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18 December 2012

Mr Russell Keith
Secretary
Public Accounts Committee
Parliament House
Darwin NT 0800

By email: pac@nt.gov.au

Dear Mr Keith

**SUBMISSION RE: INQUIRY INTO PUBLIC PRIVATE PARTNERSHIP ARRANGEMENTS
FOR DARWIN CORRECTIONAL PRECINCT; AND CONTROL OF PUBLIC MONIES
THROUGH USE OF DISPUTE RESOLUTION BOARDS**

I refer to:

- (a) the current inquiry of the Public Accounts Committee (the Committee) into the Public Private Partnership (PPP) arrangements for the Darwin Correctional Precinct;
- (b) the NT Auditor-General's report on the PPP arrangements for the Darwin Correctional Precinct, in his October 2012 Report to Legislative Assembly;
- (c) terms 2(a)-(c) of the Committee's terms of reference (set out below); and
- (d) the November 2012 report by the Advisory Committee on Alternative Dispute Resolution, Law Council of Australia, titled "The use of Dispute Resolution Boards and their expansion beyond Construction Matters" (**attached**).

I write in my capacities as an industrial relations consultant, member of the Dispute Resolution Board Foundation (under entity Lucio Matarazzo Pty Ltd), and member of the Law Council of Australia.

Terms 2(a)-(c) of the Committee's terms of reference provide:

2. The duties of the committee shall be -
 - (a) to examine the accounts of the receipts and expenditure of the Northern Territory and each statement and report tabled in the Legislative Assembly, pursuant to the *Financial Management Act* and the *Audit Act*;
 - (b) to report to the Legislative Assembly with such comments as it thinks fit, any items or matters in or arising in connection with those accounts, statements or reports, or in connection with the receipt or disbursement of the

moneys to which they relate, to which the committee is of the opinion that the attention of Parliament should be drawn;

- (c) to report to the Legislative Assembly any alteration which the committee thinks desirable in the form of the public accounts or in the method of keeping them or in the method of receipt, control, issue or payment of public moneys; ...”

I seek the Committee’s consideration of the use of Dispute Resolution Boards (DRBs) as a mechanism by which to control expenditure of public monies under substantial contracts for works or services.

If the Committee does so consider DRBs, I ask it to report to the Legislative Assembly pursuant to terms 2(b) and or 2(c) of its terms of reference, in relation to the use of DRBs as a control mechanism.

I am happy to address any questions you may have in relation to this submission:

1. On 5 December 2012 the NT Attorney-General referred questions to the Committee for inquiry and report – questions about the extent and nature of the risks the NT Government is exposed to as a result of the PPP arrangements for the Darwin Correctional Precinct.
2. In October 2012 the NT Auditor-General reported to the Legislative Assembly on the PPP arrangements for the Darwin Correctional Precinct, pointing out an “implied guarantee” risk:

“... while the legal arrangements governing the PPP remove the Northern Territory from direct involvement in the construction of the facility, the Northern Territory cannot avoid being exposed to the risk that the project may not adhere to its construction schedules, that it may fail to meet the Territory’s needs or that one of the PPP partners may be unable to meet its obligations. It is most unlikely that a Northern Territory Government will be able to turn its back upon the project in the event of failure by a partner; to do so would leave that government in the position that prevailed in prior years when the need for a new facility became increasingly urgent. It is more likely that the government would need to intervene directly in the project and face the likelihood of higher costs in order to achieve its policy objectives.

This type of risk has been described as the “implied guarantee”. The implied guarantee does not rest on any particular principle or criterion and it may arise irrespective of whether there is government fault, or whether there is government control, or government ownership, or even government financial involvement. The implied guarantee may apply notwithstanding that risks are allocated in formal contracts between a government and a private sector operator or constructor.

