admitted the assessment was a good test of ability and competence and that passing will be regarded as a real achievement.

Those candidates that pass the assessment may be invited to apply for listing by FIDIC and considered for Presidential appointments to FIDIC-style dispute boards.

The date for the next FIDIC assessment programme has not been decided but it is unlikely to be before 2008/9. The volunteer assessors for FIDIC comprise two current DRBF BOD members and one past DRBF BOD member.

FIDIC/ECV TRAINING COURSE TO BE OFFERED IN U.S.

In 2005 nine multi-lateral development banks (MDBs), led by The World Bank, agreed to adopt the FIDIC Contract Conditions for Construction (1999 Edition) as their standard contract conditions, with some modifications. The 1999 FIDIC Construction Contract includes detailed procedures for the use of a *Dispute Adjudication Board* (DAB) within the contract. The MDBs' contract retains the FIDIC DAB clauses and procedures with some amendments. The most relevant amendment is the requirement for a full term DAB to take a proactive role, in an "endeavour to prevent potential problems and claims from becoming disputes."

FIDIC actively provides training courses on the practical use of their DAB procedures. In partnership with the British training and management consultant firm European Construction Ventures Ltd (ECV), they have offered over 50 courses worldwide. FIDIC and ECV are planning their first course in the U.S., "*Practical Management of Contract Claims and Disputes under the 1999 FIDIC Contracts & the MDBs' Harmonised Construction Contracts.*" This course is to be held in Seattle in partnership with ADR Works on the September 18-19, 2006.

For more information about the training course, please contact ECV Managing Director David Heslett at DHeslett@CCE-ECV.com or visit the ECV website, www.CCE-ECV.com. □

Advance Notice of New Disputes Board Book

Two DFBR members, Gwyn Owen and Brian Totterdill, are soon to have their book, *Dispute Boards, Procedures and Practice*, published by Thomas Telford. The book is aimed at an advanced level of practice and will give advice and opinion to all professional participants and consultants working with major projects, including lawyers, claims consultants, contract advisors, engineers, architects, quantity surveyors and government employees.

Various rules and procedures are published by FIDIC, the World Bank, the ICC and the ICE to define the working of Dispute Boards. This book outlines the concept, the operation and the duties of Dispute Boards and their members and describes in detail the workings of the Boards from inception through to the completion of projects under the various rules and regulations.

For more detailed information about the scope of the book and how to obtain a copy of *Dispute Boards, Procedures and Practice*, contact Gwyn Owen by email at gwyn@easynet.co.uk.



A MESSAGE FROM THE EXECUTIVE DIRECTOR...

*To know the road ahead
ask those coming back.*
Chinese Proverb

Obviously, the DRBF lacks the ability to discern the nature of the road ahead because no one has traveled that road yet. Perhaps the best we can say is that like all things that progress, the road ahead may very well bear little resemblance to the road on which we now stand. Some of us will mourn the loss of today when we reach tomorrow. Some of us will be heard to say, "sure wish we could return to the good old days."

When I was growing up and sitting at our family's dinner table, my mother, on hearing of something new, would say, "it wasn't like that in the old days." My father would put down his fork, smile a half smile and say, "In the old days, the Irish couldn't get good jobs and so there was very little food on the table at meals. Today I've got a good job at the shipyard, our children can go out and do what they want with their lives and there's more than enough food for everyone. The 'old days' weren't as good as you remember them."

So, the DRBF moves into tomorrow while firmly rooted in the "good old days." This transition from yesterday to tomorrow finds more and more agencies moving into DRBs, more opportunities for the DRBF membership to serve as DRB members, more requests for DRB training, more new members and, most of all, new industries seeking to utilize DRBs. The beneficiaries of these increased opportunities are the DRBF membership.

The City and County of San Francisco has chosen to move into DRBs as their dispute resolution model and the DRBF starts in-house DRB training in mid-August. The DRBF will offer DRB training in California that will be jointly sponsored by the DRBF, the City/County of San Francisco, AGC-CA and Caltrans in order to provide expanded pools of qualified DRB members for these increased DRB opportunities.

Several other state agencies are poised to move into the utilization of DRBs for their construction programs and discussions for utilizing DRBs in other industries move forward at the behest of members of those industries.

Since I am now contacted to make DRB presentations to agencies, it is obvious that the DRBF is beginning to reach the long sought after "tipping point," where the mass of information we have placed in the marketplace over the last nineteen months since I have been the DRBF executive director is of a sufficient magnitude and focus for the marketplace now to seek out the DRBF.

Recognizing this place on the road to tomorrow, and building on the efforts of the late John Nichols, Hal McKittrick has undertaken to fill all Regional Representatives slots and obtain the commitment and enthusiastic leadership of John Madden as the Regional Representative Coordinator. John has sought the counsel of the Regional Representatives and developed strategic priorities. Under John's leadership, the regional representatives will become the eyes and ears of the DRBF as we move down this unknown road called "tomorrow."

FOUNDERS OF THE DISPUTE RESOLUTION BOARD FOUNDATION

R. M. Matyas
A.A. Mathews
R.J. Smith
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Under the leadership of Hal McKittrick, this year's Annual Meeting in Orlando (October 7-8) has taken a new tack for the DRBF.

