**[PRO FORMA] DISPUTE AVOIDANCE BOARD CLAUSES (Simple)**

**[These Pro Forma DAB clauses have been created by DRBF Region 3 for use by its Members and clients / users of the Dispute Board process. These pro forma clauses are for a less complex Project Deed / Contract / Agreement and will need to be adapted to suit both the definitions and other dispute resolution provisions of the Project Deed / Contract / Agreement or the like.**

**Note that these clauses also assume that:**

1. **appropriate definitions will be included in the Project Deed / Contract / Agreement (where not defined in these clauses) and these defined terms are shown as capitalised terms;**
2. **there is a three-person Dispute Board;**
3. **the hierarchy of dispute resolution is Executive Negotiations, DAB Decision and, if the DAB Decision is not accepted, then Litigation;**
4. **the Decision of the DAB is interim binding for 20 Business Days;**
5. **there are cross references to other parts of the Project Deed / Contract / Agreement that would need to be checked and included;**
6. **reference is to NSW law.**

**Each of these assumptions can be reversed or amended and appropriate amendments made to the Pro Forma DAB clauses]**

**DISPUTE AVOIDANCE BOARD CLAUSE**

# DISPUTE RESOLUTION

## Disputes Generally

Subject to clause [1.19], any dispute, difference, controversy or Claim (**Dispute**) directly or indirectly based upon, arising out of, relating to or in connection with the Works or this Deed (including any questions relating to the existence, validity or termination of this Deed) or either party's conduct before the date of this Deed, shall be resolved in accordance with this clause [1].

## Dispute Avoidance Board's Role and Functions

(a) The Dispute Avoidance Board has been constituted under the DAB Agreement.

(b) The functions of the Dispute Avoidance Board are set out in the DAB Agreement. They include:

(i) a dispute avoidance function; and

(ii) a Decision-Making function.

(c) The obligations of the parties in relation to the Dispute Avoidance Board are set out in the DAB Agreement.

## Notice of Dispute

(a) If a party requires a Dispute to be resolved, the party may, within the time required by clause [1.3(b)], give the other party written notice of the Dispute (**Notice of Dispute**). The Notice of Dispute must:

(i) specify the Dispute;

(ii) provide particulars of the party's reasons for the Dispute; and

(iii) set out the position which the party believes is correct.

(b) The Notice of Dispute must be given to the other party within 20 Business Days of the Dispute arising.

**1.4 Executive Negotiation**

(a) Where a Notice of Dispute is given under clause [1.3], the Dispute must be referred to the Executive Negotiators and the Executive Negotiators must, within five Business Days after the date on which the Notice of Dispute was given under clause [1.3], commence meetings and negotiations with a view to resolving the Dispute.

(b) If the Executive Negotiators:

(i) have not resolved the Dispute; or

(ii) have not reached agreement upon a procedure to resolve the Dispute,

within 20 Business Days after the date on which the Notice of Dispute was given under clause [1.3] (or such longer period of time as the Executive Negotiators or the parties may have agreed in writing) then, whether or not the Executive Negotiators have met and undertaken negotiations with a view to resolving the Dispute, either party may by giving notice to the other party and the Dispute Avoidance Board in accordance with clause [1.4(c)] require that those parts of the Dispute that remain unresolved be referred to the Dispute Avoidance Board for a Decision (**Notice of Referral for DAB Decision**).

(c) A Notice of Referral for a DAB Decision must:

(i) be given within 20 Business Days after the expiry of the 20 Business Day period referred to in clause [1.4(b)];

(ii) state that it is a Notice of Referral for DAB Decision under this clause [1.4]; and

(iii) include or be accompanied by reasonable particulars of those parts of the Dispute which remain unresolved.

**1.5 Obtaining Dispute Avoidance Board's Decision**

(a) If a Dispute is referred to the Dispute Avoidance Board under clause [1.4], the Dispute Avoidance Board will be deemed to have received such reference on the date when the Notice of Referral to DAB is received by the Chair of the Dispute Avoidance Board.

(b) The DAB Decision in respect of Dispute must be made in accordance with the Decision-Making Rules.

(c) The Dispute Avoidance Board will be deemed to be not acting as arbitrators.

(d) Notwithstanding anything else, to the extent permitted by Law, the Dispute Avoidance Board will have no power to apply or have regard to the provisions of Part 4 of the *Civil Liability Act 2002* NSW.

(e) The Decision of the Dispute Avoidance Board will be immediately binding on both parties, who must give effect to it unless and until it is revised in an amicable settlement or a court judgment or an arbitral award made in court proceedings or an arbitration pursuant to this clause [1].

**1.6 Notice of dissatisfaction**

(a) If either party is dissatisfied with the DAB Decision, then either party may, within 20 Business Days after receiving the DAB Decision, give notice to the other party of its dissatisfaction (**Notice of Dissatisfaction**).