An example of how events may unfold thereby crystallising an implied guarantee is illustrated by events affecting a similar PPP project in Victoria which involves the expansion of the Ararat prison. That project encountered difficulty in May 2012 when the project builder was placed into liquidation, with the project company being placed into voluntary administration shortly thereafter when one of the project financiers withdrew. The Ararat project has since recommenced, with two banks agreeing to finance the project, to meet the claims of unpaid subcontractors and to seek a new builder to takeover construction of the facility. The new arrangements appear to have been accompanied by an increase in the liability faced by the Victorian Government.

What this suggests is that the public sector must maintain a close involvement in any PPP to ensure that its interests are protected. In the case of the Ararat Prison PPP, risks that were thought to have been shifted contractually eventually returned, to be assumed by the Victorian government.”¹

3. In November 2012 the Advisory Committee on Alternative Dispute Resolution, Law Council of Australia, published its report titled “The use of Dispute Resolution Boards and their expansion beyond Construction Matters.”

¹ NT Auditor-General’s October 2012 Report to the Legislative Assembly, pages 29 and 30

4. The Law Council's report, referencing documentation of the Dispute Resolution Board Foundation (DRBF), explains the evolution of the functions of DRBs, up to current embrace of dispute avoidance via key elements, relevantly:

"...

- the DRB's fees and expenses are shared between the parties. Costs vary depending on how often the Board is asked to resolve disputes;
- the DRB is organised when work begins, before there are any disputes;
- the DRB keeps abreast of job developments by reviewing regular project progress reports and regular visits to the site, whether or not there are any disputes;
- the DRB helps prevent disputes by facilitating communication between the parties; ..."²

5. Further, the Law Council's report points out:

"In Australia and worldwide, DRBs have been shown to be remarkably successful in dispute avoidance in complex construction and infrastructure projects. For example, as at the end of July 2012, there are some 31 infrastructure projects in Australia currently on-going, or recently completed, with DRBs, ranging in value from \$75m–\$1.8bn.⁴ In the 23 years since DRBs were introduced into Australia, all disputes on projects with DRBs have been able to be resolved within the DRB process, and very few disputes were formally referred to a DRB. Most projects were completed on time and close to budget."^{5, 3}

6. Relevantly, a significant benefit of a DRB is its ability to foresee potential project delays and help to reduce associated costs. In this way, a DRB is akin to an insurance policy. A DRB can act preventatively.⁴
7. If the Ararat project described under point 2 above had chartered a DRB to review project progress for the purpose of meeting finance arrangements, the Ararat project may not have reached crisis point.
8. A DRB can review project progress for the purpose of meeting finance arrangements, if it validly determines so under its operating procedures, and has the appropriate expertise.
9. DRBs as a mechanism by which to control expenditure of public monies, and perhaps to control the "implied guarantee" risk described under point 2 above, may provide the NT with the leverage to expect lower interest rates in respect of project financing. –
10. Lowering the risk of each of the parties to a project should logically lower the price of financing.
11. Draft DRB agreements and precedents prepared by the Dispute Resolution Board Australasia Inc. indicate that there are ways to apply DRBs to substantial works or services contracts in many public sector areas.⁵
12. Given the NT's potential to procure and host substantial projects into the future, and the potential for contractors and sub-contractors to provide many different works and services in the delivery of the projects, I believe serious consideration should be given to the use of DRBs as a mechanism by which to control expenditure of public monies under substantial contracts for works or services.

² "The use of Dispute Resolution Boards and their expansion beyond Construction Matters," Advisory Committee on Alternative Dispute Resolution, Law Council of Australia, November 2012, paragraph 3

³ Ibid. The footnotes numbered within this quote are those of the Law Council's report, and can be found on page 2 of that report, a copy of which is attached to this submission

⁴ Ibid, paragraph 8

⁵ The Dispute Resolution Board Australasia Inc. advances the use of DRBs in Australia and New Zealand

I understand that the Law Council's report on DRBs has been submitted to the Council of Australian Governments in support of the use of DRBs in all Australian jurisdictions.

Thank you for your attention to this submission.

