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# Is evaluative mediation the preferred model for construction law disputes?

Chris Lenz\*

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*This article uses a hypothetical mediation example to explore the question of whether the evaluative model is the preferred process to settle construction law disputes. It looks at recent research in other common law jurisdictions, as well as the prominent dispute resolution researchers to further examine the issue.*

## INTRODUCTION

The article initially considers some of the recent research about the construction industry in order to contextualise its importance to Australia's economy. This context highlights the importance of effective processes to resolve disputes in an adversarial industry. It briefly examines some of the underlying characteristics that lead to the construction disputes. It then considers the causes of conflict in order to isolate them for the later application to mediation theory.

The article then considers some of the seminal research regarding mediation generally, particularly the facilitative and evaluative models, including that of Riskin. A brief examination of the four models identified by Boule is made, which is amplified by Moore's text. The reason for this approach is so that the underlying processes associated with mediation can be applied to test the hypothesis.

A more targeted examination of the recent literature regarding mediation in the construction industry then follows. This provides an appreciation about the mediation processes currently being implemented, whether or not they are following the classic mediation theories. Before departing this topic, the article considers the market research of the users of mediation in the United States (US) suggesting a preference for evaluative mediation, which is then the hypothesis for the construction industry. However, evaluative mediation's catering for market needs does not sit well with the facilitative mediation standard practice in Australia.

The article then tests the hypothesis by reference to a theoretical real life example combined from a whole series of facts from the writer's own dispute resolution experience. The testing evaluates the typical double diamond mediation process (as suggested by LEADR)<sup>1</sup> which the evaluative mediator uses under two possible scenarios. Suggested responses from the disputing parties, as well as from the mediator, are outlined in order to predict possible outcomes. Under either scenario, the deficiency in evaluative mediation is demonstrated, as underlying interests are not uncovered that could have allowed settlement.

The article then summarises the key issues that have emerged in the research. It theoretically concludes that evaluative mediation is not preferred for construction disputes.

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\* BSc (Eng), LLB (Hons), MBA, MIE Aust, CPEng RPEQ, Solicitor.

<sup>1</sup> LEADR, *Resolving a Dispute: About Mediation*, <http://www.leadr.info/dispute-resolution/about-mediation>.

## CONSTRUCTION INDUSTRY

### Background

Stipanowich's research identified that between 1987 and 1991 the construction industry in the US was 4.4% of gross domestic product (GDP).<sup>2</sup> In addition, Gerber and Ong stated that the industry is one of the largest individual contributors to GDP in Australia, the United Kingdom (UK) and the US.<sup>3</sup>

Australian Bureau of Statistics (ABS) data in the October 2010 Economic Indicator stated that "[t]he industry is the fourth largest contributor to ... GDP ... (6.8% of GDP) in the Australian economy playing a major role in determining economic growth and employing 9.1% of the Australian workforce".<sup>4</sup>

Construction therefore is a very important contributor to Australia's economic well-being, and any improvements have significant economic benefit.

### What is construction?

Gould provided an excellent summary of construction when stating:

Construction work takes time to complete. Unlike other manufacturing processes the production of a building or transport system is in fact the production of a prototype: a construction project is a one off and not subject to years of refinement before the final mass produced article appears. Rather than the purchasing of a final product, the process become one of the procurement; obtaining by effort and endeavour.<sup>5</sup>

It is because construction is a *process* that makes it amenable to mediation.

### Dispute-ridden industry

Duffy and Duffy stated that "[t]he construction industry in Australia, and internationally, has the unenviable reputation of being adversarial and dispute prone".<sup>6</sup> They echoed earlier research when saying that "technical, factual and legal complexity combined with the broader challenges of the construction industry environment created an adversarial conduct climate".

The development of disputes is due not only to the practical elements of a construction project, but also to the environment within which the industry operates, including:

- the highly competitive nature of the industry;
- low profit margins;
- commercial pressures when progress payments are late;
- unfair risk allocation;
- perceived bias of the superintendent; and
- perceived lack of procedural fairness in the contract administration.<sup>7</sup>

A paper presented at the National Public Works Conference in 1990, entitled "No Dispute",<sup>8</sup> recommended strategies for improvement in the industry because of the large increase in contractual claims and disputes that had occurred in the 1980s. This was caused by increasingly aggressive and

<sup>2</sup> Thomas J Stipanowich, "Beyond Arbitration: Innovation and Evolution on the United States Construction Industry" (1996) 31 *Wake Forest Law Review* 65.

<sup>3</sup> Paula Gerber and Brennan Ong, *Best Practice in Construction Disputes: Avoidance, Management and Resolution* (LexisNexis Butterworths, 2013).

<sup>4</sup> ABS, *Feature Article: A Statistical Overview of the Construction Industry* (2010), <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1350.0Feature+Article1Oct+2010>.

<sup>5</sup> Nicholas Gould, *Dispute Resolution in the Construction Industry* (Institution of Civil Engineers, 1999).

<sup>6</sup> Stephanie Duffy and James Duffy, "An Analysis of Dispute Review Boards and Settlement Mediation as Used in the Australian Construction Industry" (2014) 30 *BCL* 165.

<sup>7</sup> Duffy and Duffy, n 6 at 165.

<sup>8</sup> Conference National Public Works, Building National and Council Construction, *No Dispute: Strategies for Improvement in the Australian Building and Construction Industry*, Presented at the National Public Works Conference (1990) (No Dispute Report).

confrontational relationships.<sup>9</sup> It emphasised the Abrahamson risk allocation principle that “[a] party to a contract should bear the risk, where that risk is within the party’s control; and that risk can be transferred if it is economic feasible for the risk to be dealt with in that location”.<sup>10</sup> It added that there needed to be a clear identification of the obligations and/or risks in any method of risk allocation in order to lessen the likelihood of disputes.

Despite the “No Dispute” Report’s recommendation to change construction contracts for the benefit of the parties,<sup>11</sup> at least two Australian standard contracts, AS 2124-1992 and AS 4000-1997, have no reference to mediation or other ADR processes, unless they are modified.

The Productivity Commission’s 2014 Report into Infrastructure said that “[p]lacing too much risk on contractors may be counterproductive if they are not well placed to manage that risk; or to price it, or bear it should the risk be realised. It can also promote an adversarial relationship between the client and constructor that can, in worst case situations, lead to costly litigation and disputes”.<sup>12</sup>

Gathering together the themes from the research suggests the following conflict causes:

### **Chart 1: Cause of conflict**

#### *A Pre-contract*

- (1) the competitive nature of the industry;
- (2) causes bids to be made with low profit margins;
- (3) without sufficient margin for risk;
- (4) in circumstances where this risk should not be borne by the contractor or subcontractor, because they are unable to control or manage the risk;
- (5) resulting in an unfair risk allocation.

