An analysis of dispute review boards and settlement mediation as used in the Australian construction industry

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If there is a silver lining to the adversarial, dispute-prone nature of the building and construction industry, it can be found in the concomitant rise of innovative dispute resolution mechanisms. Time, cost and relationship concerns have meant that the formal adversarial system holds little appeal for disputing parties. As these alternative forms of dispute avoidance/resolution have matured in Australia over the last 20 years, attention has turned to the key characteristics of each process and their suitability to the building and construction industry. This article considers the role of dispute review boards (DRBs) and mediation as two alternative methods for avoiding/resolving disputes in the construction industry. Criteria are established for evaluating the efficacy of these procedures and their sensitivity to the needs of construction industry disputants. The ultimate conclusion reached is that DRBs represent a powerful, yet underutilised dispute resolution tool in Australia, and possess many industry-specific advantages that more traditional forms of alternative dispute resolution (particularly mediation) do not provide.

INTRODUCTION

The construction industry in Australia, and internationally, has the unenviable reputation of being adversarial and dispute prone. This reputation is attributable in part to the scope, scale, duration and complexity of construction projects, which can lead to differences of opinion on complex technical, factual and legal issues. If not resolved quickly, these differences of opinion can lead to expensive and drawn out disputes .[1] In addition to the practical elements of a construction project which may lead to disputes arising, the environment within which the industry operates exacerbates these tensions. Environmental factors include the highly competitive nature of the industry, low profit margins and commercial pressures when progress payments are late,[2] unfair risk allocation, perceived bias of the superintendent, and perceived lack of procedural fairness in contract administration.[3] This combination of technical, factual and legal complexity within construction projects, when paired with the broader challenges of the construction industry environment, creates a climate that is conducive to adversarial conduct.[4]

One positive consequence of the construction industry's dispute culture is the proliferation of dispute resolution mechanisms available to parties. The majority of major standard construction contracts in Australia prescribe the use of one or more processes for the resolution of disputes relating to the performance of the construction contract. These formal and informal processes range from

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[1] Peck G and Dalland P, "The Benefits of Dispute Resolution Boards for Issue Management of Medium to Large Construction Projects" (2007) 26(1) *Arbitrator and Mediator* 13 at 13.

[2] Royal Commission into the Building and Construction Industry, *Overview of Private Meetings Held between the Honourable TRH Cole RFD QC and Participants in the Building and Construction Industry* (2001) p 3.

[3] Gerber P and Ong B, "DAPs: When Will Australia Jump On Board?" (2011) 27 BCL 4 at 5-6.

[4] McGeorge D and London K, *Dispute Avoidance and Resolution*, Research Project No 2007-006-EP, Cooperative Research Centre for Construction Innovation (25 December 2007) p 8.

those aimed at *avoiding* the existence of disputes, to those which attempt to *resolve* disputes in a timely and cost-effective manner without recourse to litigation.

Two dispute resolution processes which are used in the construction industry are dispute review boards (DRBs) and mediation. This article will establish a framework for evaluating the suitability of each process to the resolution of disputes in construction matters. Defining a typical DRB or mediation process with precision poses some difficulty because each process can be procedurally adapted to suit the needs of the parties, or the circumstances of a particular case. For this reason (and for the purpose of comparative analysis), this article will rely upon a model DRB process and a model mediation process that might typically be recognised and used in building and construction disputes. The ultimate conclusion reached in this article is that DRBs represent a powerful, yet underutilised dispute resolution tool in Australia, and they possess many industry-specific advantages that more traditional forms of alternative dispute resolution (ADR) (particularly mediation) do not provide.

CRITERIA FOR SUITABLE DISPUTE RESOLUTION MECHANISMS FOR CONSTRUCTION DISPUTES

Dispute resolution mechanisms are used in construction disputes as a way to avoid or minimise the cost, time and relationship problems that arise from disagreement. It is reported that in Australia, almost 10% of construction projects incur legal costs of between 8% and 10% of the total project cost, half of which is associated with disputes.[5] In some instances this figure is close to, or more than, a contractor's expected profit margin on a project.