Yours sincerely

Catherine Matarazzo, Agent for Lucio Matarazzo Pty Ltd.

The use of Dispute Resolution Boards and their expansion beyond Construction Matters

By the Advisory Committee on Alternative Dispute Resolution, Law Council of Australia

27 November 2012

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1. The Law Council's Advisory Committee of Alternative Dispute Resolution ('the ADR Committee') was established to provide policy advice to the Law Council on alternative dispute resolution (ADR). In exercising this function, the ADR Committee has undertaken a review of the dispute avoidance role that Dispute Resolution Boards ('DRBs') have played in major construction projects in Australia and internationally. These projects are significant for the contracting parties, the economy, and governments.¹ They demonstrate the potential for encouraging the use of the DRB method in a range of other suitable non-construction projects to prevent disputes.
 2. The DRB concept was established in the United States in the 1970s. DRBs assist contracting parties to resolve disputes on large infrastructure projects in a timely manner by using the services of three impartial independent experts to recommend solutions to the problems that arise during the course of the project. The appointment of the DRB experts is subject to the approval of the contracting parties, and their role is to provide prompt recommendations on problems encountered, which are usually of a technical or contractual nature.² The first DRB was implemented in 1975 for a tunnel construction project in Colorado.³ It was discovered that in the process of implementation, disputes could be avoided by improving communications and problem understanding facilitated by DRBs. In more recent years, a greater emphasis has been placed on the dispute avoidance role of DRBs.
 3. In Australia and worldwide, DRBs have been shown to be remarkably successful in dispute avoidance in complex construction and infrastructure projects. For example, as at the end of July 2012, there are some 31 infrastructure projects in Australia currently on-going, or recently completed, with DRBs, ranging in value from \$75m–\$1.8bn.⁴ In the 23 years since DRBs were introduced into Australia, all disputes on projects with DRBs have been able to be resolved within the DRB process, and very few disputes were formally referred to a DRB. Most projects were completed on time and close to budget.⁵ This outstanding record is consistently replicated internationally. The Dispute Resolution Board Foundation ('DRBF') created in 1996 to support and

¹ The Victorian Auditor-General's Report, [Managing Major Projects](#), 2012-13:07 (October 2012) pointed out that the Victorian Government estimates that the total value of current projects is around \$35.6b, with expenditure of around \$7.6b in 2013–14 alone (at 7, 42). It also reported that a range of major projects had experienced significant time and cost overruns. The average cost of overruns was around \$9.7m, representing 18.3 per cent of the project's main contract cost, which is only a portion of the whole cost of a project. It should be noted that the major projects in Victoria referred to by the Auditor-General did not have a DRB in place.

² Allione Romano, 'The Inherent Dispute Avoidance Properties of Dispute Boards', presentation to the 12th Annual DRBF International Conference, 4 May 2012, Sydney.

³ The second bore tunnel of the Eisenhower Tunnel in Colorado: 'The construction of the first bore was a financial disaster due in large part to fighting between the parties during construction. In contrast, construction of the second bore proceeded smoothly and with few disputes. The disputes that did occur were settled quickly. What made the difference? Certainly it was not a difference in specifications or site conditions. The difference was in the use of a dispute review board, or equivalently, a dispute resolution board ('DRB'), during construction of the second bore': Kendell C. Reed and Eric van Ginkel, *Dispute Resolution Boards: From Construction to Bio-Tech* (Alternative Dispute Centres) <http://arc4adr.com/bio_tech.html>.

⁴ DRBA President's Report to 9th Annual General Meeting of the DRBA, 3 September 2012. The Dispute Resolution Board of Australasia Inc (DRBA) is a non-profit organization dedicated to promoting the avoidance and resolution of disputes using the unique and proven DRB method. DRBA is the Australasian chapter of The Dispute Resolution Board Foundation (DRBF). The DRBF provides assistance with a worldwide application of the DRB method by providing general advice and suggestions tailored for the conditions and practices existing in local areas. The DRBA has been established to promote the use of the DRB method on major projects in Australia and New Zealand. The DRBA has created suitable draft precedents for establishing a DRB, including a Draft Contract Clause and DRB Agreement. These are attached with the permission of the DRBA.