#### *B During contract*

- (1) the low margin, coupled with the unfair risk allocation;
- (2) causes commercial pressure in any event;
- (3) in the event of the risk eventuating causes financial pressure, exacerbated by slow payments;
- (4) if the contract administration is carried out in a procedurally unfair manner, or if the contract has unfairly allocated that risk;
- (5) resulting in payment disputes coupled with strain on the contracting relationship.

However, in contrast, the Productivity Commission reported the potential gaming behaviour by Tier 1 contractors preventing government clients from being able “to enforce the risk allocation of a contract”. There was also evidence of major Australian contractors “underbidding work with opaque terms and conditions, and then hitting the client with as many variations as possible”.<sup>13</sup>

Arising therefore out of the substantive matter of unfair contract risk allocation, or unfair contract administration, or in contrast, contractor gaming behaviour, emerge a number of these issues that are relationship-based during the process of at least A4 and A5, and B4 and B5 in Chart 1 above.

The Co-operative Research Centre for Construction Innovation (CRC) had confirmed the “industry-wide weighted average value of avoidable cost that ends up in dispute of approximately 5.9% of contract price”.<sup>14</sup> The CRC’s “direct cost estimate of resolving disputes was between \$560 million and \$840 million per year, which together with the avoidable costs, amounted to a waste of \$7 billion per year”.<sup>15</sup> This was based on a construction industry turnover of \$120 billion dollars for the 2008/09 financial year.

<sup>9</sup> No Dispute Report, n 8, p 1.

<sup>10</sup> No Dispute Report, n 8 at [4.1].

<sup>11</sup> No Dispute Report, n 8 at [4.7].

<sup>12</sup> Productivity Commission, *Final Report into Public Infrastructure* (2014) p 485, <http://www.pc.gov.au/projects/inquiry/infrastructure/report>.

<sup>13</sup> Productivity Commission, n 12, p 485.

<sup>14</sup> CRC, *Guide to Leading Practice for Dispute Avoidance and Resolution* (2009), [http://www.construction-innovation.info/images/pdfs/DAR\\_Guide.pdf](http://www.construction-innovation.info/images/pdfs/DAR_Guide.pdf).

<sup>15</sup> CRC, n 14, pp 11-12.

These figures demonstrate significant waste as a result of disputes. Gerber and Ong outlined that the industry has adopted a whole variety of mechanisms to avoid or resolve these disputes, and mediation is just one of those mechanisms. Accordingly, it is suggested that any improvement to mediation for construction is likely to have a beneficial impact on the industry as a whole.

It was surprising that the CRC only devoted two pages to managing disputes in Chapter E. Its industry survey criticised alternative dispute resolution (ADR) processes and did not recommend traditional mediation, but rather “project mediation”.<sup>16</sup> Project mediators were not to be facilitative or transformative mediators, but genuine experts bringing their experience and professional judgement.<sup>17</sup>

This comprehensive research may be a signal that traditional mediation can be improved.

### Causes of dispute

The “No Dispute” Report canvassed a number of reasons for increased incidence of disputes including:

#### **Chart 2: Dispute causes**

- (1) quality of documents;
- (2) roles of the parties;
- (3) claims administration; and
- (4) disputes resolution.<sup>18</sup>

As Gerber and Ong stated, “conflicts are the underlying causes of disputes”.<sup>19</sup> There is a link between dispute causes listed above which have a genesis in those conflicts identified in Chart 1 above. For example, improper risk allocation (A4 in Chart 1) could result in disputes about the quality of the documents incorrectly allocating that risk (Chart 2 #1), and the roles of the parties (Chart 2#2), which, coupled with negative emotions and lack of trust, may become disputes.

### Culture and mistrust

Kannegeiter reported a commentator saying: “I often hear very senior people in construction companies saying ‘the clients screwed us down, we’ve got to screw the others down, we have no choice’”.<sup>20</sup> He also reported another commentator’s survey about barriers to productivity improvement being the industry culture and adversarial relationships.<sup>21</sup>

Kannegeiter concluded that generally the industry remained adversarial requiring a paradigm shift “to confront the barriers to productivity rather than each other, and develop trust”.<sup>22</sup>

Gerber and Ong added that the adversarial nature of the construction industry culture needed to change significantly to one of co-operation for the facilitative model to be effective.<sup>23</sup>

### Summary of the industry

Accordingly, this is an industry where the parties agree to:

- (1) allocate risk between them by contract;
- (2) administer the contract;
- (3) in support of a process of construction;
- (4) the constructor delivering the agreed item in time and the recipient paying for it.

If (1) and (2) are unfair (either way), or the item is late or of arguable quality, or payment is insufficient for the contractor or too much for the client, there is a likelihood for dispute.

<sup>16</sup> CRC, n 14, pp 28-29.

<sup>17</sup> CRC, n 14, p 45.

<sup>18</sup> No Dispute Report, n 8, pp 67, 100, 163, 175.

<sup>19</sup> Gerber and Ong, n 3, p 8.

<sup>20</sup> Tim Kannegeiter, “Confronting Productivity in Construction”, *Civil Engineers Australia* (October 2014) p 43.

<sup>21</sup> Kannegeiter, n 20, pp 45-46.

<sup>22</sup> Kannegeiter, n 20, p 46.

<sup>23</sup> Gerber and Ong, n 3, p 267.

## MEDIATION

### Introduction

Whilst mediation is a term that is in widespread use, it has not been easy to define.<sup>24</sup> In the writer's view, Moore has best defined mediation. He is a well-known mediator, and his 2014 text is the most up to date. He described it as:

A conflict resolution process in which a mutually acceptable third party, who has no authority to make binding decisions for disputants, intervenes in a conflict or dispute to assist involved parties to improve their relationships, enhance communications and use effective problem solving and negotiation procedures to reach voluntary and mutually acceptable understandings or agreements on contested issues.<sup>25</sup>

The reason why this definition is so attractive is that it captures the essence of what Riskin had modelled in his problem-definition continuum and his "role of mediator model",<sup>26</sup> identified below. Gerber and Ong had recognised Riskin as the person who had first defined the two common mediation styles: facilitative and evaluative.<sup>27</sup>

Boulle said that the lack of empirical data meant that "mediation remains a relatively unobserved and unobservable practice".<sup>28</sup> The National Alternative Dispute Resolution Advisory Council's (NADRAC) submissions confirmed "the need for the collection of data about ADR, because its potential for increasing productivity and the avoidance of waste was significant".<sup>29</sup> The privacy of mediation means the real life scenario in this article is a theoretical bundling of facts from many actual disputes.

