2024-5 RESEARCH PROJECT

MEDIATION AND THE SENIOR COURTS

SHOULD NEW ZEALAND'S SENIOR COURTS HAVE GREATER POWERS TO ENCOURAGE, OR ORDER, PARTIES TO CIVIL DISPUTES TO MEDIATE? AN ACCESS TO JUSTICE OPPORTUNITY?

(incorporating a survey of comparable overseas jurisdictions)

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Itiiti rearea, teitei kahikatea ka taea

(Although the rearea is small, it can ascend the lofty heights of the Kahikatea tree)

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INTRODUCTION

1. On 29 November 2023, the England and Wales Court of Appeal ("**EWCA**") issued a significant decision in *Churchill v Merthyr Tydfil CBC.*[1] The EWCA found that the courts of England and Wales have the power to order unwilling parties to mediate.[2] This power joined an extensive suite of other powers that the courts in England and Wales already had to encourage mediation. The senior courts in Australia and Canada, two other jurisdictions against which New Zealand often compares itself, also have extensive powers to encourage, and order, mediation.

2. The senior courts in New Zealand do not have a general power to order unwilling parties to mediate. They have very limited powers to encourage mediation. At the same time, we are desperately seeking solutions to significant, and worsening, access to justice issues.

3. Should New Zealand's senior courts have greater powers to encourage, or order, parties to mediate? Is there an access to justice opportunity here? This paper examines these questions. It includes a survey of the approaches taken in those comparable overseas jurisdictions. In my view, the answer to these questions is "yes", and I set out why below. I conclude this paper with a suggested framework for greater powers for New Zealand's senior courts, and some related suggestions for mediators.

4. More particularly, this paper is divided as follows:

   (a) Definitions and principles;

   (b) The efficacy of mediation generally;

   (c) New Zealand: mediation framework in the senior courts, observations;

   (d) New Zealand: access to justice issues in the senior courts;

   (e) England & Wales: mediation framework in the senior courts, efficacy, observations;

   (f) Australia: mediation framework in the senior courts, efficacy, observations;

   (g) Canada: mediation framework in the senior courts, efficacy, observations;

   (h) Conclusions: should New Zealand's senior courts have greater powers to encourage, or order, parties to civil disputes to mediate? An access to justice opportunity?

   (i) Conclusions: what might such greater powers be? A suggested enhanced mediation framework;

   (j) Some related suggestions for the mediators; and

   (k) Concluding remarks.

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[1] *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416, [2024] 1 WLR 3827.

[2] And to engage in other forms of alternative dispute resolution.

5. Some of these topics merit a paper, or even a thesis, in their own right. To the extent I gallop through them, forgive my blithe economy.

6. Before I do begin, some riders on perspective. Anticipating a likely cheery tease, I should say that this is not a personal work-creation scheme. As one of New Zealand's currently tiny handful of full-time commercial mediators, I have the blessing of a busy practice. That said, I acknowledge that my occupational affection for mediation means I have a natural tendency to favour it, strive as I will to be objective. There is a delicate counterpoint to this. Might some courtroom lawyers, and judges, dedicated to, and passionate regarding, the often extraordinarily difficult work they do, naturally favour the courts? That is where they do their best work. It is where they are, quite rightly, celebrated and respected. Might some see *cur. ad. vult* through rose-tinted glasses? Perhaps it is enough to say that, as in any conversation, we all have baggage. Anyway, here goes.

DEFINITIONS AND PRINCIPLES

Definitions

7. Mediation is neatly defined in Canadian legislation as follows:

> *"**"mediation"** means a collaborative process in which two or more parties meet and attempt, with the assistance of a mediator, to resolve issues in dispute between them*"[3]

For the purposes of this paper, I am considering mediation of civil disputes only, and generally excluding family and employment disputes.

8. Mediation is a form of alternative dispute resolution, or ADR. Other forms of ADR (also sometimes described as assisted, or appropriate, dispute resolution) include arbitration, and early neutral evaluation. Other forms of ADR are not examined in this paper. But often, at least in the context of the issues examined in this paper, when commentators are referring to ADR they are referring primarily to mediation.

9. By New Zealand's senior courts, I am referring for these purposes to the High Court and the Court of Appeal. Different considerations obviously apply to the by-leave-only Supreme Court. The major focus of this paper is on the High Court.