⁵ Statistics by GM Peck, *Dispute Boards: Lessons Learned Seminar* (Sydney, 10 April, 2012); see also Paula Gerber and Brennan Ong, 'DAPS When will Australia jump on board?' (2011) 27 BCL 4 at 18, <<http://www.daps.org.au/wp-content/uploads/2011/07/DAPs-When-will-Australia-Jump-on-Board.pdf>>.

promote the use of DRBs internationally now has over 700 members in 39 countries. An extensive data base of construction projects which have used DRBs, kept by the DRBF, has shown that on those projects, 98 per cent of disputes have settled without arbitration or litigation. The DRBF has set out the key elements to the success of a DRB,⁶ which are equally relevant to Australian projects:

- all three members of the DRB are neutral and subject to the approval of both parties;
- each DRB member signs a Three-Party Agreement with the parties obligating the members to serve both equally and impartially;
- the DRB's fees and expenses are shared between the parties. Costs vary depending on how often the Board is asked to resolve disputes;
- the DRB is organised when work begins, before there are any disputes;
- the DRB keeps abreast of job developments by reviewing regular project progress reports and regular visits to the site, whether or not there are any disputes;
- the DRB helps prevent disputes by facilitating communication between the parties;
- if the DRB is unsuccessful in preventing a dispute, either party can refer the dispute to the DRB for an informal but comprehensive hearing; and
- the written recommendations of the DRB are not binding on either party unless expressed to be so in the contract, but are generally admissible as evidence, to the extent permitted by law, in the case of subsequent arbitration or litigation.

4. Most recent DRBs now utilise dispute avoidance strategies to focus on preventing conflict or potential conflict at an early stage. The benefits arising from the existence of a panel of experts with an in depth knowledge of the project, who meet regularly with the parties throughout the project, are wide-ranging. The existence of a DRB:

- generally encourages the parties to act reasonably and cooperatively;
- discourages frivolous and exaggerated claims from being submitted, which can impact upon a party's overall credibility in the eyes of the DRB;
- discourages spurious claims which are unlikely to succeed;
- improves understanding and communications on a project, which assists early resolution of problems; and
- focuses the attention of the parties on problem solving, rather than disputation.⁷

5. Several recent papers delivered at the 12th Annual Dispute Resolution Board Foundation International Conference held in Sydney 3–5 May 2012, discussed the use of DRBs beyond their usual construction application. For example, in his paper James Perry proposed that DRBs could be used beneficially in any relationship 'where suppliers are selling products or services via contractual vehicles which call for complicated performance over the medium and long term'.⁸ This would include:

⁶ Dispute Resolution Board Foundation, Brochure: *'Moving Projects Forward Since 1996 – Recipe for Success'*.

⁷ See: Benjamin JW Teo, 'Proactive dispute prevention: The value of dispute boards to the construction industry' (2011) 27(4) BCL 233, 236–40.

⁸ Perry James, 'The Future of Dispute Boards in Non-construction applications, and why it Matters', presentation to 12th Annual DRBF International Conference, 4 May 2012.

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- the development of software applications;
 - contracts involving the use, transfer and sharing of intellectual property and know how;
 - the design and building of prototype or bespoke mechanical machines or tools;
 - the development of oil and gas and other mineral or extraction infrastructure, involving performance over a period of time;
 - the shipbuilding and ship conversion industry;
 - the defence industry, telecommunications;
 - insurance;
 - the financial services industry, and
 - a range of other long term complex commercial relationships.

6. Many commercial and corporate relationships have parallels to construction contracts and are suitable for DRBs.⁹ For example, they are likely to:

- have an extended delivery phase;
- be technically complex; and
- have multiple parties with a co-dependant commitment.