Until the excellent work by Gerber and Ong in 2013, much of the research appears to have been conducted by overseas authors as part of their international review of the topic. Brooker and Wilkinson<sup>30</sup> considered mediation as part of a whole series of processes to avoid and resolve disputes in the construction industry.

Hopt and Steffek have researched mediation across various jurisdictions and confirmed that "[n]ext to the United States, Australia has become a global forerunner in mediation law and practice. Mediation is officially seen in Australia as a preferred, cheaper and quicker alternative to traditional court litigation".<sup>31</sup>

Accordingly, it is considered safe to apply the research from overseas to Australia, where there is currently (according to Boulle and NADRAC) a dearth of empirical research.

### Interest theory/mediation orientations

Cavanagh cited Boulle's interest theory, which stated that "[i]ssues form the basis of the mediation agenda and may focus on substantive, procedural and psychological problems".<sup>32</sup>

<sup>24</sup> Gerber and Ong, n 3, p 259 citing Lawrence Boulle, *Mediation: Principles, Process, Practice* (3rd ed, LexisNexis, 2011) p 13.

<sup>25</sup> Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 2014) p 8.

<sup>26</sup> Leonard Riskin, "Understanding Mediators' Orientations, Strategies and Techniques" (1996) 1 *Harvard Negotiation Law Review* 7.

<sup>27</sup> Gerber and Ong, n 3, p 260.

<sup>28</sup> Boulle, n 24, p 13.

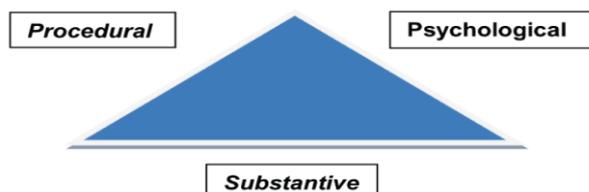
<sup>29</sup> NADRAC, *Submission to the Productivity Commission Enquiry into Access to Justice Arrangements* (November 2013), <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NadracPublicationsByDate.aspx#2013>.

<sup>30</sup> Penny Brooker and Suzanne Wilkinson, *Mediation in the Construction Industry: An International Review* (Spon/Taylor & Francis, 2010).

<sup>31</sup> Klaus J Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (OUP, 2013) Ch 17.

<sup>32</sup> Patrick Cavanagh, *Mediation Learning Guide LAWS7851S2 2014*, TC Bieme School of Law (2014) p 12.

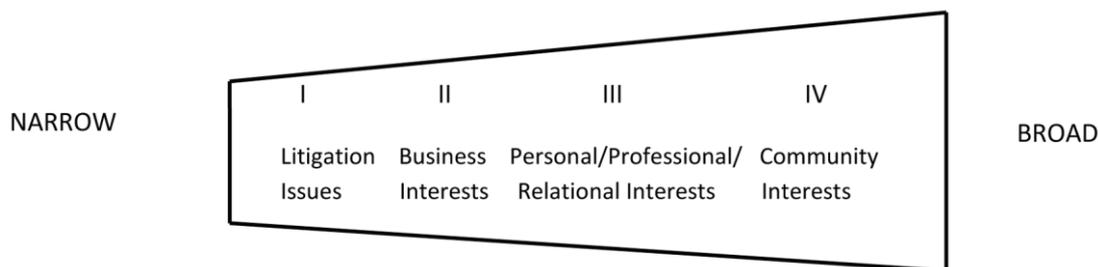
Figure 1: Boule's interest theory



- Moore considered the same three issues in a different context in which the mediator focuses on:
- improving parties' communication with each other and the negotiation/mediation *process* (Boule's procedural);
  - *relationships or psychological* issues which are the source of conflict; and
  - substance – where a barrier to resolving conflict is the lack, adequacy or acceptability of substantive information needed to fine-tune or develop options for understanding and agreement (Boule's substantive).<sup>33</sup>

This triangle depicted by Boule and confirmed by Moore will assist to test the hypothesis. However, Riskin's models (identified below) will also be used because of their profound simplicity and ease of use.

Figure 2: Problem-Definition Continuum



Riskin's four levels,<sup>34</sup> I through to IV, are mediation processes, so that as one moves from a narrow focus on the left to the broader focus on the right, there is a progressive increase in mediator involvement of exploration into wider interests.

Essentially, the diagram suggests that problems to be solved are narrowest at the left hand side, but the options available to solve those problems are also more limited. As one moves further to the right, although there are wider problems, there are also more opportunities to satisfy those problems, in combination with one another.

Riskin then explains that "his second continuum describes the strategies and techniques that the mediator employs to achieve her goal of helping the parties address and resolve the problems at issue".<sup>35</sup> He explains that at the "one end are strategies and techniques that evaluate issues important to the dispute ... [and at the other end] ... are beliefs and behaviours that facilitate the parties negotiation".<sup>36</sup>

He described an "evaluative mediator as someone who assumes that the participants want and need some guidance as to the appropriate grounds of settlement, and that she is qualified to give that

<sup>33</sup> Moore, n 25, pp 39-41 (emphasis added).

<sup>34</sup> Figure 2 taken from Riskin, n 26 at 22.

<sup>35</sup> Riskin, n 26 at 23.