(b) A Notice of Dissatisfaction issued under this clause [1.6] must:

(i) state that it is given under this clause [1.6]; and

(ii) set out the matter in Dispute and the reason(s) for dissatisfaction.

(c) Except as stated in clause [1.10] and clause [1.11], neither party will be entitled to commence court proceedings or arbitration in respect of the Dispute unless a Notice of Dissatisfaction has been given in accordance with this clause [1.6].

**1.7 DAB Decision final and binding**

If the Dispute Avoidance Board has given a DAB Decision, and no Notice of Dissatisfaction has been given by either party under clause [1.6], within 20 Business Days after it received the DAB Decision, then the DAB Decision will become final and binding upon both parties.

**1.8 Failure to comply with DAB Decision**

1. If a party fails to comply with a DAB Decision that has become final and binding, then the other party may, without prejudice to any other rights it may have, give a notice to the other party requiring the failure itself to be determined as a Dispute in accordance with clause [1.9]. In those circumstances clauses [1.2 - 1.5] will not apply to this Dispute.
2. In making any judgement or arbitral award in respect of any such Dispute, the court or the arbitral tribunal will not be entitled to open up and review the DAB Decision.

**1.9 Amicable settlement**

Where a Notice of Dissatisfaction has been given under clause [1.6], or where a notice has been given under clause [1.8]:

(a) both parties must attempt to settle the Dispute amicably before the commencement of any further proceedings;

(b) however, unless both parties agree otherwise, if no amicable settlement has been reached by the 21st Business Day after the day on which the Notice of Dissatisfaction or the notice under clause [1.8] was given, the Dispute will be determined in accordance with clause [1.13] whether or not the Executive Negotiators have met and undertaken any genuine and good faith negotiations.

**1.10 Expiry of Dispute Avoidance Board's Appointment**

If a Dispute arises and there is no Dispute Avoidance Board in place, whether by reason of the expiry of the Dispute Avoidance Board's appointment or otherwise:

(a) clause [1.4] will still apply, but if the Dispute is not resolved within 20 Business Days after a notice is given under clause [1.2], the Dispute will not be referred to the Dispute Avoidance Board;

(b) clauses [1.5 - 1.9] will not apply; and

(c) whether or not the Executive Negotiators have met and undertaken any genuine and good faith negotiations, the Dispute will be determined in accordance with clause [1.13].

**1.11 Replacement of Dispute Avoidance Board Member**

(a) If a member of the Dispute Avoidance Board resigns or is terminated (or is unable to fulfil its obligations under the DAB Agreement because of death or disability:

(i) if that member is the Chair, the remaining two members will appoint a replacement member; and

(ii) if that member is not the Chair:

A. if the parties have previously agreed upon one or more reserve members for the Dispute Avoidance Board, and one or more such members are willing and able to act on the Dispute Avoidance Board, the party that nominated the member to be replaced will appoint one of the reserve members to the Dispute Avoidance Board; or

B. if no reserve members have been agreed between the parties or none of the reserve members are willing and able to act on the Dispute Avoidance Board, the party that nominated the member to be replaced must nominate a replacement member satisfactory to the other party.

(b) If, within 30 Business Days of a member resigning or being terminated (or being unable fulfil its obligations under the DAB Agreement because of death or disability), the member has not been replaced by a person appointed in accordance with clause [1.11(a)], either party may request the President of the Resolution Institute to appoint a replacement member. This appointment will be final and conclusive.

(c) The parties, the remaining members and the new member must enter into a replacement Dispute Avoidance Board Agreement on substantially the same terms as the DAB Agreement.

**1.12 Termination of Dispute Avoidance Board**

1. The appointment of any member of the Dispute Avoidance Board may be terminated in accordance with the DAB Agreement.
2. Unless otherwise agreed by both parties, the DAB Agreement will terminate upon the later of:

### the Dispute Avoidance Board having made a DAB Decision in accordance with clause [1.5] in respect of all Disputes that were referred to it for a DAB Decision; and

### Eighteen (18) months after the Date of Construction Completion of the last Portion to achieve Construction Completion, unless otherwise directed by the Principal.

**1.13 Litigation**

If a party issues a Notice of Dissatisfaction under clause [1.6], within 20 Business Days after it received the Dispute Avoidance Board's Decision, then either party may refer the Dispute to litigation.

**1.14 Contractor to continue performing obligations**

Despite the existence of any Dispute, the Contractor must:

(a) continue to perform the Contractor's Activities; and

(b) perform its other obligations under this Deed.

**1.15 Urgent relief**

Nothing in this clause [1] will prejudice the right of a party to seek urgent injunctive or declaratory relief from a court.

**1.16 Survive termination**

This clause [1] will survive termination of this Deed.

**1.17 Additional Definitions**

(See “Complex” clause).