

INTERVIEW:

Peter Preller

Deputy General Counsel Infrastructure of Optus Telecommunications



Peter Preller is the Deputy General Counsel Infrastructure of Optus, who spent a gap year in Geraldton, working with the Aboriginal and Torres Strait Islander Commission while enjoying the windsurfing opportunities the region offered. He has been back to WA many times since. Peter has been with Optus for 22 years and advocates on the use of Dispute Avoidance Boards in contracts.

Michelle Antonio is a full-time dispute resolution practitioner with Mediatius and has practised law for over 20 years, now becoming the first female in Western Australia to gain accreditation having completed the Region 3 Advanced Training Workshop as a Dispute Resolution Board Foundation (DRBF) member. With her experience as General Counsel in the construction, infrastructure, and mining sectors, she interviewed Peter following the Biannual DRBF Conference in Sydney in September 2024.

Q Can you elaborate on what a Dispute Avoidance Board (DAB) also known as a Dispute Resolution Board is and how it functions?

A DABs are proactive dispute avoidance and resolution mechanisms designed to resolve issues before they escalate into conflicts.

Generally, a DAB is a board of (one or three) impartial, experienced professionals that has regular meetings with the project teams during the term of the project. In the meetings the DAB is updated on progress, dispute avoidance is encouraged by having issues raised and discussed, and it provides independent guidance as to the merits of disputes.

In particularly difficult disputes, it has the expertise to undertake a thorough dispute process, and its decision can be either advisory or binding.

Q I have described a Dispute Avoidance Board (DAB) as akin to a football game, where the construction project is the game, and the DAB measures out the field and is the umpire present during the match. What are your thoughts on this analogy given your experience with DABs?

A I agree, but it's important to stress that the DAB doesn't just measure out the field, call out fouls or intervene during disputes. The mere presence of a DAB, much like having an umpire, encourages everyone to adhere to the rules, effectively preventing issues from arising. This is particularly helpful for companies that don't have good contract management practices, and let's be honest, we can all use help with improving our contract management.

It also means that projects with DABs are very unlikely to end up in litigation or arbitration.

Imagine the workload of the AFL tribunal if there were no line markings and no umpires present during a game.

Q Can you outline your journey with DABs and what has worked for Optus in their implementation?

A By way of background, Optus, as well as providing telecommunications services (mainly mobile services), is a large property and construction company with a multi-billion dollar annual spend across property, acquisition, construction, technology services and spectrum acquisition.

Optus provides telecommunications through over 9,500 sites which require constant replacement and technology upgrades.

About 10 years ago, after major disputes and material value leakage related to site construction (and with extremely frustrated senior management and investors), we decided that there needed to be a better way. So, we trialled a DAB.

Optus has now had six one-person DABs on its major networks construction and service contracts over the last 10 years, all with regular DAB meetings, which is where the real value-add occurs. These meetings clarify the parties' obligations, allow open and without prejudice discussions, and result in issues being identified and resolved proactively.

As the DAB is independent it brings objectivity and discipline to the interactions between the parties and helps avoid speculative and merit-less claims.

During this time lots of dispute avoidance work has taken place. We have obtained one determination and two advisory opinions, but no litigation has arisen from the contracts with DABs. The costs of running the DABs is relatively minor so the DAB costs have never been questioned – it is akin to a small insurance premium.

There is absolutely no reason why DABs cannot work in the IT industry, as they have worked so well on telecommunications sites and service contracts, which now include substantially more IT components.

Q I understand your initial interest in DABs arose after a costly arbitration with Optus. What personal reflections or experiences led you to advocate for DABs, especially considering they are predominantly used in the construction and infrastructure industry not telecommunications?

A My career has been mainly in sectors where major disputes are common, firstly in IT and then with Optus across the entire infrastructure portfolio which includes networks, construction and IT contracts.

I was able to effectively champion DABs as lawyers are also advisors to the business in regard to dispute management, so it was incumbent on me to find a better way.

My passion for non-determinative resolution stems from growing up with parents that each ran a small business. Simply, everyone wants to see their agreements conclude and the relationship to result in repeat business.

Q Do you see the benefits of using a one or three-person DAB for complex projects, and could you provide a comparison of the costs of a DAB versus the costs that are incurred in arbitration or litigation?

A There is no comparison when it comes to saving costs – a DAB wins hands down every time.

If you are unfortunate enough to be involved in major litigation or arbitration, this itself becomes an additional project, the worst of which are akin to living in a commercial nightmare.

There is significant involvement of costly combative and pedantic external lawyers (with control moving away from project staff); substantial executive management distraction; and, impact to the project relationships.

There is also the difficult act of managing both the ongoing project and the dispute through the same resources.

The cost of litigation and arbitration can be many millions of dollars.

Even a relatively simple dispute in arbitration or litigation can cost in excess of half a million dollars.