<sup>36</sup> Riskin, n 26 at 23-24.

advice”. By contrast, Riskin says that “the facilitative mediator assumes their principal mission is to clarify and enhance communication between the parties in order to help them to decide what to do”.<sup>37</sup>

He said that mediators operate from a default or predominant orientation and he then superimposed his problem-definition continuum on a vertical facilitative-evaluative orientation continuum to develop a matrix of role of mediator as identified in Figure 3.<sup>38</sup>

**Figure 3: Role of Mediator**

		<b>EVALUATIVE</b>			
<b>PROBLEM DEFINITION NARROW</b>		<ul style="list-style-type: none"> <li>*Urges/pushes parties to accept narrow (position-based) settlement</li> <li>*Proposes narrow (position-based) agreement</li> <li>*Predicts court or other outcomes</li> <li>*Assesses the strengths/weaknesses of each side’s case</li> </ul>	<ul style="list-style-type: none"> <li>*Urges/pushes parties to accept broad (interest-based) settlement</li> <li>*Develops and proposes broad (interest-based) agreement</li> <li>*Predicts impact (on interest) of not settling</li> <li>*Educates self about parties’ interests</li> </ul>	<b>PROBLEM DEFINITION BROAD</b>	
		<ul style="list-style-type: none"> <li>*Helps parties evaluate proposals</li> <li>*Helps parties develop and exchange narrow (position-based) proposals.</li> <li>*Asks about consequences of not settling</li> <li>*Asks about any likely court or other outcomes</li> <li>*Asks about strengths and weaknesses of each side’s case</li> </ul>	<ul style="list-style-type: none"> <li>*Helps parties evaluate proposals</li> <li>*Helps parties develop an exchange broad (interest-based) proposals</li> <li>*Helps parties develop options that respond to interests</li> <li>*Helps parties understand interests</li> </ul>		
		<b>FACILITATIVE</b>			

Riskin’s model defines not only the differences between facilitative and evaluative mediation, but also captures four levels of mediation involvement within these two models, which are the principal focus of this article. His basic principles, developed in 1996, remain equally as prevalent today because there is a lack of clarity about the model used in construction disputes.

For example, as identified below, Gerber and Ong’s research supported the use of settlement mediation in construction disputes,<sup>39</sup> and Brooker suggested Australia uses facilitative, and that her home jurisdiction, the UK, uses evaluative mediation. Boulle suggested that evaluative mediation is the predominant model. Accordingly, to theoretically test the appropriate mediation model for the construction industry, the writer has returned to these basic principles and used Riskin together with Boulle and Moore to assist in analysis.

Before further considering other models of mediation, the reader must appreciate some of the constraints imposed on mediator conduct in Australia.

<sup>37</sup> Riskin, n 26 at 24.

<sup>38</sup> Figure 3 taken from Riskin, n 26 at 35.

<sup>39</sup> Gerber and Ong, n 3, p 267.

## NMAS preferred model

The National Mediator Accreditation Standards (NMAS) are voluntary standards and provide that “[t]he mediator has no advisory or determinative role in regard to the content of the matter being mediated or its outcome”.<sup>40</sup> However, “[i]f a mediator, upon request, uses a ‘blended process’ model, such as evaluative mediation or conciliation, this process must be the subject of clear consent normally through a mediation or similar agreement”.<sup>41</sup>

In order to provide blended mediation, NMAS approval requires the mediator provide evidence of continuing professional registration/membership, appropriate qualifications and experience. These requirements, the writer suggests, place a sensible restriction on the temptation to provide evaluative mediation that should not be ignored by Australian mediators.

## Boulle’s four models

Boulle identified four conceptual models he described as “[w]ays of conceptualising the different tendencies encountered in practice”. He identified that the biggest disconnection within the models was between the facilitative and evaluative approaches<sup>42</sup> and this article considers these two models in the most detail.

### **Settlement**

Boulle says this is also known as compromise mediation carried out by high status people such as barristers who do not have to have necessary expertise in the process of mediation.

The dispute is defined in terms of legal positions based on the parties self perception and self identification of the problems, and there is limited procedural intervention by the mediator, leaving the parties to positional bargaining. This is similar to the Riskin’s narrow evaluative mediation at Level I.

### **Facilitative**

Boulle describes this as interest-based, problem-solving mediation, where the main objective is to avoid positions, and to negotiate terms of parties’ personal and commercial needs and interests instead of legal rights and duties. This is similar to Riskin’s broad facilitative mediator, to at least at Level III.

### **Transformative**

Boulle says this is also known as therapeutic mediation which deals with the underlying causes of parties’ problems with a view to improving their relationship, through recognition and empowerment, and the focus is on resolution of the relationship rather than just the settlement of the dispute.

Del Ceno suggests that the construction mediation process should be measured not by its outcome, but rather by its process to effect industry change and individual development.<sup>43</sup> This is transformative, and given the recent CRC criticisms of construction ADR, he may well have a point; however, that consideration is for another day.

### **Evaluative**

Boulle describes this as advisory, managerial or normative mediation with the objective to reach a settlement, according to the rights and entitlements of the parties within an anticipated range of court, tribunal or industry outcomes.

The mediators need to have expertise in the substantive areas of the dispute with no necessary qualifications in mediation techniques. There is high intervention by the mediator (quasi-arbitral) with less party control over the outcome.<sup>44</sup> This falls within a continuum of Riskin’s narrow to broad evaluative mediation, which can vary from Level I possibly only to Level III.

<sup>40</sup> Mediator Standards Board, *National Mediator Accreditation Standards: Practice Standards* (March 2012), Practice Standard No 10, <http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf>.

<sup>41</sup> Mediator Standards Board, n 40, Practice Standard 10(5)

<sup>42</sup> Boulle, n 24, pp 43-45.

<sup>43</sup> Julian Sidoli Del Ceno, “Mediation and the Judiciary: Negotiation is Not Enough” (2012) 21 *Nottingham Law Journal* 146 at 148.

<sup>44</sup> Boulle, n 24, pp 44-45.

## Moore's characterisation of "mediation schools"

Moore categorises mediation practice into three schools:

- procedural, followed by process-focused schools;
- relationship, followed by relationship-focused schools; and
- substantive, followed by substantively focused schools.<sup>45</sup>

This echoes Boule's triangle in Figure 1 above.

Moore states that facilitative mediation falls within the process-focused school where the mediator focuses on process but not to the exclusion of improvement of parties' relationships, but rarely providing substantive ideas for agreement. This means Boule's triangle has a narrow base.

Moore claims that he is generally a process-oriented, facilitative mediator, but if required can be procedurally directive.

His characterisation of transformative mediation falls within the relationship-focused school, where the primary focus is on supporting empowerment and recognition shifts of the parties.

His characterisation of evaluative mediation falls within the substantively focused school which he states is a specific kind of advisory mediation that focuses on an assessment of legal issues and legal rights of the parties. The base of Boule's triangle would be very wide.

He says that the proponents of this school state that, without intervention by the mediator, the parties would not understand their potential "best alternatives to a negotiated agreement" (BATNAs). He explains that the parties may request, or the mediator may offer, substantive information deemed useful for promoting an agreement or settlement which may include the legal merits and strengths and weaknesses of each party's case.<sup>46</sup>

Moore describes the forums and processes generally preferred by an evaluative mediator as:

- limited joint sessions;
- extensive separate private meetings; and
- shuttling between them.<sup>47</sup>

Moore further amplified the evaluative mediator's approach of preventing parties from providing tangible proposals at an early meeting to prevent them publicly locking into untenable positions, thereby unduly antagonising each other or escalating the conflicts. He added that, depending on the strengths and weaknesses of the parties' cases and how reasonable or unreasonable their views, the mediator should not directly ask questions or raise doubts about the merits of disputants' cases in front of all concerned, but rather meet extensively in private sessions with each party.