10. When I refer to the framework within which courts operate, I am referring to the statutes, procedural rules, and common law precedents, which empower courts to regulate court process and direct parties. When I refer to the mediation framework, I am referring to the framework within which courts can encourage, or order, mediation.

11. My survey of comparable jurisdictions includes: England and Wales, Australia, and Canada. I have tried to compare similar courts, although jurisdictional limits vary from country to country.

12. My survey of those comparable jurisdictions shows, as noted, that the senior courts in all have greater powers than New Zealand's senior courts to encourage and/or order

[3] Law and Equity Act RSBC 1996, BC reg 4/2001, r 1.

mediation. Those powers come in various forms. For the purposes of this paper, I have defined them via five rough categories:

(a) "Nudge/s" – this includes steps courts take to encourage mediation, to push the parties towards it, but which are less than prescription. It includes: statements of purpose/objective in civil procedure legislation/rules, pre-action requirements, and case management;

(b) "Presumption/s" – frameworks by which it is presumed parties will mediate at some point in a proceeding;

(c) "Mandatory mediation" – frameworks in which mediation is mandatory. The boundary between presumption frameworks and mandatory mediation can be blurred. But the phrase "mandatory mediation" seems quite provocative to some, and so I have focussed in this regard on frameworks which describe themselves, or are generally described, in that way;

(d) "Orders" – courts having the power to order parties to mediate, even if one or more do not wish to. The power may be an express statutory one, or derived from an interpretation of the court's inherent procedural powers (*Churchill*); and

(e) "Costs sanctions" – courts having the power to sanction parties with costs for failure to engage with mediation.

13. There is nuance and overlap to these categories. Courts can utilise many tools to get parties mediating. The conversation should be, and the options are, much more than: "*status quo v mandatory mediation*".

Principles

14. There are some broad principles which are relevant. They include:

(a) Access to justice should be promoted by the Courts;

(b) Justice should be seen to be done;

(c) Courts should treat all parties fairly; and

(d) Mediation is a voluntary process.

The last three are often used as arguments against giving courts greater powers to encourage, or order, mediation. Comments on these principles as they apply in the context of this paper follow.

Access to justice should be promoted by the Courts

15. Everyone agrees that access to justice is a good thing, and we need more of it. But quite what access to justice means is more elusive. Non-lawyers will suppress wry chuckles to hear that, even on this, lawyers disagree. The New Zealand Bar Association ("**NZBA**") says:

> "*Access to justice" is fundamental to upholding and promoting the rule of law. It is the idea that all people should be able to access the courts in order to resolve their disputes*."[4]

But, with respect to the NZBA, the conception of access to justice as access to the courts is considered to be the narrowest available, with its origins in 18th and 19th century thinking.[5] New Zealand's Ministry of Justice ("**MOJ**") says:

> "*Broadly, access to justice can be defined as the ability of people to get a just resolution to their legal issues and enforce their rights. Justice can be accessed through avenues such as legal advice and services, legal representation, courts and tribunals, alternative dispute resolution such as mediation, and information about legal rights*."[6]

The New Zealand Law Society ("**NZLS**") says:

> "*Access to justice" can mean different things to different people, depending on the perspective taken. ... Access to justice goes beyond courts and lawyers. It incorporates everything people do to try to resolve the disputes they have, including accessing information and support to prevent, identify and resolve disputes. This broad view of access to justice recognises that many people resolve disputes without going to court and sometimes without seeking professional assistance*."[7]

Going further still, the Australian Commonwealth Access to Justice Taskforce stated:

> *"Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged."*[8]

16. A UK court users survey found that 68% of all litigants contacted said they would have preferred to avoid court proceedings if they could.[9] Most defendants would rather not be there. And some plaintiffs join this group as cases drag on. These people do not want their day in court. They want out.

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[4] New Zealand Bar Association [NZBA] "Access to Justice, Diversity and the Legal Profession" <www.nzbar.org.nz/access-justice-diversity-and-legal-profession>.

[5] Alberta Civil Liberties Research Centre "What is Access to Justice?" <www.aclrc.com/what-is-access-to-justice>.

[6] Ministry of Justice "Frequently asked questions - Legal Needs Survey" <www.justice.govt.nz/justice-sector-policy/key-initiatives/access-to-civil-justice/frequently-asked-questions-legal-needs-survey/>.

[7] New Zealand Law Society *Access to Justice: Stocktake of Initiatives* (December 2020) <www.lawsociety.org.nz/assets/About-Us-Documents/General/NZLS-Access-to-Justice-research-report-2020.pdf>.