We have booked a hotel with an attractive rate, we have scheduled interesting side trips, airfares booked now for Orlando are reasonable and we have set a very affordable rate for attending a conference such as the one we have put together. There will be new Administration and Practice and Advanced and Chairing Training Workshops offered on Thursday and Friday prior to the meeting.

While Orlando has many exciting attractions, I believe once you review the program, you will not be leaving the hotel on Saturday or Sunday morning. The Annual Meeting Committee of Jack Norton and Bob Rubin, assisted by Hal, Kerry Lawrence, Ann McGough and myself have booked the following:

- Representatives of five major DRB users
- One of the top networking/personal marketing experts in the dispute resolution field
- A premier worldwide dispute resolution specialist and inspirational speaker who will be the luncheon keynote speaker
- Reports by academics undertaking studies of the efficacy of DRBs
- Educational sessions on the following:
 - writing a DRB report
 - holding a DRB hearing
 - DRB ethics
 - selection of DRB members by DRB users
- Opportunities for networking among users, DRBF Regional Representatives and the DRBF membership in attendance.

Many of the DRBF membership have communicated to me their concern for what the DRBF does for the membership. This year's Annual Meeting is the first concrete response to those concerns.

Maybe after the Orlando meeting, others will seek your counsel as one of those coming back from the road ahead.

See you in Orlando in October!
Larry Delmore, Executive Director
T: 781-400-1024
E: lfdelmore.drb@comcast.net

Workshop Calendar

**October 5
2006 Administration and
Practice Workshop
Location: Orlando, FL**

**October 6
2006 Advanced and
Chairing Workshop
Location: Orlando, FL**

Registration fee includes lunch and workshop materials. Each participant will receive a Certificate of Completion from the DRBF. To register for a workshop or learn more about the new programs, contact the Dispute Resolution Board Foundation by phone at 206-248-6156 or e-mail home@drb.org.

Plans are in development for training programs in multiple locations throughout California and Massachusetts and in Washington, DC.

For the latest additions to the training schedule, visit www.drb.org.

Memorandum of Understanding Signed Between Construction Institute and DRBF

On June 15, 2006, the following Memorandum of Understanding was signed by Richard P. MacDonald, president of the Construction Institute and Harold V. McKittrick, president of the Dispute Resolution Board Foundation.



MEMORANDUM OF UNDERSTANDING

WHEREAS, The Construction Institute (CI), one of the institutes of The American Society of Civil Engineers (ASCE), is a non-profit organization;

WHEREAS, The Dispute Resolution Board Foundation (DRBF) is a non-profit organization,

WHEREAS, CI and DRBF both provide educational opportunities to their memberships within the construction industry;

WHEREAS, CI and DRBF both seek to expand their access within the construction industry and shall jointly explore means whereby the two organizations may efficiently and effectively exchange information, conduct joint research, provide technical assistance, collaborate in technical publications and jointly take part in conferences, seminars, workshops and other professional meetings;

WHEREAS, CI and DRBF independently have determined that an association between CI and DRBF would be mutually beneficial to their memberships and to their missions and would increase their respective offering of services to the construction industry; and

WHEREAS, the Board of Directors of CI and DRBF each has agreed to enter into this Memorandum of Understanding.

NOW, THEREFORE, CI and DRBF hereby agree to enter into this Memorandum of Understanding for the development of joint activities for the twelve month period ending June 30, 2007, with a mutual option to renew this Memorandum of Understanding on a year-to-year basis.

The initial proposed areas for CI and DRBF to study for development of joint activities in 2006-2007 throughout the United States are as follows:

1. Continuing engineering unites (CEU) and professional development hours (PDH) training based on the needs of the construction industry;
2. Any other mutually beneficial programs that may be developed in support of the construction industry; and
3. Mutual sharing of the respective membership lists, as needed, for the mutual benefit of CI and DRBF.

Signed this 15th day of June, 2006, as directed by the respective Board of Directors of both CI and DRBF.

Construction Institute
Richard D. MacDonald
President

Dispute Resolution Board Foundation
Harold V. McKittrick
President

WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS MAY THROUGH JULY 2006

DRBF Country Representatives

Australia & New Zealand
Graeme Maxwell Peck

Austria
Maria Theresa Trofaier

Bahamas
Colin Arthur Marshall

Belgium
William Buyse

Brazil
Gilberto José Vaz

Ethiopia
Michael Gunta

France
James C. Perry

Germany
Dr. Helmut Koentges

Greece
Rohan Shorland

Iceland
Páll Ólafsson

India
Shri K. Subrahmanian

Ireland
Dr. Nael G. Bunni

Italy
Dr. Ing. Igor V. Leto

Japan
Toshihiko Omoto

Malaysia
Sundra Rajoo

Mexico
Dr. Lic. Herfried Wöess

Netherlands
S.C. Conway

Pakistan
Khalil-Ur-Rehman Khan

Phillippines
Salvador P. Castro, Jr.