Construction disputes may be particularly costly to resolve by conventional methods (primarily arbitration and litigation) for several reasons. First, in a large construction project, the volume of documentation relevant to a dispute can be significant, given the contractual requirements for provision of notices between the parties in the event of certain circumstances arising, and the extensive use of electronic communications between site personnel, contract administrators and management. The cost of initiating and prosecuting a dispute which involves the consideration of large volumes of evidence can be significant. Secondly, it is not uncommon for expert evidence to be required to assist in the resolution of disputes. This is particularly the case where the dispute concerns complicated programming analyses or the adequacy of design or construction. The cost of engaging experts to provide opinions to support a party's position in a dispute can be a significant addition to the legal costs incurred in resolving the dispute. Accordingly, the ability of dispute resolution mechanisms to minimise the cost and time impact of disputes is fundamental to their suitability to construction disputes.

Given the disparate range of matters which may be the subject of a construction dispute, flexibility in the process adopted is important, so that it may be tailored to best suit the needs of the parties and the project. That the dispute resolution practitioner is suitably empowered to manage the process, and is appropriately qualified, is also fundamental to achieving this purpose. The certainty of outcome from the process is a further matter which bears on the suitability of the process in the context of construction disputes.

For the purposes of this article, there are five criteria which will be applied to consider the suitability of DRBs and mediation as dispute resolution mechanisms for construction disputes.

(1) Cost-effectiveness, in the sense of proportionality of cost to the matters in dispute and the degree to which the process may contribute to tangible and intangible cost benefits to the parties. This criterion is important in the resolution of construction disputes given the traditionally low profit margins enjoyed by construction industry participants and increasingly higher holding costs experienced by principals.

(2) Timing of the process. Prompt resolution is particularly important where: (a) the resolution is required to ensure the completion of the works; (b) the dispute impacts third parties (such as end-users or other contracted parties); and (c) the dispute impacts the ability of either party to continue to perform their contractual obligations.

[5] Peck and Dalland, n 1 at 22.

(3) Flexibility of process. As the full range of disputes which may arise on a project cannot be foreseen at the commencement of a project, a dispute resolution mechanism ought to allow flexibility of process to enable adaptation of the process to meet the needs of the parties in the resolution of the dispute.

(4) The role and expertise of the dispute resolution practitioner. As there is high potential for complex technical, factual and legal issues to be involved in a construction dispute, the resolution may be assisted by the dispute resolution practitioner possessing relevant expertise and having the ability to utilise that expertise to assist the conduct of the process.

(5) Certainty and enforceability of outcome, which is often an important commercial consideration for the disputing parties.

DISPUTE RESOLUTION MECHANISMS UNDER EXAMINATION

Dispute review boards

A DRB[6] is a body established under a construction contract to assist in the avoidance and resolution of issues and disputes that arise out of the performance of work under that contract.[7] A DRB is generally formed at the start of a construction project and meets regularly to follow work progress and to provide guidance to the parties about any differences before they become disputes.[8] Disputes are referred to the DRB contemporaneously with their occurrence.

A DRB commonly comprises three independent, impartial members. Each contracting party will nominate one member (who must be acceptable to the other party) and the nominees, once accepted, choose the third member to be the chairperson of the DRB.[9] The parties select members for appointment due to their particular expertise which is relevant to the project and their role on the DRB.

The operation of the DRB is governed entirely by the framework agreed between the contracting parties in the construction contract. Depending on the agreement between the parties, a DRB may be empowered to "make recommendations, awards that are binding for a period of time, awards that are binding but appealable, or final and binding decisions".[10]

For the purposes of this article, the DRB model which will be examined is one in which:

- the parties must refer all disputes to the DRB as a condition precedent to invoking any other dispute resolution process including litigation; and
- the DRB makes non-binding recommendations to the parties in respect to a dispute, following the parties' presentations to the DRB.

Internationally, DRBs have been in use since the 1970s. The concept of the DRB has been embraced by industry bodies including the International Federation of Consulting Engineers (FIDIC), the International Code Council, all multilateral development banks, and the European Union.[11] The World Bank prescribes the use of DRBs for projects with an estimated construction value in excess of US$50 million.[12] In Australia, the first recorded use of a DRB was the Sydney ocean outfall tunnels

[6] The term "dispute review board" is often used interchangeably with "dispute resolution board" in the literature.

[7] Goldstein S, "Dispute Resolution Boards – a Better Way Forward?" (2011) 23(4) *Australian Construction Law Bulletin* 42 at 42.

[8] Smith S and Martinez J, "An Analytic Framework for Dispute Systems Design" (2009) 14 *Harvard Negotiation Law Review* 123 at 167.

[9] Hunt R, "Dispute Resolution Boards" (2004) 23(2) *The Arbitrator and Mediator* 13 at 14.