[8] Marc Galanter "Justice in Many Rooms" in M Cappelletti (ed) *Access to Justice and the Welfare State* (Sijthoff, Alphen aan den Rijn, 1981) 147 at 161–2, as cited in Access to Justice Taskforce, Attorney-General's Department *A Strategic Framework for Access to Justice in the Federal Justice System* (September 2009) at 11.

[9] Becky Hamlyn and others *Civil Court User Survey Findings from a postal survey of individual claimants and profiling of business claimants* (Ministry of Justice, Ministry of Justice Analytical Series, 2015) <https://assets.publishing.service.gov.uk/media/5a7f1b0940f0b6230268d78a/civil-court-user-survey.pdf> at 7.

17. New Zealand's senior courts have the power to regulate their own processes.[10] Increasingly, there is a sense that the courts should exercise that power to promote access to justice. This has been a key focus for the Rules Committee in recent years.[11] It has been emphasised in cases, including recently by the Supreme Court in *ANZ Bank New Zealand Ltd v Simons.*[12] It has also been a key focus of public statements by judicial leaders.[13]

18. I think it is fair to say that the access to justice New Zealand's courts have been looking to promote is access to justice of the kind described by the NZBA quote above, access to the courts. That is important, but I would respectfully suggest that broader definitions, as per the MOJ and NZLS quotes above, are also worth consideration in this context.

Justice should be seen to be done

19. Justice should be seen to be done.[14] Having an open, public, justice system allows the fairness and integrity of the system to be scrutinised, tested and upheld. It also provides valuable precedents. Mediation, typically confidential in both process and outcome, does not directly serve this principle. But most cases, as noted below, are going to settle. To the extent that mediation is simply a better way to get those cases where they are going anyway, is the principle that justice should be seen to be done compromised?

20. Encouraging, or ordering, more cases to mediation may mean that some which were otherwise destined for trial get settled. But are those going to be the cases that were destined for the law reports? And what price must parties pay for precedents to be created?

Courts should treat all parties fairly

21. The courts should treat all parties fairly.[15] Is encouraging, or ordering, them to mediate a fair thing to do? This begs the question of whether mediation itself is a fair process?

22. Parties can come and go as they please from mediations. No-one is obliged to say anything. Mediators have no power over the parties. Mediations generally end with an agreed settlement, or when it becomes apparent that settlement cannot be reached. These factors support fairness in mediation.

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[10] Senior Courts Act 2016, ss 145-155.

[11] Rules Committee *Improving Access to Civil Justice Report* (November 2022) <www.courtsofnz.govt.nz/assets/Rules-Committee-Improving-Access-to-Civil-Justice-Report.pdf>.

[12] *ANZ Bank New Zealand Ltd v Simons* [2024] NZSC 186 at [13].

[13] See:

a. Helen Winkelmann, Chief Justice of New Zealand "Access to Justice: We Need More (Than) Lawyers" (MacKenzie Elvin Law Lecture, University of Waikato, Tauranga, 24 August 2022); and

b. Chief District Court Judge *Timely Access to Justice Judicial Protocol Ref#01* (June 2024) <www.districtcourts.govt.nz/assets/Uploads/Publications/2024/CDCJ-Timely-Access-to-Justice-Protocol-June.pdf> (albeit focussed on criminal cases).

[14] "*Justice should not only be done, but should manifestly and undoubtedly be seen to be done."* Lord Hewart CJ in *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

[15] "*It is a basic requirement of any system of justice that the courts must be seen to be impartial and fair*". Courts of New Zealand "Our Court System" <www.courtsofnz.govt.nz/about-the-judiciary/overview/#:~:text=There%20are%20other%20important%20legal,to%20be%20impartial%20and%20fair>.

23. Concerns have been raised about the effect of power imbalances in mediation.[16] Power imbalances, arising from resources, sophistication, and psychological dynamics do affect mediations. But they also permeate other dispute resolution mechanisms, including trials.

24. Concerns have also been raised about the risk that parties will make decisions on the basis of undue pressure in mediations.[17] No doubt parties do feel pressure at times in mediations. It is a big day for them. In court, the judge makes the decisions. In a mediation, the parties do. That can sometimes be hard for parties, but that does not make it inherently unsafe.