Poland
Adam K. Heine

Singapore
Christopher Redfearn

Southern Africa
Andrew L. Griffiths

Switzerland
Pierre M. Genton

Thailand
Victor James Smith

United Arab Emirates
Hamish F. MacDonald

United Kingdom
Peter H.J. Chapman

Vietnam
Richard L. Francisco

Bernard Becq
World Bank
Washington, DC USA

David Beardsly
Fremont, CA

Megan D. Blackford
Ohio Dept. of Transportation
Columbus, OH USA

Jeffrey J. Cooper
CPM Services, Inc.
San Francisco, CA

John Daly
Koch/Skanska
Colts Neck, NY USA

Giovanni Di Folco
Techno Engineering & Associates SRL
Bucharest, ROMANIA

Ryszard Dubno
Sulejowek, POLAND

Eugenia Dunca
Techno Engineering & Associates SRL
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Bucharest, ROMANIA

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Fort Lee, NJ USA

Douglas Isbell
San Diego, CA

Bernard Langan
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Elmwood Park, NJ USA

Feniosky Pena Mora
University of Illinois at Urbana Champaign
Urbana, IL USA

Keith Morton
Kuala Lumpur, MALAYSIA

Edmundo A. Puchi
MCM Construction
N. Highlands, CA

Lakshmy Mulavana
N. Sydney, NSW AUSTRALIA

David Richards
Pickavance Consulting
London, UK

Marcello Viglino
Iglesias, ITALY

William E. Waddell
Quincy, FL USA

Alexander B. Vollmer, P.E.
Vollmer Construction Consultancy
San Rafael, CA □



Would you like to be a Country Representative for the DRBF?

Help give the DRBF a voice in your country by becoming a Country Representative. You may be called upon to act as a spokesperson, and should be interested in raising the profile of DRBs and increasing membership. You may also be asked to help organize DRBF events within the country you represent.

To qualify, you must be a member of the DRBF and live in the country you represent (you need not be a national). Terms are for a three year renewable period.

If interested, contact the DRBF office today: Phone: 206-878-3336; Fax: 206-878-3338; or Email: home@drb.org.

Ethics in Today's World of DRBs

The Department of Public Works for the state of It's Our Money and We're Going to Keep It (State) instituted a DRB program in 1996. On average, six new DRB panels have been consecrated each year, with most contracts lasting three years. Records of the State's DRB program reflect an average of four formal hearings and 12 advisory hearings per year per contract.

You are a replacement member on the State's construction contract UV416, a \$115 million contract for the construction of a 186 bed dormitory and dining facility being constructed by You Took My Money, When are You Going to Give it Back and Sons, Inc. (Contractor).

You were selected to replace a Board member who had become an advocate for the contractor during all DRB meetings and had resigned after complaints by both parties.

The first dispute for which you were a DRB member was the construction of a 14 foot earthen berm encircling the dormitory/commons building. The State directed the Contractor to build the berm in order to increase the height point from which the applicability of a fully sprinklered building is determined. The dispute arose on the basis of the extra cost involved in constructing the berm, which the State said the Contractor should have known was required due to the Contractor's knowledge of all applicable building and fire codes and due to the absence of a sprinkler system in the design drawings.

As the formal hearing nears an end, the State's executive project manager asks to address the DRB and states the following:

I firmly believe in the DRB process. I spearheaded this state's efforts in DRBs and now we believe we are the foremost proponent and user of DRBs in the world. We're not asking for thanks, we just want to make sure that you people realize your duty as DRB members.

Like I said, I firmly believe in the DRB process... until I received that piece of garbage two of you guys published on the natatorium that you thought would pass as a decision. We won, dammit! And you people acted like a group of little school girls all afraid to hurt anyone's feelings. Then you went and put some weasel words on top of the first page like, "Recommendations."

Recommendations hell! We've been paying good money for a long time to you guys, waiting for you to grant justice. All you guys have been doing is giving us a whole bunch of paper that told us about "Findings." That's nothing but what we already know! And as for "Recommendations," that has about as much usefulness as thrice-boiled-rice.

Now, don't let any of that spoil your normal deliberations. I mean I'm just the guy who pays your bills. Keep all that in mind as you do your deliberations and make sure you don't forget that we don't have to stay with DRBs forever. Keep up your good work, gentlemen.

During the subsequent deliberations, the DRB Chair states that the continued success of the State's DRB program probably rests on a forceful positive decision for the State from the DRB on this issue and the goal of the deliberations will be a consensus decision in favor the State, since the Contractor probably will make up for any potential loss in this case in later disputes before the DRB, so that everything will even out in the long run.

What do you do?

This problem is the second of an ongoing series designed to engender a discourse among the DRBF membership about some of the challenges that occur during the DRB process.

Please send your thoughts on this issue, or problems faced by DRBs, to DRBF Executive Director Larry Delmore by email: ldelmore.drb@comcast.net or phone: 781-400-1024.

Problem No. 1 - May 2006

Several members responded to the ethical problem presented in the May issue. A summary of their thoughts follow. The original scenario is found on page 10 of the *Forum*, Volume 10, Issue 2, and is available in the *Forum* archives on the DRBF website, www.drb.org.

Would you have done anything differently if you were a member of the first DRB?