7. It should be noted that the DRB concept has recently been expanded by the International Chamber of Commerce (ICC) to extend to commercial contracts generally. In addition, for the past last three years, Leighton Holdings Ltd has included in its International Contract Works Policy a DRB to manage disputes that might arise under a claim made under that policy. The DRB consists of three members, one based in London, one based in Hong Kong and one based in Australia. The DRB is activated when there is a claim under the Contract Works Policy of more than \$5m. The progress of the claim, including the role played by the insurer's loss adjusters, is effectively supervised by the DRB to ensure a speedy outcome. The DRB concept has been renewed in the Contract Works Policy for the past three years.¹⁰

8. Dispute boards, and particularly three person boards, are said to be costly to set up and maintain. However, there are smaller projects where there is a one person DRB. In any event, DRBs should be treated as equivalent to an insurance policy and the costs compared with the expense and delays inherent in a project which suffers from unresolved disputes which end up in arbitration or litigation. The Hon. Nick Greiner, the current Infrastructure NSW chairman and former Premier of NSW, stated in a recent article in *The Australian* which contained an edited extract from a speech he delivered to the May 2012 DRBF Conference:

What really impresses the businessman in me is the vanishing small cost of establishing a DRB as part of a contract compared to the value it delivers. The base cost of a DRB in Australia is between 0.1 and 0.2 per cent of the total cost of a project of more than \$100m.

⁹ Ian Briggs, Minter Ellison Lawyers, 'Opportunities for DRBs in IT, ICT, Resources and Insurance', presentation to 12th Annual DRBF International Conference, 4 May 2012.

¹⁰ Information provided by DRBA.

And really what a DRB equates to is an insurance policy against the possibility of a dispute that disrupts work.¹¹

9. The potential challenge is to identify industries and commercial contracts where a DRB could be usefully created, outside the standard construction and infrastructure industry use, and to identify the costs and benefits of establishing a DRB.
10. There is a tremendous opportunity for the use of DRBs in appropriate commercial contracts generally and the lack of use of DRBs (certainly in some Australian states and territories) appears largely to be due to a lack of knowledge and appreciation of the DRB concept by legal advisors and their clients, both from private industry and government. Once DRBs have been used the experience is that parties use them again. This is apparent, for example, in major projects run by Sydney Water, John Holland, Transport for NSW etc.. For example, John Holland and the Transport Projects Division of Transport for NSW, have appointed a DRB for the South West Rail Link Project, which is constructing the new Glenfield to Leppington Rail Line. The project commenced in early 2011 and will be completed in 2015. The function of the DRB is to assist the parties to prevent disputes, and if unsuccessful, to resolve disputes in a timely and equitable manner.
11. In Australia, lawyers with dispute resolution and construction expertise are frequently involved in DRBs, particularly in the role of chairperson.
12. There is also the need to provide training to potential DRB members in relation to the various skills which can be utilised to achieve proactive dispute avoidance, for example in:
 - identifying issues or potential issues, and following up to encourage the issues to be addressed;
 - acting as a 'sounding board' for the parties and providing informal non-binding advisory opinions to assist; and
 - proposing a range of dispute avoidance strategies such as requiring further information or clarifying information and encouraging communications and negotiations at an early stage.
13. In conclusion, the Law Council of Australia's Advisory Committee on Alternative Dispute Resolution suggests that there is scope to extend the use of DRBs to a wider range of contractual relationships than currently occurs. A DRB is a powerful dispute avoidance weapon, which has been shown to work consistently in achieving dispute avoidance in construction projects, by motivating greater cooperation and preventing disputes by facilitating better communications between the parties. The Advisory Committee on Alternative Dispute Resolution encourages the expansion of DRB's in Australia beyond construction matters.

¹¹ N. Greiner, 'Resolution of disputes the key to getting infrastructure built', *The Australian*, 9 May 2012.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.