25. Protections against power imbalances and undue pressure exist. In particular:

    (a) Most parties to mediations relating to senior courts matters will have lawyers to protect their interests;

    (b) Lawyers have professional duties to act courteously towards all, and not to bully or harass, and can be subject to professional discipline if they breach those duties.[18] Most mediators who mediate senior courts matters are also lawyers, and subject to the same duties;

    (c) Most mediators who mediate senior courts matters are also members of The Arbitrators' and Mediators' Institute of New Zealand/Te Mana Kaiwhakatau, Takawaenga o Aotearoa ("**AMINZ**"), and/or the Resolution Institute ("**RI**"). Both of these organisations have ethical conduct standards and complaints regimes,[19] albeit I think this is less well known;

    (d) Parties are protected by the fact that any settlement requires the agreement of all. No-one is obliged to agree to anything; and

    (e) Even after agreement is reached, there is protection. New Zealand's courts have the power to undo contracts concluded under duress, contracts obtained as a consequence of a wrongful and unconscientious abuse of power, and unconscionable bargains.[20] That said, as far as I am aware, no settlement agreement arrived at in a commercial mediation in New Zealand has ever been

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[16] Helen Winkelmann, High Court Judge (as she then was) "ADR and the Civil Justice System" (paper presented to Arbitrators' and Mediators' Institute of New Zealand Conference, 6 August 2011) [2011 AMINZ speech]. <www.courtsofnz.govt.nz/assets/speechpapers/adrw.pdf> at 10.

[17] At 8-11.

[18] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 3.1, 10.1 and 10.3.

[19] See:

a. Arbitrators and Mediators Institute of New Zealand [AMINZ] Code of Ethics 2011, Ethical Statements 3 and 9, and commentary at <https://static1.squarespace.com/static/5ed98fedc4eeaa0be4fecea4/t/620c2e60d5fce37fd241278a/1644965475236/AMINZ%2BCode%2Bof%2BEthics.pdf>.

b. Resolution Institute [RI] Code of Ethics 2021 at <https://resolution.institute/common/Uploaded%20files/Resolution%20Institute/Resolution-Institute-Code-of-Ethics.pdf>.

[20] Stephen Todd and Matthew Barber *Burrows, Finn and Todd on The Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at 414.

the subject of a successful duress/abuse of power/unconscionability claim. It was tried, unsuccessfully, in *McGrath v Simson* [2015].[21] Given the sheer number of mediated settlement agreements that have been reached in New Zealand in the last 30 years,[22] I would suggest that, if duress/abuse of power/unconscionability were a significant issue with them, that would have played out in the law reports.

26. There is another, more subtle, criticism sometimes directed at mediation in the fairness context, being that mediated agreements are "dirty deals". The essence of this criticism is that mediated agreements are driven by compromise, economic pressure, and risk aversion, rather than principle. It is true that mediated agreements are often driven, to varying degrees case by case, by compromise, economic pressure, and risk aversion. But that is also true of almost any negotiated resolution to a dispute. It is not true to say that principle plays no part. Principle, in the sense of parties' assessments of their legal positions, is an important driver in most mediations. This criticism also implies that resolution through the courts has the sanctity of being driven exclusively by principle. But, of course, economic pressures (costs and delays of litigation) and risk aversion (affecting decisions, for example, around who to sue, and for what) are often at play in that context too. Further, in cases resolved by the courts, unsuccessful parties often consider that the sanctity of principle has not been respected. They will say that the judge "got it wrong", and sometimes appeal (sometimes successfully). None of this is to say that the courts do not approach cases with objectivity (they do), or that the courts are not the apex of our dispute resolution system (they are). The point is that the "dirty deals" criticism is, in my view, unfair. It is a criticism which is also somewhat disrespectful to parties who settle at mediation, suggesting that their decisions are suspect. It is a criticism which is, perhaps, a function of the rose-tinted glasses I mentioned at the outset.

27. In some cases, it may be unfair for parties *not* to be encouraged, or ordered, to mediate. For example:

    (a) If all but one party (or their lawyer) to a, say, six party claim[23] want to mediate, is it fair on the others for all to be denied the opportunity? And

    (b) What about if all parties to a claim would be prepared to mediate, but one or more (or their lawyer/s) is anxious that, by suggesting or agreeing to it, they will be showing weakness?

    There will be other blushes to such hypotheticals, some more nuanced, some more extreme.