- *As a member of the first DRB I would have encouraged my colleagues to take the position that without valid contracts we had no standing or authority to act as a DRB member. This would set the stage for the contractor to seek a judicial remedy—this is a matter of contract enforcement—the DRB clauses in the contract define the contracting parties’ rights and responsibilities. Further, I would not have approached the contractor with respect to financial matters. Ex parte communications should not take place. If the contractor did indeed pay for all of the DRB’s fees and expenses, bias can be readily inferred. This would only give the owner another reason to reject the first DRB.*
- *I would have suggested that the chair of the DRB arranges a meeting with the COEs of the owner and contractor to get the matter understood by the most senior persons in the respective organisations. If the meeting did not unblock the jam, then would suggest that the issue goes to immediate arbitration under a fixed time procedure and that the DRB stands aside during the course of the arbitration but then continues. In any event, I would not have continued without the consent of both parties.*

“This is an interesting issue which has been occurred more than once in the real world. Though the DRBF should never intervene in an active proceeding, the discussion of this issue in the *Forum* should be helpful.”

If you were the lone voice of the three members who disagreed with this DRB action, what could you have done if you thought the chosen action was improper?

- *If I could not convince the other two members to stop going ahead with the hearing, I would have resigned from the Board.*

Does the requirement to assure a prompt hearing and to work around parties who attempt to thwart the DRB process cause the DRB to be empowered to seek any means to ensure scheduled hearings go forward?

- *No. The DRB process relies on consensual behaviour in accordance with the contract. Failure for one party to comply with the procedure may lead the other party to sue but I believe that the DRB should not enter this bear pit. As good as DRBs are, the process can easily be derailed by a party not wanting the DRB process. Sometimes the lender can assist in putting pressure on an errant owner.*
- *I would have strenuously argued against going forward with the hearing. The DRB should have recognized the following:*
 - a. *The essence of the DRB process is mutual agreement of the owner and contractor—here the owner did not agree.*
 - b. *Conducting a hearing ex parte would be a waste of time and money, as the likelihood of the owner accepting the result from a hearing in which it did not participate is virtually nil.*
 - c. *Given the obvious lack of authority of the DRB, there is no duty to move forward*
 - d. *A DRB needs to work within the contractual framework. It is not like a court that can direct one or both parties to participate in a hearing. The notion of a DRB working around parties who attempt to thwart the DRB process and empowerment to seek any means to ensure the hearing goes forward is totally contrary to the DRB process—and just plain wrong. □*

International Conference Spreads DRBF Message in Eastern Europe

The 6th Annual International DRBF Conference was held May 6-7, 2006 in the historic and beautiful city of Budapest. True to its international title, the conference was attended by 107 delegates from 21 countries covering 5 continents. Approximately half were non-DRBF members reflecting robust interest and regard for the DRB model.

Conference speakers and panellists also reflected this international mix. Presentations were made representing a wide range of experiences with DBs, from the novice to seasoned practitioners. Discussions took place regarding the finer points of DB best practice and what to aim for or avoid. Delegates made suggestions for the future direction of dispute boards and for the necessary training of DRB members and those who will increasingly use dispute boards. In particular, representatives from the parties (and the engineer) responsible for a number of road development and reconstruction projects in Romania spoke about their positive experiences of using the FIDIC DAB process. The credibility of dispute boards was greatly endorsed by these presentations and interjections. The fact that European community project funding will utilise the FIDIC form of contract which in turn require the establishment of dispute boards will clearly create an upsurge in future usage.

For those not experienced in the operation of dispute boards, some theatre was created by demonstrations of dispute boards in action both in ‘dispute avoidance mode’ and ‘dispute adjudication mode.’ These demonstrations proved to be popular, amusing and gave many delegates their first taste of dispute board operations.

At the end of the first day, a majority of the delegates plus some guests took a boat trip on the Danube. For those familiar with Johann Strass’s famous *Blue Danube Waltz*, the colour of the river must have come as a sad surprise. No, it wasn’t blue. It was muddy brown! However, setting such disappointment aside, the evening then went with a swing.

Once on board, guests were treated to a delicious, typically Hungarian meal serenaded by a 3-piece combo playing traditional Hungarian music. As the wine (local) flowed, so did the conversation which threatened to drown the sounds of the valiant musicians. As twilight gave way to darkness, the historic buildings on the river banks appeared bathed in shimmering light, acquiring a breathtakingly magical quality.

By reaching out and making contact with 21 countries, the DRBF has undoubtedly enhanced its standing in the global arena.

*Submitted by Peter Chapman
DRBF BOD Member and
International Conference Director*

International Conference attendees enjoy a dinner cruise on the Danube River.





In Memoriam John Nichols 1928-2006

JOHN W. NICHOLS passed away in late May of 2006. Mr. Nichols was a charter member of the DRBF, a former member of the Board of Directors, and an active member and chair of several committees. He worked for Jacobs Associates in San Francisco for more than 30 years, serving as President of the company from 1985 to 1992, when he took on the position of Chairman until 1994. Mr. Nichols held professional engineering licenses from the states of California, Missouri, New Jersey, and New York.

Born in 1928 in Poughkeepsie, New York, John Nichols began his engineering career with the Army. After high school he attended an officers training program and later served in an Army engineering unit in the Philippines. Mr. Nichols then attended the Missouri School of Mines and graduated in 1950 with a degree in Civil Engineering. Afterwards he took up employment with Raymond International, a large heavy construction contractor. His work took him around the world: to France in 1952, to assist the US Air Force in constructing NATO air bases; to San Francisco in 1958, to manage Raymond's projects in the Western states; and to London in 1960, to serve as Assistant Manager and Director of Engineering.