Before considering construction industry mediation, the writer suggests that future research should consider Moore's ideas together with the Boule triangle and model to ascertain whether the area of the triangle is a constant in mediation. Differing mediators would have differing lengths to the sides of the triangle, depending on their preferences, which automatically shorten the other legs, but the area would remain the same.

## MEDIATION IN THE CONSTRUCTION INDUSTRY

Boule said that, in the 1990s, evaluative mediation was seen as preferable to arbitration because of the latter's expense, delays and legalistic nature.<sup>48</sup>

Gerber and Ong's excellent 2013 text, however, devoted an entire chapter to mediation in the construction industry in Australia, and their conclusions suggested that the most appropriate model for

<sup>45</sup> Moore, n 25, pp 46-59.

<sup>46</sup> Moore, n 25, p 56.

<sup>47</sup> Moore, n 25, pp 56-57.

<sup>48</sup> Boule, n 24, p 376.

large, complex construction disputes was the settlement model, allowing for the mediator to intervene to express opinions on the merits.<sup>49</sup> The writer, however, considers that an expression of opinion on merits connotes the use of the evaluative model.

King and Gould<sup>50</sup> carried out a comprehensive review of dispute resolution in the UK construction industry, which included quantitative and qualitative research of various practices, including mediation. The interesting finding of this research was that negotiation was the dominant dispute resolution procedure favoured by the participants. Mediation then followed, and the authors suggest that it is now an indispensable tool in construction disputes. However, Brooker's earlier research in the UK indicated evaluative mediation as preferred.<sup>51</sup>

Brooker and Wilkinson's chapter on construction mediation in Australia identified that the literature on ADR in Australia confirmed that there was confusion as to the distinction between mediation and conciliation. They stated that the facilitative and evaluative models are commonly used, but also cited Sourdin who nominated the facilitative model as the most popular.<sup>52</sup>

Accordingly, Australia and the UK as two common law countries appear to use different models.

### Market research of users of mediation

The "No Dispute" Report carried out extensive consultation across all industry stakeholders and developed recommendations for significant improvement in what was then a dispute ridden industry. It identified mediation as:

A process which rather than expert opinion being given by an assessor, a process of discussion occurs collectively with both disputants and in caucus with each disputant. In this confidential environment the mediator may make suggestions which are not binding in any way. The objective is to establish grounds for a resolution which is reached by the disputants themselves without coercion by the mediator.<sup>53</sup>

It referred to the mediator, being:

- the catalyst to discussions;
- a questioner who raised doubts in the parties' minds;
- who attempted to loosen unjustified rigid positions; in order
- that the real issues were considered by the parties;
- with an emphasis on problem-solving.<sup>54</sup>

As to the characteristics of a mediator, the Report stated that "[m]ediators in construction industry disputes should possess a sound knowledge of the industry, with the ability to direct the focus of the disputants into certain and particular regions of dispute/claim".<sup>55</sup> It added: "The object of mediation is not one of finding a winner or loser, but rather that of bringing the parties together to reach settlement which each can accept."<sup>56</sup>

The writer considers that the "No Dispute" mediator is facilitative and the process should be facilitative, particularly because it specifies no coercion by the mediator. At least this recommendation had been taken on board by the industry in that the NMAS standards require facilitative mediation.

This is in contrast to the empirical research carried out by the American Bar Association (ABA)<sup>57</sup> eight years later in 2008, which identified a majority expectation of evaluative mediation by the

<sup>49</sup> Gerber and Ong, n 3, p 267.

<sup>50</sup> C King and N Gould, "The Mediation of Construction Disputes: Recent Research" (2010) 163(1) *Proceedings of the ICE – Management, Procurement and Law* 29.

<sup>51</sup> Penny Brooker, "An Investigation of Evaluative and Facilitative Approaches to Construction Mediation" (2007) 25(3/4) *Structural Survey* 220 at 223.

<sup>52</sup> Brooker and Wilkinson, n 30, pp 32-33.

<sup>53</sup> No Dispute Report, n 8 at [4.28].

<sup>54</sup> No Dispute Report, n 8 at [4.29].

<sup>55</sup> No Dispute Report, n 8 at [4.30].

<sup>56</sup> No Dispute Report, n 8 at [4.30].

<sup>57</sup> ABA, *ABA Section of Dispute Resolution: Task Force on Improving Mediation Quality* (2008) p 46.

parties. The outcome was that 80% of participants believed that some “analytical input” by a mediator to be appropriate. About 70% said that a mediator “giving opinions” was very important or essential. Furthermore, 95% thought that in the least half or more of their cases, a mediator should give an analysis of case, including the strengths and weaknesses. Sixty per cent expected a prediction about likely court results. In the writer’s view, this falls squarely within the definition of evaluative mediation.

Fisher suggested that the result would be similar in Australia.<sup>58</sup> However, the survey also suggested that that nearly half of the users indicated that it was not always appropriate for a mediator to give assessments of strengths and weaknesses, nor was it always appropriate to recommend a specific settlement. The ABA quite sensibly suggested that the reservation on these issues should “give pause to mediators who routinely offer such analysis and opinion”.<sup>59</sup>

In the ABA’s recommendations about further investigation into analytical techniques, it recommended an examination of how mediators could offer various analytical techniques in civil cases where all parties are represented by counsel, who prefer an evaluative mediation. It did recognise the question as to whether evaluative mediation was an appropriate style, and it said that the goal of the study was not to resolve that controversy, but rather to make recommendations about analytical styles that were consistent with the mediation standards of practice.<sup>60</sup>

It is a pity that the ABA did not “grasp the nettle” about this important issue, and the writer decided that this should form the basis to construct a hypothesis for the best mediation process in construction matters where disputes were endemic, particularly because of the dissonance between service delivery and market expectations as discussed below.

Stipanowich<sup>61</sup> found from his research conducted in 1994 and his analysis of an earlier 1991 US study that in mediation in construction in the US, 77% of the parties agreed with the statement that “[p]arties should authorise mediators to convey to parties, their personal opinions regarding the issues in dispute”.