Also, litigation regularly settles, so why not increase the chance of resolution before litigation is commenced.

Q Given countries like Peru mandate DABs for all large government contracts, the World Bank requires them, the Abu Dhabi Projects and Infrastructure Centre now requires government entities to implement contract conditions for capital projects which include the mandatory use of Dispute Avoidance and Adjudication Boards and government entities (outside WA) are the biggest users of DABs in Australia, what are the benefits of DABs for corporations in WA beyond government use?

A There is a difference in dispute management between government and non-government bodies, particularly the appetite to commence litigation and how existing and future business is impacted.

Despite these differences, Optus has found DAB's to be successful between non-government entities.

Q Have there been challenges in implementing DABs at Optus, and how do the benefits outweigh the drawbacks?

A When Optus first used a DAB, we found that our contract management had to be upgraded, which also contributed to better outcomes.

Also, some suppliers need convincing when Optus insist on the use of a DAB.

Below are direct quotes I have received from employees in the business:

- DABs allow open and without prejudice discussion, resulting in potential issues being identified and being resolved proactively.
- The DAB approves the transparency of the relationship.
- The DAB process allows positive commercial and operational relationships while complex disputes can be managed by the DAB process.
- We are able to resolve disputes relatively quickly and at a low cost (avoiding litigation).

- The flexibility to scale DAB meetings up and down is a great feature of the arrangement – we have even been able to place regular meetings on hold.
- The DAB, being independent, brings a level of objectivity and discipline to the interactions of the parties and helps avoid the contractor making claims without merit.

Q With your life experience in Geraldton, WA, as well two return trips to working with Indigenous bodies in Broome, you have an appreciation of Indigenous communities. Do you see a role for DABs in promoting cultural sensitivity and Indigenous engagement?

A When working in Geraldton and then Broome twice, I immersed myself in the Indigenous community. Investing the time to understand others takes longer but there is no better way to build a platform that allows mutual understanding and an ability to agree mutually beneficial outcomes.

This is the same principle used in a DAB, which is why they are so successful.

I don't see why a DAB wouldn't be successful where cultural sensitivity and indigenous engagement is involved.

Q As General Counsel, I have engaged many external legal professionals however if I am honest DAB's were not often recommended. How frequently do front-end lawyers recommend DABs in contracts and what advice or guidance would you give to the legal profession about any hesitation or reluctance in introducing a DAB?

A Evidence from organisations like Optus shows that neglecting to recommend DABs is likely to costing your organisation money and time.

Unfortunately, I think that lawyers are part of the issue. This is why the business should be included in the decision.

Lawyers that have experienced a DAB may want to know all of the issues before committing, and they can make the DAB terms too complex.

I suggest that you talk to the business and project teams about the benefits of a DAB and try a DAB in the standard form.

Q Statistics show that, among 119 DABs in Australia, none have resulted in litigation or arbitration needing a judgment and only two have even commenced proceedings. When statistics show that over \$76 billion worth of infrastructure has been protected by DABs, were you surprised to learn that Optus is the largest private user of DABs in Australia?

A This statistic is a headline that needs to be much better advertised. It is absolutely incredible, and the same results can be achieved in any organisation.

Using DAB's within Optus has been a success from the beginning.

I was surprised to hear the Optus is the biggest private users of DAB's. I think there are two hurdles to overcome. Firstly, the fear of the unknown as explained in the answer above.

Secondly, as this is cost avoidance there must be an assumption that disputes will arise and cause loss. This is not something executives usually factor into the future business cases.

We need to be more honest with ourselves that there will be contract leakage, except that every large project has "a bad hair day", and that a DAB is by far the most cost effective and fastest way to deal with it.

Q With the draft AS4000 - 2024 General Conditions of Contract which is widely used in the construction industry considering a complete overhaul of clause 42 on dispute resolution and providing more dispute options for parties including the option for a DAB, do you foresee an increase in the use of DABs?

A Without awareness of the practical benefits and support from the legal profession, clients are unlikely to opt for a DAB even if included in the Standards. Regardless, any assistance that increases the use of DABs is welcome.

Q Do you have a final message for anyone considering DABs as an alternative form of dispute resolution in contracts?

A Dispute resolution methods like DABs have the potential to transform how organisations approach conflict and risk management, serving as effective mitigation strategies.

Standard dispute resolution clauses that require the parties to escalate the negotiation through multiple levels in the organisation, up to the CEO level, before they run off to court or arbitration don't provide the best outcomes.

This is because the dispute is escalated to people with less knowledge of the dispute, less time to resolve it, and the executives may have ulterior motives that result in a perverse outcome.

It is like getting that card in a monopoly game that says go to jail, go directly to jail, do not pass go do not collect \$200. Prison is a last resort in sentencing for a court, and court should be an absolute last resort in all business dealings.

For more information on DAB's see www.drpf.org.au or contact Michelle Antonio via www.mediatius.com.au.

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