

DRBF R3 Breakfast Briefings

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Due Process in DBs – A Map for Everyone

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Dispute Resolution Board Foundation. *Moving projects forward* since 1996.



Agenda

- What is Due Process?
- To whom does the obligation apply?
- Does it apply to Expert Determinations?
- Does it apply to Dispute Boards:
 - When giving an advisory opinion?
 - When making a Decision?
- What does due process require?
- DRBF Code of Conduct and DRBF R3 Templates
- What can we learn from the Med-Arb debate?

What is Due Process?

→ Concept of Administrative Law

→ Magna Carta:

→ *No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.*

→ In more modern terms, due process is a short hand reference to the law requiring certain decision makers, including government bureaucrats, to afford ‘procedural fairness’ (also referred to a ‘natural justice’) to the those (individually) affected by the decision

What is Due Process, and to whom does the obligation apply?

- ➔ If decision makers to whom the requirement applies fail to provide procedural fairness / natural justice to someone when making a decision that affects them, the person affected can apply to the courts to have the decision quashed (as part of the court's inherent jurisdiction).
- ➔ The decision makers to whom the requirement applies remains an open question (at the edges):
 - The requirement applies to arbitrations by virtue of the legislation supporting arbitrations;
 - It also applies to employers in unfair dismissal cases (Fair Work Act);
 - But does it apply to an Expert Determiner appointed to determine a matter or dispute under a contract?

Does it apply to an Expert Determiner?

Answer: It depends on what is required of the Expert Determiner under contract relevant Contract

- Due Process is required if Expert Determiner is required to act judicially or quasi-judicially (or as an arbitrator), ie:
 - required to receive submissions / hear the respective cases of the parties;
 - decide on the basis of the evidence laid before the Expert Determiner
 - “an inquiry in the nature of a judicial inquiry”
- Due Process is not required if Expert Determiner is required to decide the issue in accordance with his/her own specialist knowledge or skills without any obligation to hear the parties

See [Expert Determination](#) by The Hon Michael McHugh AC, address to Chartered Institute of Arbitrators (Australia) Ltd, 2007

Does it apply to a Dispute Board....

- when exercising its dispute avoidance function, including when providing an Advisory Opinion?
- when making a Decision?

Must a DB afford due process?

→ Canon 4 of DRBF Code of Conduct provides:

*“All Board meetings and hearings must be conducted in accordance with the applicable contract provisions and operating procedures, in a manner that provides **procedural fairness** to the contracting parties.”*

→ But does the DRBF Code of Conduct form part of the Contract between the parties?

→ DRBF Website states:

*Revised in March of 2018, the DRBF Code of Ethical Conduct consists of the four canons below that **all DRBF members agree to adhere to in practice. The DRBF recommends that these canons be adopted by all users of the process as a matter of best practice.***

Must DB afford due process when exercising its dispute avoidance function?

- An *Advisory Opinion* or *non-binding recommendation* by a Dispute Board doesn't affect a person's legal rights (unless the parties subsequently agree to implement it)
- So, a failure by a Dispute Board to adhere to due process when providing it is not relevant to legal enforceability. Same applies to mediators
- Would Canon 4 enable a party to a settlement agreement facilitated by the DB to obtain a court order setting the agreement aside if the DB hasn't afforded procedural fairness?

Must DB afford due process when exercising its dispute avoidance function?

- A party is less likely to agree to implement recommendations/opinions if it believes the DB is biased or it hasn't been heard (limits persuasiveness of the recommendations/opinion and reduces trust)
- Result: DBs will become less effective at dispute avoidance if due process isn't afforded
- So, if we want to grow the adoption of DBs we need to be seen to be adhering to due process when exercising the Dispute Avoidance function

Must DB afford due process when making a Decision?

- ➔ A *Decision* by a Dispute Board can affect a person's legal rights
- ➔ But will a failure by a Dispute Board to adhere to due process affect the legal enforceability of the Decision?
 - Australian legal position would be similar to Expert Determination. It depends on what is required of the DB under the Contract when making a Decision
 - Is the DB required to receive submissions / hear the respective cases of the parties, and make its Decision on the basis of the evidence laid before it?
 - Or is the DB required to decide the issue in accordance with his/her own expertise without any obligation to hear the parties?
- ➔ Answer: Probably yes.

Must DB afford due process when making a Decision?