John Nichols joined Jacobs Associates in 1962. As a result of his prior experience in preparing and negotiating change orders, his work evolved into claims preparation, defense and review. Eventually, an entire department grew from these beginnings. Mr. Nichols personally handled hundreds of construction disputes, which covered a broad spectrum of structures. Project highlights include the Fortuna Dam in Panama, EPCOT Center in Florida, the Los Angeles Metro, MGM Hotel and Casino in Las Vegas, and renovation of the Golden Gate Bridge in San Francisco. A large majority of Mr. Nichols' cases settled through negotiation, often after the particular dispute went into litigation. Additionally, Mr. Nichols served as an active member and chairman of several dispute resolutions boards, both in public and private construction projects.

Indicative of the spirit of his leadership, one of the most interesting stories about Mr. Nichols involves Jacobs Associates' validation cost estimate of a railroad for the World Bank in Gabon, a small equatorial nation on the west coast of Africa. Mr. Nichols traveled to Gabon to discover an absence of roads along the path of the proposed railroad. With local people and technical advisors from France, he set out to explore the Gabon backcountry in a convoy of six Land Rovers. The party brought food with them and slept in villages along the way. Denser parts of the jungle hindered the team's ability to follow the road alignment. Nevertheless, they could see enough to make some realistic estimates, and the team prevailed in determining soil conditions and examining river crossings. The Trans-Gabon railroad opened in the 1980s and today remains the only railroad in the country.

Recently, even as Mr. Nichols battled with a debilitating illness, he remained spirited and courageous, and continued to serve the Dispute Resolution Board Foundation. Many with whom John worked will miss him.

John W. Nichols' son, John S. Nichols, would like to invite all DRBF members who are interested to sign the memorial guestbook: <http://www.john-nichols.virtual-memorials.com/>.



DRBF 10th Annual Meeting and Conference October 7-8, 2006 Orlando, Florida

The Dispute Resolution Board Foundation is hosting the **10th Annual Meeting and Conference** October 7-8, 2006 in Orlando, Florida. The program includes guest speakers from owner organizations, government agencies, academia and DRB practitioners, all who bring their experience and analysis to the implementation of successful DRBs. You'll learn:

- The results of a study into proven cost savings from the owner's perspective
- Major state Department of Transportation agencies' experience from the owner's perspective and the practitioners who serve on their DRBs
- Ethics in the DRB process
- Overviews of regional programs and a major multi-national, multi-contract project
- The workings of a mock hearing and practical tips for being appointed to a DRB, preparing position papers and presentations, and setting up a DRB and preparing reports.

The conference program is packed with useful information and expertise from some of the top DRB practitioners in the U.S. and around the world. As a bonus, there will be extensive networking opportunities during cocktails and the Al Mathews Awards Dinner on Saturday night. Attendees can also choose to join the optional "NASA Up Close" tour at Kennedy Space Center on Friday preceding the Annual Meeting and Conference.

Workshops

The DRBF will be offering the 2006 Administration and Practice Workshop on October 5 and the 2006 Advanced/Chairing Workshop on October 6. These are intensive one-day skill development sessions for those who are serving on or wanting to serve on DRBs. These workshops are also excellent for owners or contractors who want to implement a DRB program. Contact the DRBF office for additional details on these and other upcoming workshops.

Registration and Reservations

Registration fees for members are \$220 in advance or \$250 after September 16, 2006. Non-member fees are \$250 in advance and \$280 after September 16, 2006. Additional registrations (up to four from the same company) are \$190 each. To register, fax, e-mail or mail a registration form which can be obtained from the DRBF office or downloaded at www.drb.org.

The Annual Meeting and Conference will be held at the Radisson Worldgate Hotel in Kissimmee, Florida. Room reservations may be made by calling 866-705-7676 toll free in the US, or 407-396-1400. Be sure to request the DRB Foundation group rate of \$99.00 per night when you make your reservation.

Cancellation Policy: Before September 16, 2006 a \$30 processing fee will be assessed and registration fees refunded. No refunds will be issued after September 16, 2006. Each individual is responsible for canceling hotel reservations.

DRBF Annual Meeting and Conference Program Agenda

Friday, October 6

11:00 – 6:00pm

“NASA Up Close” Tour at Kennedy Space Center- Join fellow DRB practitioners and guests on a group tour of NASA’s Space Shuttle program at Kennedy Space Center. Learn about the Space Shuttle – assembly, launching and landing, plus Astronaut crew preparation and training. The tour includes NASA KSC’s headquarters and the closest possible view of the Space Shuttle launch pads, plus KSC’s Shuttle Landing Facility, the massive Vehicle Assembly Building, and NASA’s gigantic Crawler Transporters. Limited to 50 attendees.

6:00 – 10:00pm

Board of Directors Meeting

Saturday, October 7

8:00 – 12:00 noon

Welcome – Harold McKittrick

Keynote Kickoff: The State of DRBs in Florida

Ananth Prasad, Chief Engineer, Florida Department of Transportation

DRBs: Paving the Way Across the USA – A panel discussion from two sides: the owner’s perspective with Mike Kissel of Caltrans, Dennis Tsai of the City of San Francisco, Ananth Prasad from FDOT, and representatives from Idaho and Ohio DOTs; and the DRB member’s perspective with John Duke, Jack Feller, and Jim Donaldson, three seasoned DRB members who have served on numerous DRBs for the Department of Transportations in Florida, California and Washington State.