It appears therefore that, in the US construction industry, evaluative mediation is the expectation from the market, which may or may not correlate with mediation service delivery in the US. However, application of this research to Australia demonstrates dissonance, as discussed below.

## HYPOTHETICAL MEDIATION MODEL

The article has not found Australia-specific research data about mediation styles. The standard is the facilitative model with the blended exception in special circumstances. However, market research about civil disputes and those in the construction industry in the US suggests evaluation is expected. Furthermore, Gerber and Ong have commented that evaluative mediation has become increasingly popular,<sup>62</sup> and the reference to Brooker’s 2007 qualitative survey suggests a preference for it.

Accordingly, this dissonance between market expectations and outcomes requires testing to check if evaluation mediation is the preferred model.

## A practicing evaluative mediator in the US

A practicing mediator in the US, Joy Noonan, cited in Hollander,<sup>63</sup> said that in court-appointed mediations she may the start off as a facilitative mediator but knows that she has been hired by the parties to be gently evaluative, once they get out of the main room. She describes evaluative mediation as focusing on the merits of the case which is more often used in court-ordered mediation, in which

<sup>58</sup> Robert Fisher, “When Should Mediators Bite Their Tongues?” (2011) April 2011 *The Arbitrator and Mediator* 14.

<sup>59</sup> ABA, n 56, p 14.

<sup>60</sup> ABA, n 56, p 19.

<sup>61</sup> Stipanowich, n 2, p 164.

<sup>62</sup> Gerber and Ong, n 3, p 265.

<sup>63</sup> John Hollander, *Mediation for Civil Litigators: Issues and Solutions* (Irwin Law, 2013).

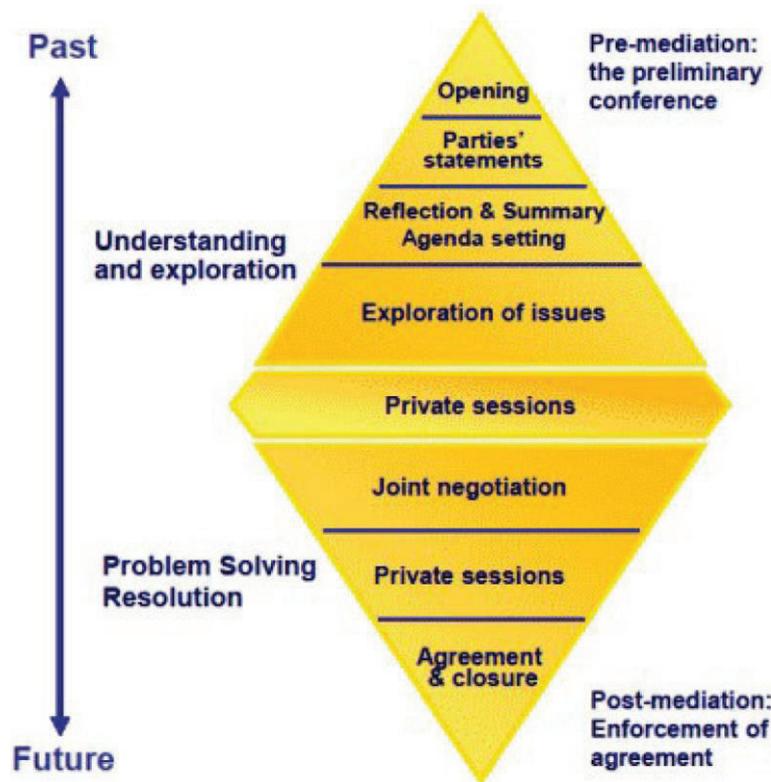
the mediator keeps the parties mostly separate, shuttling back and forth one proposal at a time, offering advice based on the merits of the case or defence. In her experience, it could be worthwhile starting off in a facilitative manner when everyone is together but then move to evaluative once the parties are in separate rooms. Given the often highly emotional states of parties, sometimes it may be better if the parties did not see each other at all and moved straight into separate rooms.

This approach accords with Moore's evaluative model described above.

### What happens in mediation?

The training for NMAS accreditation generally uses the LEADR model – see Figure 4.<sup>64</sup> The diagram will be used in the hypothetical testing, which should progressively explain its activities. The reason why this diagram is provided to the reader is the ease with which the process of mediation can be imagined to those unfamiliar with mediation.

Figure 4: LEADR Model



### EXAMPLE TO TEST THE HYPOTHESIS

The writer is a professional civil engineer and solicitor in private practice and has mediated construction disputes and represented clients in mediations. He has also decided construction disputes as an adjudicator. Disclosure about actual mediation experiences cannot occur except in very broad detail due to the confidential nature of mediation.

Accordingly, the writer has combined issues surrounding personal experiences of mediation, negotiations and adjudications to develop hypothetical “real-life” facts to test the hypothesis. These facts are listed in detail in the Appendix, so that they are able to be discovered progressively and be used when reviewing the analysis of the evaluative mediation.

<sup>64</sup> Taken from LEADR, n 1.

Riskin said that “most mediators – whether they know it or not – generally conduct mediations with a presumptive or predominant orientation”.<sup>65</sup>

### Case study: Hypothetical evaluative mediation

The mediator understands the LEADR mediation model, and is also a nationally accredited mediator. She has the requisite qualifications to carry out blended mediation under Mediation Accreditation Standard 5(5). She has Riskin’s default orientation toward evaluative mediation.

She has previously spoken to each party’s representatives to get an appreciation of their positions and has received each party’s statement of position. In accordance with this standard, she has requested and obtained the consent of the parties to carry out evaluative mediation. The mediation is to commence and she has two options, both of which are explored below.

#### Option 1

She has only one day allocated for the mediation. She considers that if she follows the process of understanding and exploration, comprising the top half of the mediation triangle (see Figure 4), she would be unable to conclude the mediation in the time-frame because of the complexity of the dispute. This follows Moore’s evaluative model, or Boulle’s quasi arbitral, or Riskin’s narrow evaluative model.

Her reasons are that, in the event that the normal facilitative model does not get the parties far enough along the road to a negotiated agreement, at least one of the parties may not have time to consider and accept her evaluation in the short time frame, so settlement is unlikely to be achieved. This is demonstrated by the bottom half of the LEADR triangle in Figure 4.

Although she will say to the parties that she is disinterested in the outcome, such that it does not matter whether they settle or not, this is a court-appointed mediation where high settlement rates are expected. Furthermore, she is a busy practitioner, so long mediations cut into her busy practice.