[10] Smith and Martinez, n 8 at 167.

[11] Peck and Dalland, n 1 at 13.

[12] Hunt, n 9 at 17.

and ocean risers project in the 1980s.[13] The uptake in use of DRBs in Australia has been slow, with only 21 projects having used a DRB between 1987 and 2010.[14]

Although they are not in frequent use in Australia, there are many advocates for more frequent adoption of DRBs in Australia due to their practical benefits.[15] DRBs represent a viable ADR process in construction, with considerable international uptake and success. For these reasons, DRBs are a dispute resolution tool worthy of analysis.

Mediation

Defining mediation is notoriously difficult, due to the inherent flexibility of the process, its diverse practice and its private and confidential nature.[16] The recently abolished National Alternative Dispute Resolution Advisory Council (NADRAC) defined mediation as a process in which the participants, with the assistance of the mediator:

> <blockquote>identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.[17]</blockquote>

Inherent in this definition of mediation is that a dispute or disagreement is already in existence between the parties before the mediation process commences. Mediation may be initiated by the parties voluntarily, by reason of a court order (with or without the consent of the parties), or due to the provisions of an existing contractual agreement to refer disputes to mediation.

The procedure adopted in any given mediation is usually directed by the mediator with the input and agreement of the participant parties. The mediator may not have particular experience or expertise in the subject area of the dispute but should be expected to be experienced and have expertise in the mediation process itself. If resolution of the dispute is reached, the agreement may be produced in writing – an agreement which is itself generally enforceable as a legally binding contract.

The difficulty with the above definition of mediation is that it is premised on a particular type or model of mediation – the facilitative model. The reality in the building and construction industry is that this model of mediation is rarely utilised. Four models of mediation are widely recognised in Australia: settlement mediation, facilitative mediation, transformative mediation, and evaluative mediation.[18] These models do not operate as "separate silos" and modern mediation practice will often blend or switch between the features of different models. Although the confidential nature of mediation inhibits the ability to obtain information about the model of meditation most frequently used in construction disputes, anecdotally the authors suggest that the settlement model of mediation is highly prevalent in practice. This view is supported by the observations of George Golvan SC, in describing the features of mediation as including "hard bargaining" rather than "the more elegant process of 'problem solving'" and the role of the mediator being to endeavour to get the parties to reassess their positions, understand the potential risks and costs of continuing the dispute and to "take a settlement package".[19]

These observations are consistent with the key objectives and features of settlement mediation, being "to encourage incremental bargaining towards compromise, at a 'central' point between the

[13] Peck G, "Dispute Resolution Takes Hold in Australia and New Zealand" (2006) 10 *Dispute Resolution Board Foundation Forum* 1 at 18.

[14] Dispute Resolution Board Australasia Inc, *List of Australian and New Zealand DRBs*, http://www.drba.com.au/images/australiasian%20drbs%2023%2006%2010.pdf.

[15] See, for example, Gerber and Ong, n 3.

[16] Boulle L, *Mediation: Principles, Process, Practice* (3rd ed, LexisNexis, 2011) pp 12-13.

[17] NADRAC, *Glossary of ADR* Terms, http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_GlossaryofADRTerms_GlossaryofADRTerms#MM.

[18] Boulle, n 16, p 44.

[19] Golvan G, "The Use of Mediation in Commercial and Construction Disputes" (1996) 7 ADRJ 188 at 190-191.

parties' original positional demands".[20] It involves the mediator determining the parties' "bottom lines" and, through persuasive interventions, moving the parties off their positions to a point of compromise.[21]

For the purposes of this article, the mediation model which will be examined is one which:

- is contractually prescribed as a condition precedent to invoking any other dispute resolution process, including litigation, for the resolution of all disputes between the parties; and
- is conducted in the settlement model of mediation.

The examination of this model of mediation and the model of DRB described above is to enable an "apples for apples" comparison between the processes, based upon their current (and anticipated future) use in the construction industry, and their existence in contractual dispute resolution clauses (domestically and internationally).