Ethics in Today’s DRB Process

Kerry Lawrence and Larry Delmore

Case Histories from Europe and the Far East

Peter Chapman

12:00noon – 1:30pm

Lunch

Keynote Address: Dr. Tom Stipanowich

1:30 – 5:00pm

Cost Savings from an Owner’s Perspective

Dr. Feniosky Pena Mora and Dr. Ralph Ellis

Mock Hearing and How to Prepare for a Hearing: Position Papers and Presentations

Jack Norton, Dr. Ralph Ellis, Don Henderson. Experience a sample hearing and learn practical tips for preparing for a DRB hearing.

How to be Appointed to a DRB

Natalie Armstrong of Golden Media

Open Forum: Q & A Session

Harold McKittrick, Robert Rubin, Peter Chapman, Jack Woolf, Peter Douglass. This distinguished panel of DRBF leaders will discuss the evolution of the DRB process and answer questions about the effective implementation of the process in various industries and locales around the world.

6:45pm

Cocktails, Dinner, Al Mathews Award Presentation, and after dinner remarks **“Adventures on the Dispute Route”** by Larry Delmore, DRBF Executive Director

Sunday, October 8

8:00 – 12:00noon

How to Set Up a DRB

Learn from owners how they solicit and select DRB members and all the front-end work that goes into establishing a successful DRB.

How to Prepare a DRB Report

John Duke. Understand the basics for creating a successful DRB report, and how to handle requests for clarification and reconsideration.

Dispute Resolution in South America

Dispute Resolution: The Contractor’s Perspective

Construction Institute of the American Society of Civil Engineers

“DRBF: Past, Present and Future” by Larry Delmore

Committee Reports

International Committee

New Terms of References have now been sent to all Country Representatives and through this initiative it is hoped that a closer link may be forged between the various countries which are represented by the DRBF. The ToRs will assist various countries to identify their own needs and other countries may be able to more readily see what they can provide in the way of support and back up when needed. Basically the message is ... how can we help in your country????!!!

The initial reports have so far been received from such countries as Singapore, France, Greece and Australia. All indicate a strong activity for the DRBF and each have either staged or are intending to stage new meetings to promote the DRBF. To this end strong congratulations are due to Jim Perry and his partner Geoffrey Smith in France and Herfried Wöss in Mexico. Each are dealing in very difficult countries with regard to the concept of DBs. Each claim some success, particularly with Herfried claiming some success with a FIDIC form of contract applied under Mexican law for two textile plants.

Recent DB seminars have been held in Poland, Romania, France, Belgium, Mexico and East Africa. In Singapore the local DRBF Country Representative is meeting with his colleagues in Malaysia, Indonesia and Thailand in order to make a joint marketing drive for the promotion of DBs in those regions.

For those of you who know the ICC then please look out for the name of Katherine Gonzales Arrocha. She is now senior counsel for the Dispute Boards division of the ICC in Paris and she is a keen and very knowledgeable campaigner. She is currently travelling all over the world promoting the use of DBs particularly those using the new ICC rules. We have heard of some six projects so far using these new ICC rules.

For those of you just coming to terms with the new FIDIC MDB 2005 form of contract then remember to keep up ... its already out of date ... the new March 2006 edition is now out and in general use. The new form calls for DBs to "endeavour to prevent potential problems or claims from becoming disputes" and for tighter controls and time limits on the Engineer. For those wanting more information, visit the FIDIC web site.

Keep sending your reports in – if you don't tell us we won't know!!!

Stay in touch,
Gwyn Owen
gwyn@easynet.co.uk

Manual Committee

The revision of the Manual should be complete in August. An Index and Glossary are being added; this will complete the Manual. A summary to explain the changes is being prepared for each revised chapter.

As noted in the May *Forum*, the revisions place greater emphasis on the importance of DRB member total impartiality, without even a perception of bias. Also emphasized is the DRB function of encouraging the parties to discuss and resolve issues without referring them to the DRB hearing process.

The revised Manual will be on the web site as soon as approved by the DRBF.

Joe Sperry



**If you have news about
DRBs, DRBF members,
or an article to share,
please tell us!**

***Deadline for the
next issue of the Forum is
October 1, 2006***

(continued from page 1)

Committee includes elected representatives with responsibility for regions, viz: New Zealand and Australian States - NSW; Queensland and Northern Territory; Victoria, South Australia and Tasmania; and West Australia. Each regional group operates with a subcommittee under the chairmanship of the regional representative.

The New Zealand group is planning a public launch of the DRBA in Auckland in the third quarter of 2006. This event is to be hosted by Auckland based lawyers Simpson Grierson. It is expected that at least one Australian representative will also be present.

The primary objectives of DRBA are to:

1. expand the understanding of the DRB concepts as an extremely cost effective and efficient process for dispute avoidance and for dispute resolution on construction projects;
2. promote the use of DRBs as the preferred dispute prevention and resolution model for major contracts;
3. provide assistance to parties within the industry for the establishment and application of DRBs, including the provision of general advice and suggestions for tailoring to suit particular needs.