- Canon 4.
 - All DRBF members agree to....
 - DRBF recommends that these canon be adopted by users
- Essential for continued survival of DB model? Why would parties agree to to use a DB if they think they won't get a fair hearing or the DB will be biased against them?
- To grow the adoption of DBs we need to be seen to be adhering to due process when exercising the decision-making function

What does due process (generally) require?

- No fixed content. Content of obligation depends on circumstances of the case, the nature of the inquiry, the rules under which the decision maker is acting, the subject matter, the potential consequences for the parties and so forth.
- Due process traditionally requires:
 - fair hearing; and
 - absence of bias.
- A fair hearing generally requires:
 - Prior notice
 - Disclosure of the critical issues to be addressed
 - Substantive Hearing – oral or written – with a reasonable opportunity to present a case, including opportunity to rebut or respond to material from other sources put before the decision maker. Legal representation?

What does due process look like for a DB?

- Does it matter what the DB Clause and DB Agreement say?
 - Yes, as these inform the content of the due process requirement for the relevant DB
 - The requirement to provide due process will still apply even if the DB Clause and DB Agreement are silent on content of requirement
 - A DB Clause and DB Agreement that specifies procedures that afford due process will assist DBs to actually provide due process
 - DBs that operate with DB Clauses and DB Agreements that are silent on process, or specify inadequate procedures, are more like be *perceived* as failing to provide due process
 - DBs that fail to follow (or that amend) specified procedures may be *perceived* as failing to afford due process even if the process actually adopted is adequate

DRBF R3 Templates

- See Appendix to Slides for summary of relevant provisions.
- DB Clause in Contract
- DB Agreement
 - Operative provisions of DB Agreement
 - General Operating Procedures (for DAB Meetings and Advisory Opinions) (Appendix 1)
 - Rules for Decisions (Appendix 2)

Do the procedures contemplated by the DRBF R3 Templates afford due process?

Decisions

- ✓ Notice of Dispute provides adequate and prior notice of the dispute and referral, so that effective representations can be made
- ✓ Written submissions - Reasonable opportunity to present case and respond to the other's
- ✓ If a Conference – each party has right to be heard
- ✓ Legal representation afforded (but no right to cross examination)
- ✓ Decision to be on basis of submissions, conference *and DB's own expertise*
- ✓ Decision – must include reasons.
- The required machinery is there. Up to DB to use it, and ensure absence of bias.
- DB can reinforce and amplify the machinery via procedural directions
- Does the reasoning responds to all substantial, clearly articulated arguments relying on established facts?
- What if DB proceeds to Decision despite uncooperative Party?
- Should the DB provide a draft of the Decision to the parties for comment?

Do the procedures contemplated by the DRBFR3 Templates afford due process

DB Meetings at which non-binding recommendations are made to help parties resolve disputes

- ✓ Akin to mediation (minus private sessions). Rules of natural justice don't apply to mediation, as no power over substantive outcome.
- ✓ But Canon 4 requires "*all Board meetings ... must be conducted in accordance ... in a manner that provides procedural fairness ...*
- ✓ Agenda and minute – with opportunity to comment on each
- ✓ No communications with DB between meetings (except for admin purposes)

Do the procedures contemplated by the DRBFR3 Templates afford due process

Advisory Opinions

- X Not much detail on process for Advisory Opinions
 - Must be jointly requested
 - DB not prevented from subsequently making Decision of subject matter of advisory opinion
- X Missing detail found in US DRBF template on:
 - X Joint submissions re scope of Advisory Opinion sought
 - X DB advice/determination on whether issue is appropriate for an advisory opinion
 - X Conference call with parties to establish schedule for submissions and date /location of meeting
 - X After advisory opinion is given, opportunity for parties to ask clarifying questions (to promote understanding of opinion)
 - X DB not bound by advisory opinion if issue is referred to DB for Decision
- ? Should DB provide draft advisory opinion to parties for comment?

What can we learn from Med-Arb debate?