ANALYSIS OF DRBS AS A SUITABLE DISPUTE RESOLUTION MECHANISM FOR CONSTRUCTION DISPUTES

Cost-effectiveness

Commonly, the costs of establishing and maintaining a DRB are the legal costs of setting up the DRB (drafting contract provisions), the retainer and daily fees payable to each member of the DRB, and any legal and expert fees incurred in the event of a dispute referral.[22] Although DRB costs are not always published, the data available indicates DRB costs equate to 0.05% to 0.3% of contract value, with a high proportion under 0.2%.[23] Industry considers this investment to be "extremely cheap insurance"[24] even if the DRB is never required to make a determination on any issue during the course of the contract. When compared with the potential damage disputes can cause to the progress of a project and the potential costs of dispute resolution through traditional processes (arbitration or litigation), the costs of establishing and maintaining a DRB is comparatively small.[25]

Notwithstanding this view, the cost of establishing and maintaining a DRB is more significant than that of most other dispute mechanisms, especially where the project is not a large one.[26] Further, if the DRB is only referred minor disputes, or no disputes at all, parties may retrospectively question the wisdom of such expenditure.

According to the Florida Department of Transportation Office of Inspector General, DRBs are "effective in assisting in the resolution of disputes, leading to more timely completion of projects, reduced cost overruns and avoidance of claims. Utilization of DRBs on larger projects can serve to motivate greater cooperation between parties, resulting in fewer unresolved claims and a reduced litigation potential".[27] Further, the effort that might otherwise have been devoted to running a dispute will be redirected to the project, with positive impacts for the relationships between project participants.[28]

[20] Boulle, n 16, p 44.

[21] Boulle, n 16, p 44.

[22] Gould N, *Dispute Boards from a Practical Perspective "Dispute Board Costs"*, Paper presented at the Dispute Resolution Board Foundation 8th Annual International Conference (Cape Town, 2 May 2008) p 2.

[23] Peck and Dalland, n 1 at 21.

[24] Peck and Dalland, n 1 at 22; Corbett E, "Moment of Decision? The Future of Dispute Boards under the FIDIC Forms and Beyond" (2009) 4(3) *Construction Law International* 20 at 21.

[25] Spencer D, *Principles of Dispute Resolution* (Thomson Reuters, 2011) at [5.5].

[26] Jones D, "A Critical Analysis of the Means Commonly Adopted to Avoid Disputes in the Construction Industry" (1995) 14 BCL 31 at 38.

[27] Delmore L, "Dispute Review Boards: Real-Time Avoidance and Resolution of Construction Disputes" (2006) 29(2) *State & Local Law News* 5 at 5.

[28] Corbett, n 24 at 21.

The cost savings associated with the intangible benefit of improved relations between project participants due to the DRB's intervention and prevention of escalation of disputes cannot be quantified. However, this is a benefit which must be considered when assessing the overall "value for money" of the DRB model.

On balance, due to the tangible and intangible cost savings attributable to the DRB, its cost-effectiveness is considered to be high.

Timing of the process

The old English proverb "a stitch in time saves nine" succinctly reflects the timing of the DRB process.[29] DRBs are primarily a dispute *avoidance* process, although they also possess dispute *resolution* capacities. As the DRB is intimately involved in the project from the outset, the DRB members are in a position to foresee issues which may lead to disputes and are able to address any disputes reasonably contemporaneously with the dispute arising (subject to any constraints and timeframes imposed by the contractual framework governing the DRB).

The DRB's consideration of disputes is "real-time", during the course of construction.[30] This is recognised as minimising any damage to the relationships of project participants,[31] and assisting in the resolution of disputes in a timely and equitable manner.[32] This feature of the DRB also has the benefit of allowing issues to be canvassed at a time when both parties have a range of commercial options available to them (as they often will during the currency of a project) and when the facts are not forgotten or confused.[33]

The actual time involved in executing the DRB process is dependent on the process enshrined in the contract. It is likely that this process will prescribe short timeframes for the recognition and referral of a dispute to the DRB, the parties' presentations to the DRB and the DRB's recommendation to be published to the parties.

Thus, the timing of the invocation of the DRB's intervention in a dispute is a critical aspect of the success of DRBs, as the DRB will be involved in the dispute early, preventing it from escalating before referral to a dispute resolution process.

Flexibility of process

As the process to be followed by the DRB is enshrined in the contract agreed by the parties at the outset of the project, unless there are provisions allowing for its amendment, that process will continue to govern the DRB irrespective of whether the process remains suitable to the particular disputes which arise. Although there is flexibility as to which process may be agreed upon at the outset, there is unlikely to be flexibility for the DRB to adapt the process to meet the needs of the particular dispute being considered by it.