Contract Procedures in common Usage

A significant proportion of major capital works infrastructure within Australia has historically been funded directly by government instrumentalities. 42% of engineering construction during 2005 was government funded. The various government groups developed a set of standard Conditions of Contract which have strongly influenced the forms of contract in wider general usage.

Until about 10-15 years ago, the primary dispute provisions for matters not resolved at site level involved conventional arbitration or litigation. Since the mid 1990's, a first round 3rd party Expert Determination process has been widely used. This is binding for minor issues (generally <\$500k) but non-binding for major issues. For the latter, conventional arbitration and/or litigation follow if the determination is disputed.

These forms of dispute provisions in contracts continue to lead to a significant number of formal disputes extending well beyond the completion of the physical contract work, even when they commence during construction.

The high cost of resolving disputes by the conventional 'processes of finality' (arbitration or litigation) have led to development of many non binding 'Alternative Dispute Resolution' (ADR) processes.

Australasian Perspectives of ADR & Experiences with DRBs

The majority of ADR processes are founded on some form of 3rd party involvement at the post dispute stage. A 1998 survey of dispute resolution practitioners in the Australian construction industry concluded that while there was a strong trend for increased use of non binding ADR techniques, only 28% of respondents admitted to "familiarity with DRBs" as compared to 80 to 90% of respondents who were familiar with Arbitration, Mediation and Expert Determination. Only 8% of respondents had any direct experience with Dispute Review Boards.

Unlike the DRB concept, most other non binding ADR processes are 'Without Prejudice,' and cannot be used or referred to in any subsequent proceedings. Those of our members with direct exposure to the DRB process are firmly of the view that important factors in the very high acceptance rate of DRB decisions or recommendations is the 'With Prejudice' aspect adopted in the majority of cases, together with the method of choosing the DRB members at the project outset and their accepted experience and industry standing.

The other significant feature (arguably **the** most significant feature) of the DRB process is that it is a pro-active process which:

- forces the parties to confront issues as they arise;
- encourages meaningful dialogue and mutual understanding; and
- prevents differences of opinion from escalating into full blown disputes.

(continued on page 18)

(continued from page 17)

The relative benefits of such a process are represented in Figure 1. Quite apart from the relationship benefits of early resolution, the commercial benefits are obvious. The author's experience as an arbitrator of a number of significant construction disputes strongly suggests that the factor of 3 or 4 to 1 on resolution costs suggested in the diagram (ie, aggregate dispute costs, including legal, witness, staff and hearing costs) may be very conservative.

Australian Experience Prior to DRBA

The first known use of DRBs in Australia was for the Sydney ocean outfall tunnels (3#) and ocean risers (1#) awarded around 1987.

The design and supervision of these four contracts on behalf of the Sydney Metropolitan Water Sewerage & Drainage Board (MWSDB) involved a consortium of John Connel (Australia) and Hatch & Jacobs (USA). It is believed the DRB concept was encouraged by the latter group. There were no unresolved issues on any of the contracts at completion. It is not known if there were any DRB referrals.

MWSDB subsequently used the concept on the contract for the raising of Warragamba Dam. Again it is understood that there were no unresolved issues at contract completion. The only other known examples of the application of conventional DRBs within Australia, post 1991, involved two dams in West Australia constructed within the past 10 years. Both were deemed highly successful, with all issues resolved very shortly after project completion.

Two major Sydney Airport upgrades utilised a variant of the DRB format, without a requirement for full independence of the owner and contractor nominees. All have been successful.

Progress Since Formation of DRBA

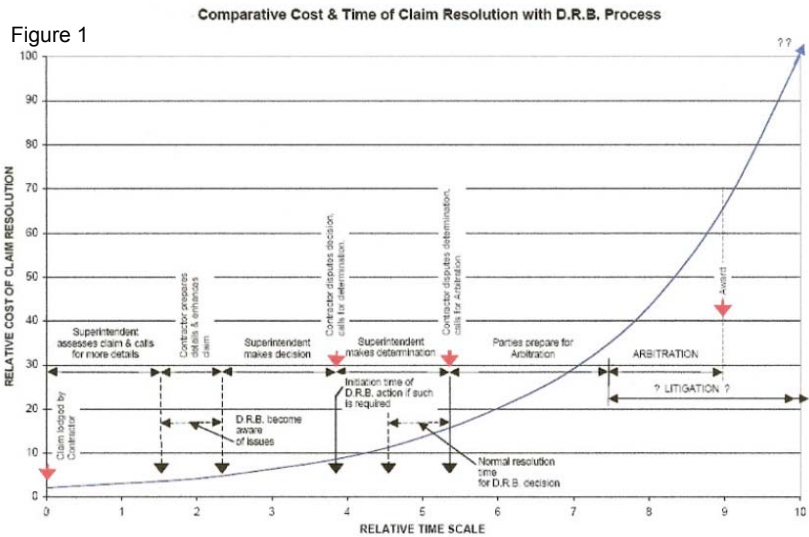
Since the formation of DRBA in 2003 there has been a concerted effort to increase awareness of the potential benefits of DRBs on major projects. Queensland has made the greatest progress. There are now three confirmed DRBs in Queensland - Ross River Dam (approx. \$75m), Gateway Arterial duplication (approx. \$1.3 Bn) and the Logan Motorway/Ipswich Motorway Interchange (approx. \$140m). Each of these projects have interesting differences.