28. Concerns about the fairness of mediation should never be discounted. But I would respectfully suggest that such concerns do not have sufficient weight to stand in the way of giving our senior courts greater powers to encourage, or order, parties to mediate. Significant fairness protection is available in the mediation context. It can be expected that, even if the courts did have greater powers to encourage or order mediation, they would not exercise such powers in specific cases where there might

[21] *McGrath v Simson* [2015] NZHC 2644, and see also Nina Khouri "Mediation" [2018] NZ L Rev 101, where that case and similar overseas cases are analysed.

[22] Grant Morris and Annabel Shaw *Mediation in New Zealand* (Thomson Reuters, Wellington, 2018) at 253 estimates there are 1000 commercial mediations per year in New Zealand.

[23] And there are claims, for example in construction and estates cases, with more parties than that.

be particular fairness concerns. There may well be cases where it will be unfair for the courts not to exercise such powers.

29. I would also suggest that promoting access to justice is part of the courts treating parties fairly. Undue delays, costs, and other burdens in litigation are unfair on all who suffer them.

Mediation is a voluntary process

30. Mediation is often described as a voluntary process.[24] This principle runs hand in hand with the primacy of party autonomy in mediation.[25] How can this principle be reconciled with judicial encouragement, or even compulsion, to mediate? Philip McNamara notes that voluntariness has two aspects in reference to mediation:

> *"First, there is the concept of voluntarily entering into the process. Secondly, there is the concept of voluntary participation in the process once it has been embarked upon. The power of the court to compel mediation does violence to the first of these concepts — that of mediation as a process voluntarily embarked upon — but not to the second concept, which must remain inviolable. There can be no question of a party being compelled to enter into a settlement, let alone a settlement imposed on either or both of the parties by the mediator. A party must have the right to terminate or adjourn a mediation, subject only to due consultation with the mediator. The only true obligation of a party to a mediation is to attend and participate in negotiations in good faith."*[26]

31. In 2000, then New South Wales ("**NSW**") Chief Justice Spigelman spoke extra-curially on the power of the NSW Courts to refer parties to mediation against objection. He stated:

> "*I am advised that in Victoria no difference in success rates or user satisfaction between compulsory and non-compulsory mediation has been noted. Not all research or anecdotal evidence is to this effect.*
>
> *It appears that, perhaps as a matter of tactics, neither the parties nor their legal representatives in a hard fought dispute are willing to suggest mediation or even to indicate that they are prepared to contemplate it. No doubt this could be seen as a sign of weakness. Nevertheless, the parties are content to take part in the mediation conference if directed to do so by a Judge.*
>
> *There is a category of disputants who are reluctant starters, but who become willing participants. It is to that category that the new power is directed*." [27]

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[24] See:
a. Philip McNamara "Mandatory and quasi-mandatory mediation" (2019) 47 Aust Bar Rev 215 at 218.
b. *"Mediation is a voluntary process"* Ministry of Justice "Mediation" <www.justice.govt.nz/tribunals/weathertight-homes/what-happens-next/mediation/>; and
c. *"Mediation is a voluntary process"* Hong Kong Judiciary "What is Mediation" <https://mediation.judiciary.hk/en/doc/What_is_Mediation-Eng%20(March%202023).pdf>.

[25] "*Mediation...puts the power for a solution back into the hands of those most affected – the parties – and enables them to construct a solution that works for them*" Richbell et al *How to Master Commercial Mediation* (Bloomsbury, 2015) at 3.

[26] McNamara, above n 24a, at 218-219.

[27] J J Spigelman AC, Chief Justice of NSW "Address to the LEADR Dinner" (Address to the LEADR Dinner, University and Schools' Club Sydney, 9 November 2000)

32. In 2008 Lord Phillips, the then Lord Chief Justice, stated:

> "*What are the pros and cons of compulsory mediation? Strong views are expressed about this on both sides. Those opposed argue that compulsion is the very antithesis of mediation. The whole point of mediation is that it is voluntary. How can you compel parties to indulge in a voluntary activity? "You can take a horse to water, but you cannot make it drink." To which those in favour of compulsory mediation reply, "yes, but if you take a horse to water it usually does drink." Statistics show that settlement rates in relation to parties who have been compelled to mediate are just about as high as they are in the case of those who resort to mediation of their own volition*."[28]

33. In *Churchill*, the EWCA stated:

> "*Even with initially unwilling parties, mediation can often be successful*"[29]

34. Melissa Hanks states:

> "…*studies demonstrate that where parties are compelled to mediate, there are still comparatively high rates of settlement and parties benefit from the process*"[30]

35. In effect, there is a recognition that to compel (order) mediation is to compromise the principle of voluntariness, with regards process initiation. But it is argued to be a justifiable compromise, because those so compelled are likely to benefit, by voluntarily settling their dispute.

