Mediation: an invitation to come to the party

By **Kim Lovegrove**, building contracts lawyer.

MEDIATION, the antithesis of traditional adversarial litigation, has heralded a dramatic change to dispute resolution in the building industry. Where litigation is about waging legal warfare and "upping the ante", mediation, is about making peace and finding amicable solutions.

The litigation vernacular includes words such as sue, defend, interrogate, judgment.

Conversely, that of mediation, abounds with terms such as negotiate, conciliate, "find the middle ground", and compromise.

Until recently, dispute resolution was predominantly of the litigation persuasion. This is a legacy of the traditional British adversarial approach that shaped Australasian legal-dispute resolution.

Litigated outcomes, nevertheless, in the macro sense, play a critical societal role in that they generate precedents that create and define the parameters of judicial rationale.

So what is mediation? It is a process whereby an appointed mediator assists parties to resolve their disputes. A mediator is a facilitator or a dispute-resolution catalyst. He or she cannot force parties to settle, nor can he or she impose or compel an outcome. The skill of the mediator is to steer the parties along the path to accord.

Mediation is as new to Australia as it is old to countries such as Japan. Japan, with a population of approximately 110,000,000, (half that of the United States of America), has only 27,000 lawyers. Compare this to the USA which has nigh on 800,000 lawyers. Why this discrepancy?

If Americans have a love affair with law suits, the Japanese have an aversion to dispute escalation, which is the ally of litigation. Japanese philosophy is such that they prefer to work through problems in order to keep business and personal relationships intact.

There are many reasons why it is preferable to opt for mediation rather than litigation. First, mediation, as a product of negotiation, is conducive to amicable outcomes, where a "win win" situation is possible.

Litigation leaves "blood on the streets" as the winner takes all.

Secondly, mediation is much cheaper and it can be deployed at the beginning of a dispute. The cost of the mediator is borne in equal shares by the parties, who also normally bear their own costs.

FURTHERMORE, with litigation, private matters can become public, particularly if the judgment establishes a precedent or catches the attention of the press. Mediations can be said to ensure confidentiality.

In the building industry, a mediated outcome generally allows businessmen to work with one another again, and for the relationship to mature. Litigated outcomes have a tendency to sever commercial alliances.

One of the best advertisements for mediation is the Domestic Building Tribunal. There are currently about 20 nominated mediators, and as a rule these mediators are experienced building lawyers or technical experts. Generally, within six weeks of legal proceedings being issued, the parties appear before a mediator. The parties give the mediator a summary of the dispute along with copies of the relevant contract documents prior to the mediation.

The mediator convenes the session; hears the issues; and works together with the parties to find a way to resolve their differences. The settlement strike rate has been about 60 per cent, to date.

Such early settlement means that the expense associated with dispute resolution can be curbed by as much as 90 per cent. With the court system, mediation generally occurs much further down the track, often at "death's knock" (that is, just before the matter hurtles into a formal hearing). By this stage, the greater part of interlocutory proceedings have been concluded and therefore 40-60 per cent of trial costs may have been expended. Nevertheless, the Building Cases lists of the County and Supreme Courts have an eviable settlement strike rate at mediation.

WHAT is not commonly understood is that building contracts can be amended to include a "front end" mediation clause and that the parties can nominate a mediator in the contract. Where there is a premonition of a dispute, the mediator can be summonsed to convene a mediation at an early stage and thereby head off any escalation of such dispute.

Such a contractual condition has, for a number of years, commonly been found in major development contracts. This is testimony to the fact that it is considered bad business for a dispute to be allowed to escalate.

Irrespective of the jurisdiction, one should be thoroughly prepared for mediation. A succinct, typed dispute summary should be prepared and dispatched to the mediator prior to the hearing. The more the mediator knows beforehand the better. All relevant contract documents and correspondence should be annexed to the dispute schedule. Although parties do not have to use advocates, the deployment of a legal or technical construction advocate has merit.

At the mediation, each party has a right to be heard, and mediations can take many hours to conclude.

Above all, a willingness to settle is critical.

Sometimes disputants are actuated by revenge. If one is of the latter persuasion, be mindful of the old saying:

"If you want revenge, then dig two graves".