She has the agreement of the parties to carry out evaluative mediation. However, she wants to follow the LEADR mediation process as far as she can. Therefore, she gives her opening statement about her being disinterested in the outcome and that the objective is for the parties to reach agreement themselves. She explains the process that may occur, but adds that, she may in private caucus provide her evaluation of the respective legal rights of the parties. After this she allows the parties to provide their respective statements.

#### Opening statements

The *developer* says that the builder:

- has been paid all that it is entitled to;
- failed to provide the requisite notices in accordance with the contract;
- was responsible for the cost overrun; and
- had too low a tender price for the risk that it undertook;

and the developer says it will continue to litigation, if required.

The *builder* says that:

- the developer is estopped from relying upon the time bars under the contract;
- the developer has failed to honour its promise to pay the builder for its delay and for the acceleration costs;
- it will be forced to continue with the litigation, if required; and
- it owes no duty of care to the body corporate owners.

The *body corporate* for the owners says that:

- it is innocent in these proceedings and is entitled to compensation;
- on its advice, the builder arguably owes a duty of care to it; and
- collectively, it has the capacity to continue with the litigation.

These are the Level I Riskin litigation issues.

<sup>65</sup> Riskin, n 26, p 35.

### *Mediator's reframing*

The mediator faithfully follows the process and reflects on each party's position and develops an agenda, with the assistance of the parties, that essentially provides the following issues in the agenda:

- (1) How can entitlement for delays and acceleration be fairly dealt with?
- (2) Who is responsible for compensating the owners for the cracking in the building?
- (3) What will the parties do if the matter does not settle today?

### *Exploration of issues*

Significant time has now been expended to reach this position, and the builder has vocally expressed his dismay about his lack of trust in the developer. The mediator decides to go into caucus because of the builder's emotional state and provide her evaluative opinion about each party's legal position, and carry out the shuttle described by Moore.

This prevents her from determining the underlying interests of the parties that correspond to Riskin's Levels on his continuum, which may have allowed a settlement to occur, including: the business interests of the developer's ability to pay, either to settle or to continue through to litigation; the possibility of the parties' future co-operation, in view of the fact that the builder is interested in more of this type of work and that the developer was ultimately happy with the builder's work; and the developer's membership of the body corporate through to the personal and relational interests of common church membership where forgiveness is encouraged, to possibly the right hand continuum of community interests because of the community outreach of the H&F church, which may have allowed a settlement to occur.

Furthermore, she is not aware of the very recent High Court decision.

### *Private session*

Her advice to the developer is that in all of the circumstances it is likely to be estopped from relying upon the strict terms of the contract with a time bar, and that it is likely to be liable to compensate the builder.

Her advice to the builder is that it is likely to succeed in its claim for delays and acceleration, after the incurring significant cost in the litigation, but that the outcome, of course, is not certain. In relation to liability to the body corporate, she says that this is a risk that needs to be factored into its deliberations, because the law is not settled.

Her advice to the body corporate is that it may succeed against the builder, for a breach of duty of care; however, the outcome is by no means certain.

### *The parties' response*

The developer may choose to ignore the advice of the mediator because it has the financial means to continue with the litigation. Its own legal advice is that the time bars, whilst not impregnable, are a significant impediment to the builder's claim. Furthermore, the onus is on the builder to demonstrate the estoppel, and the builder's contract administration was poor.

The builder is relatively pleased with the outcome of the evaluation, but has concerns about its potential exposure to the body corporate.

The body corporate is also relatively pleased with the outcome of the evaluation, because it may be able to pressure the builder into a reasonable settlement.

However, the developer is not prepared to make any concessions in the joint negotiation and advises the mediator in private session that it is prepared to risk an adverse outcome in litigation. Despite the mediator's efforts to convince the developer of its "weak" position, the developer will not budge and the mediation does not settle.

None of the underlying interests of the parties have been gleaned, so the positional bargaining of the parties limited consideration of any other possibilities. The positional bargaining fails.

## **Option 2**

The mediator decides to only use evaluative mediation if facilitative mediation is not progressing well, but will wait until the private sessions to change her strategy with the parties' consent. She is trying the break away from her Riskin default orientation, and not follow Moore's and Boulle's evaluative model.

### *Opening statements, reframing and agenda setting*

As in Option 1.

### *Exploration of issues*

Now there is an exploration of issues which unearths some interesting possibilities of the developer needing a builder for further work.

The builder still has significant relationship problems, maintaining it was badly treated by the developer, which it is having difficulty overcoming, so it cannot see further work with the developer as an option due to a lack of trust. It still has no sign that the developer is prepared to pay it any money.

The builder, however, concedes that if there is money from the developer, it may be able to contribute some compensation to the body corporate, in order to settle both matters.

The body corporate sees an advantage in co-operating with the builder in order to obtain evidence against the designer, and possibly the developer, so it is prepared to consider reducing its claim.

### *Private sessions*

The mediator decides to speak to the body corporate first, because it has the least issues to deal with, and has indicated a willingness to cooperate with the builder. She unearths all the underlying interests of the body corporate (including the Chairman's membership of the H&F church), and obtains an agreement in principle from it to co-operate with the builder to further its own interests in litigation against the developer and the designers. In return, the body corporate will reduce its claim against the builder.

She then speaks to the builder and unearths most of its underlying issues. She has some considerable difficulty in the builder developing realistic options (because of the builders mistrust of the developer) to carry out further work for the developer in future projects. The builder's CEO lack of forgiveness means that she does not explore his personal religious affiliation. In order to even consider working again for the developer, he says that at least the acceleration money must be paid by the developer.

The last private session is with the developer who had dangled the carrot of future work for the builder. The mediator cannot go down that road any further, because she knows that the builder has a significant relationship problem with the developer (and she cannot disclose anything about the caucus discussion). She obtains all the underlying issues from the developer, apart from his membership of the H&F church, due to lack of time and her focus on bargaining. She explores the possibility of some payment by the developer (for the acceleration), but the developer is not prepared to budge because it was the last to be caucused and its CEO is getting tired. He senses the mediator's frustration, but his advisors remind him of its strong financial position and its ability to defend that in litigation.

### *To overcome the impasse*

She then reminds the parties of their consent to her being evaluative, and she provides the same advice identified previously in caucus: first, to the developer to reduce its expectations, then to the body corporate because they are the most flexible, and lastly to the builder.

### *Parties' reaction*

The developer considers that the mediator is biased by favouring the builder, particularly, since it had dangled the carrot of further work, and all the mediator was asking from it was an offer of money. It maintains its position of being prepared to litigate.