In this respect, the DRB process lacks flexibility since, commercially, the parties may benefit from different timing or procedures being applied to the dispute process rather than those enshrined in the contractual arrangement.

Role and expertise of the dispute resolution practitioner

DRBs have been described as "a superior form of mediation cum early neutral evaluation, superior precisely because the DRB members are not complete strangers to what has to be mediated or evaluated".[34] A feature of a DRB which sets it apart from numerous other dispute resolution mechanisms adopted in construction disputes is the fact that its members are selected for their

[29] This proverb was quoted by Hunt, n 9 at 13.

[30] Delmore, n 27 at 5.

[31] McMillan D and Rubin R, "Dispute Review Boards: Key Issues, Recent Case Law and Standard Agreements" (2005) 25 *Construction Lawyer* 14 at 15.

[32] Delmore, n 27 at 5.

[33] Jones, n 26 at 32.

[34] Griffiths D, "Do DRBs Trump DABs in Creating More Successful Construction Projects?" (2010) 5 *Construction Law International* 29 at 31.

expertise on the subject matter of the project. This enhances the credibility of the members' recommendations on disputes[35] and allows them to contribute their expertise and experience to the outcome of the dispute.

The three-person Sydney Desalination Plant DRB comprised an experienced consulting engineer of large infrastructure projects, a senior lawyer and consultant on infrastructure and construction projects, and a Senior Counsel with construction law and ADR expertise.[36] George Golvan SC, the chairperson of the Sydney Desalination Plant DRB, considered that the "combination of technical, management, legal and dispute resolution experience" provided by those members was "a good one".[37]

The DRB members' familiarity with the project due to their close involvement from the outset, their participation in regular meetings with key project participants, and attendance at site meetings, allows them to have a frame of reference when a dispute arises, allowing the parties to make more focused presentations to the DRB regarding their positions.[38] The DRB's recommendations and proposed solutions to the dispute are made in the context of the project as a whole.

However, the DRB's project and party familiarity may adversely affect the operation of the DRB where allegations of bias are made against the DRB, as demonstrated by two decisions of courts in the United States. In *Los Angeles County Metropolitan Transport Authority v Shea-Kiewit-Kenny*,[39] the court confirmed that a party was justified in terminating its appointment of a member to the DRB where that member held private discussions with the party regarding the DRB's likely recommendations in respect to the dispute under consideration. In *Sehulster Tunnels/Pre-Con v Traylor Brothers Inc and Obayashi Corporation*,[40] the court found that the DRB established under the contract between the owner and head contractor was presumptively biased against a subcontractor, so that the subcontractor was discharged from its contractual obligation to refer its dispute with the head contractor to the DRB for resolution.

On balance, the DRB members' expertise and experience in the subject matter of the contract and their familiarity with the project will inform the recommendations they make in relation to the dispute. This is a key advantage of DRBs over any other dispute resolution mechanism and is particularly beneficial to the resolution of disputes in construction given the specialist expertise and knowledge called for in the resolution of such disputes.

Certainty and enforceability of outcome

Although the model of DRB examined in this article does not provide for binding decisions to be imposed on the parties, the expertise of the DRB members and their continuing association with the project makes their opinion influential in the resolution of the dispute.[41] Further, observance of the DRB's recommendations is incentivised by the risk of an adverse cost order, which may be ordered after arbitration or litigation is unsuccessfully pursued by a party in the face of three respectable "expert" opinions.[42]

[35] McMillan and Rubin, n 31 at 15.

[36] Golvan G, *Dispute Boards and Construction Contracts*, Paper presented to the Victorian Bar Association (20 October 2009) p 5.

[37] Golvan, n 36, p 5.

[38] McMillan and Rubin, n 31 at 15.

[39] *Los Angeles County Metropolitan Transport Authority v Shea-Kiewit-Kenny* 59 Cal App 4th 676 (1997). The project in question was the construction of the Los Angeles subway.

[40] *Sehulster Tunnels/Pre-Con v Traylor Brothers Inc and Obayashi Corporation* 111 Cal App 4th 1328 (2003). The project in question was a $90 million contract to build the South Bay Ocean Outfall Project, a 3.5-mile tunnel under the Pacific Ocean off San Diego to discharge treated sewage at sea.

[41] Astor H and Chinkin C, *Dispute Resolution in Australia* (2nd ed, LexisNexis, 2002) p 99.

[42] Jones, n 26 at 38.