Advocates for Med-Arb say:

- Threat of having third party render an arbitral award often motivates disputants to reach an agreement;
- Can cover issues outside dispute, and thereby have positive outcome on relationship going forward
- Cost effective – avoids need to start arbitration from square one if mediation fails
- Settlement can be recorded in form of award by tribunal, and thereby benefit from NYC enforcement regime

Critics of Med-Arb say:

- Pressure to settle to avoid arbitration. Adversely affects self-determination
- Potential lack of procedural fairness: arbitrator learns things in private session, that other party hasn't has opportunity to respond to. Advocates can 'poison the well'
- Apprehension of bias: Esp if settlement suggestion is made. How can arbitrator forget/ignore what it learned on without prejudice basis.
- Lack of candour: Parties less candid in mediation, because mediator may become arbitrator



What can we learn from Med-Arb?

- Private sessions can allow advocates to poison the well, without other side having opportunity to respond/rebut. Not applicable to DB as no ex-parte conversations. Always avoid private sessions when performing Dispute Avoidance role.
- Dual consent process.
 - Consent of both parties to Med-Arb before commencing mediation;
 - Consent of both parties to proceed to arbitration, given in writing after mediation terminates (s.27D(4) of CAA)
- DB Agreement evidences first consent, but not the second, as either party (NOT both jointly) can refer dispute to DB for a Decision
- No evidence that parties fear DBs due to perceived bias, probably due to absence of private sessions.

QUESTIONS / COMMENTS

APPENDIX – RELEVANT TEMPLATE PROVISIONS

DB Decisions

- Before a Dispute can be referred to the DAB for a Decision:
 - A Notice of Dispute must be given under clause 1.3 of DB Clause. Adequate particulars of case to be answered?
 - Executive Negotiation must be attempted under clause 1.4 of DB Clause. Further opportunity to understand case to be answered.
- DB Decision to be in accordance with Appendix 2 Rules (or such other rules as are agreed (in writing? – see Rule 4) between the parties) (cl.1.5(b)) – see next slide
- **DB acts as expert, not an arbitrator (cl.1.5(d)). Purpose?**
 - Often done to avoid requirement to afford procedural fairness, and allow DB/expert/valuer rely on own expertise ('take his own counsel').
 - To avoid the agreement being an 'arbitration agreement' under Australian arbitration legislation
 - Why not: *"This [clause/agreement] is not an arbitration agreement for the purposes of any legislation supporting arbitration."*
- Decision to be in writing and reasoned (cl.1.5(f))

Appendix 2 Rules for DB Decisions

→ Written Submissions

- Written submission by Party A
- Written response by Party B (14 days or such other time as DAB considers reasonable)
- Written reply by Party A (if DAB considers it appropriate, and within time permitted by DAB)
- DAB may direct further submissions (for example if a party B asserts that Party A's reply introduces new arguments that it hasn't had an opportunity to respond to)

Appendix 2 Rules for DB Decisions (cont)

→ Conference

- Either Party may request
- DB may convene conference, if neither party requests
- DB to provide written agenda 5 days before
- Parties may bring lawyers to conference
- DB may issue procedural directions

→ Decision

- DB can proceed to decision even if a Party fails to cooperate
- Decision to be made on basis of submissions, conference *and* DB's own expertise

Procedures for regular DB meetings (DAB Agreement, Appendix I)

- Procedures to be established at first meeting (DB Agreement, cl.4(a))
- Parties to comply with general operating procedures in Appendix I (DB Agreement, cl.4(b)(i))
- Communications are “without prejudice” (App. I, cl. I.5)
- DB Chair prepares agenda, and minutes. Minutes to be circulated for comment, and adopted (as amended) at next meeting (App. I, cl.4)
- No communications with DB between meetings (App. I, cl.5.1).

Advisory Opinions

- To be jointly requested, in writing (App. I, cl.7)
- Provided on “Without Prejudice” basis. Not a Decision.
- The Other Parties agree that nothing said or done by the Dispute Avoidance Board in providing any such advisory opinion shall prevent a Dispute, including a dispute the subject of the advisory opinion, from being referred to the Dispute Avoidance Board for a Decision pursuant to the Rules for Dispute Avoidance Board Decisions (App. I, cl.7)
- See slide on Med-Arb debate

Other relevant provisions

- DB Members to act fairly and impartially (DB Agreement, cl.5.2)
- DB Members to act honestly, impartially, without bias and independently (DB Agreement, cl.5.3)
- DB members to keep information obtained from parties confidential, including if information enters public domain (DB Agreement, cl.9)
- DB Members to disclose circumstances that might reasonably be considered to affect capacity to act independently, impartially and without bias. Either party can require Member to be replaced (DB Agreement, cl.10)



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