The body corporate is not happy that the mediator has not been able to convince the builder to pay some money, and considers the evaluation must have favoured the developer, because she had spent so much time with the developer.

The builder receives its legal advice about its duty of care following the recent High Court decision that it is not liable to the body corporate, so it is unhappy with the evaluation. The CEO believed it was an attempt to get it to settle with the body corporate, whatever the outcome with the developer. In frustration, he advises the mediator about the High Court case.

The mediator has a dilemma, because her evaluation on this point was wrong and has been conveyed to the body corporate, and she can hardly go back to the body corporate with a different evaluation. She would either be considered to be incompetent, or having been influenced by the builder.

Under this option, the mediation again does not achieve a settlement, and because of the further involvement of the mediator in exploring underlying interests, there is the potential for a lack of trust in either the process or in the mediator.

## CONCLUSION

Lack of empirical data about construction mediation in Australia prevents the most suitable model from being implemented for more dispute resolution efficiency. The “No Dispute” Report had suggested the facilitative model 24 years ago, but Boule claims the evaluative mediation model was dominant, at least in the 1990s. Other commentators (Brooker citing Sourdin) suggest that facilitative mediation is the standard most practised in Australia.

Five years ago, the CRC did not recommend traditional mediation, but it is unclear whether facilitative or evaluative mediation was not favoured. Recent UK research championed negotiation. The market research in the US indicated a preference for evaluative mediation. This was the hypothesis that was adopted and then tested.

A distillation of the various models of mediation was made, with particular assistance from Riskin’s models, which allowed hypothetical testing of an evaluative mediation under two scenarios to take place. Under neither scenario did the mediation settle because the underlying interests of the parties were not fully discovered. This suggests that evaluative mediation is not to be preferred.

The writer suggests that further research take place regarding Del Ceno’s suggestion to measure mediation’s transformative effects on participants, as this may assist in changing the culture of the industry and its participants over time. In addition, research should be conducted into whether the application of Boule’s triangle be considered of a fixed area; such that depending on the orientation of the mediator, or as Moore says, the school to whom they belong, there is a recognition that if one or two sides of the triangle are favoured, then in order to keep the same area, the other side would have to shorten. This could allow the development of a useful mathematical model, which could then be quantitatively tested. The writer echoes Boule and NADRAC by stating that empirical research on mediation is needed.

## APPENDIX: CASE STUDY

### The facts

A builder manages the construction of a unit development which is designed by architects and engineers on behalf of a rich developer. The design (mainly by the architect) is inadequate, causing delays to the builder's construction, which has the effect of potentially moving the end date for completion. This would be catastrophic for the developer's sale contracts. The contract is not particularly clear, but it points to the builder being entitled to delay costs.

Out of a genuine desire to assist the developer, but also to reduce further delays to which it claims entitlement that have not yet been reimbursed, the builder assists the professionals in having the design improved. The developer also improves the design further with more expensive fittings and requiring a different layout very late in the construction process. The builder also accelerates the work to meet the developer's original completion date. This action is taken because of pressure from the developer, who promises the builder it would be compensated for the additional costs.

The builder has not followed the formal notification procedures under the contract, although it has kept all parties advised in writing about the delays and costs for which it has requested payment. It also trusted that the developer would compensate it for its acceleration costs.

Once the builder reaches practical completion, the developer sells all the units (but keeps a few for itself), and does not compensate the builder, and a dispute between the builder and developer has formally been commenced.

In addition, the constructed foundations are inadequate because of defective design, through no fault of the builder, so that one year after completion, there are significant cosmetic cracks, which are unsightly but not unsafe.

The rich developer has other developments on the horizon, and the builder is still building but it has lost millions in this development. The builder is also being sued by the body corporate of the unit owners for the cosmetic cracking. The body corporate has not yet sued the engineer who designed the foundations.

Pleadings on both matters are closed and disclosure is completed. The Supreme Court of Queensland orders that both disputes be mediated and a senior barrister is appointed as mediator. She conducts an evaluative mediation.

### The law

The High Court of Australia has decided very recently that a builder does not owe a duty of care to owners of a strata title building to not cause them economic loss: *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36. This point of law was previously unclear and the subject of much debate.

There are time bars to the builder's claims for delay costs, and the acceleration was not ordered by the developer, as it merely acquiesced to the builder doing so. However, the builder has pleaded that the developer is estopped from relying on the time bars.

The duty of care of a builder to a body corporate was not conclusively settled until the High Court's judgement.

### The underlying interests of the parties

The developer:

- is rich and has been advised that the builder has been adequately compensated;
- has other developments in the pipeline, and would be prepared to consider the builder for them;
- has litigated previously, so is not concerned about the process or any adverse finding;
- trusts some of the builder's employees, and understands that they feel they are entitled to claim, but has been advised by its own employees that the builder is at fault, and delayed the project and had too low a price to begin with;

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Is evaluative mediation the preferred model for construction law disputes?

- thinks that the all the legal costs that it has incurred, and may yet incur, is merely the cost of doing business;
- has the money to pay the builder, but does not want to send a message to the industry that it will give into builder's demands;
- has the capacity to sue the designers, but wants to use them on his next projects, because they have good ideas.
- he is a member of a church that strongly suggests that harmony and forgiveness are paramount, even in business. This is particularly encouraged when disputes arise where other church members are involved. This evangelical church seeks to reach out into the community as well (the H&F Church).

The builder:

- is genuinely aggrieved about the breach of trust, after all it has done for the developer;
- has lost money, but not as much as it has claimed;
- has been advised by its lawyers that it would have some difficulty in suing the designers, whereas the body corporate may have a better chance against them;
- has learned a lot about this sort of development, which it has never previously been exposed to, and is now far more "street smart";
- acknowledges that it could have administered the contract better;
- would like to do further work of this type;
- cannot afford to pay damages to the body corporate, unless money is forthcoming from the developer; and
- thinks it could have pushed the geotechnical engineer to improve the foundation design because it appeared a bit "skinny", but there was no time to do so because of all the other design faults of the architect.
- He is also a member of the H&F Church, but of a different congregation.

The body corporate:

- believes it is the innocent party in the whole process;
- could issue a levy for rectification costs, but would prefer to find someone else to pay for the loss;
- could commence proceedings against the developer, but has the developer as a member of the body corporate, who is privy to all deliberations of the body corporate; and
- has not realistically considered the possibility of suing the designers.
- has an influential Chairman of the Body Corporate who is present at the mediation who is also a member of yet another H&F church congregation.