Ross River Dam is an Alliance project. A typical Alliance involves a "no blame" cost reimbursable arrangement between the owner and a selected contractor. The management of the project is delegated to an 'Alliance Board' with equal owner and contractor representation, with all risks shared via a Pain/Gain arrangement – usually with a limit to the pain for the contractor at a percent margin on cost about equal to the corporate overhead level. The Ross River Alliance differs from a typical arrangement in that some risks are not shared but left with the contractor. The DRB is perceived as an insurance policy in the event that the Alliance parties are unable to resolve all issues.

Gateway is a contract for design, construct and maintain for 10 years of duplication of the existing Gateway Arterial which forms the eastern bypass of Brisbane city. It involves a major tolled crossing of the Brisbane River together with feeder expressway standard roads to the north and south – in all comprising 20km of expressway. The Logan Motorway Interchange project is design and construct (D&C) only.

New contract documentation produced by Qld. Main Roads (QMR) for D&C contracts now includes a standard selection option for DRBs. The DRBA is hopeful that there will be a significant increase in the use of DRBs by QMR if the first couple prove to be successful.

NSW has achieved one success with a new tunnel beneath Sydney CBD for power supply upgrade. Bid documents



are about to be issued with a DRB requirement in the documentation. The project is construct only with benchmark ground conditions defined via a Geotechnical Baseline Reference framework.

West Australia Main Roads (WAMR) has embraced the concept of using DRBs. The commissioner was previously with WA Water and was largely responsible for inclusion of DRBs in the two major dam contracts constructed by WA Water and referred to under Australian experience pre DRBA. As yet no WAMR contracts have been awarded with a DRB included. In addition, the WA group are working on several possible opportunities for DRBs in the oil and gas area.



The Gateway Arterial project features a major tolled crossing of the Brisbane River with feeder roads to the north and south comprising a total of 20km of expressway.

New Zealand's Experience

There is unanimous support for DRBs in New Zealand which, on a population and construction turnover basis, has led Australia in its acceptance of the concept. This seems to be related to the involvement of U.S. based experts with several of the major hydro and hydrothermal power development projects over the past 20-30 years.

Over the past 10 years, DRBs have been used on Matahina Dam (reconstruction of an existing dam following severe damage by an earthquake) and Manapouri Power Station second Tailrace tunnel (10 km hard rock tunnel from an underground power station). Despite the technical difficulties of the former contract it was completed within budget and time and without a single referral to the DRB. The DRB on Manapouri assisted with resolution of several minor matters and one very significant differing site conditions claim. The claim was resolved by agreement shortly after a two week hearing by the Board but prior to the Board issuing its decision.

A modified DRB has been used on two projects, one with a single DRB panel member and one with three DRB members on stand by. In each case, all issues were resolved within the DRB process. A sewerage outfall project in Christchurch is about to commence (approximately NZ\$70 million) which has a FIDIC form of contract with a modified DAB / DRB approach.

Cooperation with Other Organisations

DRBA has forged links with the Institute of Arbitrators Australia (IAMA) and the Association of Consulting Engineers Australia (ACEA). Agreement has been reached for a series of joint ACEA/DRBA seminars to be held in the third quarter of 2006 in the main eastern seaboard cities of Sydney, Melbourne and Brisbane. The primary seminar topic will be the benefits of inclusion of the DRB concept in standard Australian construction contracts.

This series of seminars should build upon a joint ACEA/FIDIC/DRBA seminar held in Sydney last year at the same time as an International Executive Committee meeting of FIDIC, whose president at the time was well known Sydney Consulting Engineer Richard Kell. □

¹Source: Australian Bureau of Statistics, (Building Activity, December quarter 2005: Australia, Cat. No. 8752.0) and ABS (Engineering Construction Activity, December quarter 2005: Australia, Cat. No. 8762.0).

About the Author:

Consulting Construction Engineer Graeme Peck has 37 years experience covering most facets of heavy construction. He was a founding principal of Evans & Peck, Australia's largest independent construction and project delivery consulting group. He retired in 2001, and now serves as an independent advisor to client, financial and construction groups involved with major infrastructure projects. Mr. Peck has served as a DRB member on two DRBs, one in Australia and one in New Zealand. The former was completed with only one referral to the Board, the latter without a single referral. All contracting parties on both projects considered the DRB concept to be a very worthwhile investment. Mr. Peck is also a Grade 1 Arbitrator and Mediator.



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The Agenda for the DRBF's 10th Annual Meeting & Conference is Out of This World!

All the background on launching a successful DRB program and practical tips for serving on a Board are available at this year's Dispute Resolution Board Foundation Annual Meeting and Conference, October 7-8, 2006 in Orlando, Florida.

Conference attendees can take advantage of affordable rates and some of the many attractions in the area. On Friday, participants will have the option of joining the "NASA Up Close" tour at Kennedy Space Center on Friday before the start of the conference. See pages 14 and 15 for complete details on the program agenda and registration details.

Make plans today to join the DRBF in Orlando!