Despite the above, the model of DRB examined in this article only permits the DRB to make recommendations to the parties as to how the dispute ought to be treated. There is a lack of certainty for the parties as to the possible recommendations which may be made by the DRB, and in any event, if the recommendations are not followed the dispute will remain unresolved. In this respect, the DRB does not provide certainty of outcome which may be enforced or relied upon by the parties.

ANALYSIS OF MEDIATION AS A SUITABLE DISPUTE RESOLUTION MECHANISM FOR CONSTRUCTION DISPUTES

Cost-effectiveness

George Golvan SC has observed that "mediation has proved a surprisingly successful way to resolve large and complex commercial and construction disputes, some of which had an unfortunate history of protracted litigation".[43] Amongst other matters, Golvan attributed this success to the time and cost-effectiveness of mediation compared with resolution by litigation.[44] A recent study of litigants in the Technology and Construction Court (TCC) in the United Kingdom[45] revealed that where legal proceedings were settled by mediation prior to trial, the cost savings were substantial, with more than 21% of parties estimating they had saved more than £300,000[46] as a result of settlement through mediation.[47]

According to some estimates, the cost of mediating a dispute concerning an amount in the range of $200,000 to $50 million could be in the order of $3,000 to more than $20,000 per party.[48] This is considerably less than the costs which would be involved in resolving the dispute through arbitration or litigation.

The estimated tangible cost benefit of resolving a dispute through mediation is significant compared with other dispute resolution processes and it is a cost-effective method for participants. Despite these cost savings, the parties to mediation may still incur considerable costs due to the dispute; both direct financial costs and the impact of the dispute on the project. In addition, the parties will incur costs in preparing for and attending mediation, which will include legal fees, mediator's fees and possibly experts' fees, as well as the costs of having relevant project personnel and management engaged in the mediation process rather than their day jobs.

Timing of the process

Compared with DRBs, settlement mediation suffers a significant disadvantage because it comes into play only when the dispute has crystallised and the parties are unable to come to a resolution themselves.[49] At this point in time, the parties may have incurred significant costs due to the dispute having arisen, the parties may be entrenched in their positions, and the parties' working relationships may be damaged. Viewed in this way, mediation can only "avoid disputes" if during the progress of the contract work, the mediation process can influence the performance of the contracting parties and thereby avert issues that if otherwise unaddressed, may have resulted in conflict.[50]

Notwithstanding this, the flexibility and availability of mediation allows it to occur at any stage of a project (once a dispute has been referred to mediation). In some instances, it may be more beneficial to the resolution of the dispute for the process to occur after matters have progressed and the parties have had the opportunity to fully understand the scope and impact of the dispute. The

[43] Golvan, n 19 at 188.

[44] Golvan, n 19 at 189-190.

[45] The participants in the study were litigants in the TCC courts in London, Birmingham and Bristol between 1 June 2006 and 31 May 2008: Gould N, "The Mediation of Construction Disputes: Recent Research" (2009) 4(3) *Construction Law International* 5 at 6.

[46] Approximately AU$500,000.

[47] Gould, n 45 at 8-9.

[48] Madden J, "Recipe for Success in Construction Mediation" (2001) 56(2) *Dispute Resolution Journal* 16 at 20.

[49] Hunt, n 9 at 15.

[50] Peck and Dalland, n 1 at 15.

exchange of complex technical information, which can take time to develop, may be necessary to assist in the resolution of the dispute.

Settlement mediation therefore has great flexibility as a *resolution* process, but limited utility as a dispute *avoidance* process.

Flexibility of process

One of the key advantages of mediation is the flexibility of the process which is adopted in any given mediation. Generally, the process is entirely open to be agreed between the mediator and the parties.[51] This means that the mediator and parties are not bound by contractual requirements as to how the process is conducted and may mould the process so that it meets the particular needs of the parties and the dispute (for example, in relation to timing and duration of meetings and documents to be exchanged by the parties prior to or at the mediation). Mediation enables the parties to shape the process and control its outcome, leading to a degree of party autonomy and self-determination that is not present in determinative processes such as arbitration and litigation.

Mediation in the settlement model has been criticised because it may stifle the parties' consideration and acknowledgement of the other party's perspective and underlying needs.[52] Another criticism of the settlement model is the fact that mediators may tend to focus on a limited number of solutions that have worked in the past, rather than considering the unique facts of the case at hand.[53] If, however, a mediator is aware of the potential shortcomings of settlement mediation, the mediator may guide the parties and the process to minimise the occurrence or impact of these shortcomings.

Role and expertise of the dispute resolution practitioner

The main role of the mediator in the settlement model of mediation is to determine the parties' "bottom lines" and, through persuasive interventions, move them in stages off their positions to a point of compromise.[54] The point of compromise ultimately reached may involve a combination of monetary and non-monetary arrangements and need not necessarily be governed by the parties' legal rights and obligations. This aspect of the mediator's role makes mediation suited to construction disputes because the mediator can be actively involved in assisting the parties to reach the point of compromise by reference to non-monetary proposals for resolution.

In mediation, the parties must agree to the appointment of a mediator at the time of initiating the process. Although a mediator with expertise relevant to the issues in dispute may be appointed, that is not always the case and is not necessarily the norm. The mediator's involvement in the dispute is confined to the dispute which is referred for mediation – the mediator does not have the familiarity of the project and its participants that members of a DRB would possess.

Certainty and enforceability of outcome

Mediation allows the parties to develop creative and commercial solutions that satisfy their particular requirements – solutions which could often not be ordered by a court or arbitrator. The parties are encouraged to reach settlement and to record any agreement reached. A major criticism with mediation is the pressure placed on parties to reach settlement quickly.[55] The mediation agreement will often be binding on the parties and means that they avoid the unpredictability of a possible court

[51] Subject to any existing agreement about how the mediation is to be conducted, for example, pursuant to the standard procedures of an industry body, such as the Institute of Arbitrators and Mediators Australia.

[52] Alexander N, "The Mediation Metamodel: Understanding Practice" (2008) 26(1) *Conflict Resolution Quarterly* 97 at 108-109.

[53] Alexander, n 52 at 108-109.

[54] Boulle, n 16 at 44.

[55] Davenport P, "What is Wrong with Mediation" (1997) 8 ADRJ 133 at 133.

resolution of the dispute.[56] Unless the mediation agreement is subject to challenge, the parties will have a binding and enforceable agreement as to the resolution of the dispute.

There is a risk that some matters simply will not be resolved at mediation and some parties approach mediation without a commitment to the process and without any intention to settle.[57] In these instances, participation in the mediation may exacerbate the tension between the parties and make ultimate resolution more difficult.

Even where mediation is not successful, participation in the process may be beneficial to the parties and their representatives because the information exchanged by the parties may allow decision-makers to re-evaluate their positions, make informed business decisions and gain a better understanding of the case and a clearer grasp of their prospects of success.[58]

CONCLUSION

Given the industry-specific nature of many construction disputes, certain dispute resolution procedures will be better suited to the needs of disputing parties. This article has considered two dispute resolution processes which are used in the construction industry – DRBs and settlement mediation – and examined their suitability as construction dispute resolution processes. When analysed against five criteria (cost effectiveness, timing, flexibility, role and expertise of the dispute resolution practitioner, and certainty/enforceability of outcome), it is concluded that both DRBs and the settlement model of mediation are well suited to construction industry disputes.

Given that DRBs and settlement mediation are not mutually exclusive dispute resolution processes, perhaps there is not large utility in suggesting that DRBs are *better* than settlement mediation for construction projects (especially without any project context). What is apparent is that the DRB process contains features that conventional forms of ADR (such as mediation) do not. The inclusion of a DRB process in a construction contract and the involvement of the DRB members at such an early stage of a project have huge cost saving potential. The dispute *avoidance* philosophy of DRBs can be observed through proactive board members using their expertise to predict project difficulties, reality testing contracting parties, and providing advice as to how project "speed bumps" might be commercially navigated. When disputes do arise, DRB members are able to offer non-binding recommendations to the parties, based upon their intimate knowledge of the project. This combination of early project involvement, intimate project knowledge, construction expertise (across disciplines/professions), and dispute avoidance philosophy set DRBs apart from other growing ADR processes in the construction industry. Whilst there will always be a place for mediation in the resolution of construction disputes, DRBs have an important future role to play in the Australian building and construction industry.

[56] In a commercial context, the intention of the parties is usually to be bound by a written agreement reached at mediation. The original contract may stipulate that any agreement reached during a mediation process is to be binding; alternatively, an agreement to mediate may have been entered into, dealing with the status of any agreements reached at mediation.

[57] Madden, n 48 at 26.

[58] Roberts K, "Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement" (2007) 39 *Loyola University Chicago Law Journal* 187 at 187.