THE EFFICACY OF MEDIATION GENERALLY

36. Mediation ought not to be encouraged, much less ordered, by the courts merely because it has fans (be they mediators or otherwise). There must be efficacy to the process. If mediation is to be a part of addressing access to justice challenges, it must work.

37. There is substantial empirical evidence to show that mediation works, in the sense that settlement rates are high. For example:

    (a) US Department of Justice records for Department litigation in 2013-2017 across the US showed that the success rate (defined as "resolved") for voluntary ADR in Department litigation ranged from 69%-82%;[31]

<https://supremecourt.nsw.gov.au/documents/Publications/Speeches/Pre-2015-Speeches/Spigelman/spigelman_speeches_2000.pdf> at 3-4.

[28] As quoted in Varda Bondy and Margaret Doyle *Mediation in Judicial Review: A practical handbook for lawyers* (The Public Law Project, London, 2011) at 8, referencing <www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf> (but link no longer active).

[29] *Churchill*, above n 1, at [59].

[30] Melissa Hanks "Perspective on Mandatory Mediation" (2012) 35(3) University of New South Wales Law Journal 929, at 950.

[31] US Department of Justice "Alternative Dispute Resolution at the Department of Justice" <www.justice.gov/archives/olp/alternative-dispute-resolution-department-justice>.

(b) The 10th CEDR Audit found that, in the UK, for the 2022 year, civil and commercial mediations had an aggregate settlement rate of 92%, with 72% settling on the day, and 20% settling shortly after the mediation day;[32] and

(c) A 2019 survey of New Zealand commercial mediators by Dr Grant Morris of Victoria University found that:

(i) All reported settling at least 60% of the cases they mediated;

(ii) 85% reported settling 80-100%; and

(iii) 55% said that they settled 90-100%.[33]

38. But high settlement rates are not an absolute efficacy metric. Most civil cases settle.[34] Most commonly, this is achieved by direct negotiation.[35] Is mediation a better way to get them settled? Critically, in the access to justice context, does mediation save time and money? Can it reduce court workloads, and the burdens of litigation on parties? And are there other reasons why mediation might be better?

39. The following studies support the view that mediation can save parties time:

(a) In the United States, it has been claimed that the increasing use of ADR has led to a significant decrease in the number of cases reaching trial since the 1960's. Approximately, 11% of all federal cases reached trial in 1962, but less than 2% did in 2002;[36]

(b) A 2011 study of mediated EU commercial cases found that even those that did not settle at mediation saved time (and costs) by attempting mediation;[37] and

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[32] The Centre for Effective Dispute Resolution [CEDR] *The Tenth Mediation Audit* (1 February 2023) at 7.

[33] Grant Morris and Sapphire Petrie-McVean "Resolution Institute/Victoria University of Wellington Commercial Mediation in New Zealand: The Mediators Project Report" (August 2019) 12 VUWLRP 58/2022 at 15.

[34] See:

a. "*Most cases tend to resolve without the need for a fully contested hearing*", Simon Menzies "The civil jurisdiction: a helping hand in resolving disputes" The District Court of New Zealand <www.districtcourts.govt.nz/about-the-courts/j/the-civil-jurisdiction-a-helping-hand-in-resolving-disputes/>;

b. "*In New Zealand, around 10% of proceedings commenced by Statement of Claim are resolved through judgment following a full substantive hearing*", Winkelmann, above n 16, at 4; and

c. Morris and Shaw, above n 22, at 5 and 247.

[35] Morris and Shaw, above n 22, at 247.

[36] Galanter "The Vanishing Trial: An examination of Trials and Related Matters in Federal and State Courts" (2004) 1 Journal of Empirical Legal Studies 3, as cited in Law Reform Commission (Ireland) *Alternative Dispute Resolution Consultation Paper* (LRC CP 50 – 2008).

[37] De Palo, G., Feasley, A., and Orecchini, F. *Quantifying the cost of not using Mediation – A data analysis* (Brussels: European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs, 2011) <www.europarl.europa.eu/RegData/etudes/note/join/2011/453180/IPOL-JURI_NT(2011)453180_EN.pdf> at 2.6.

(c) US Department of Justice records for Department litigation in 2013-2017 across the US showed that 1,740-2,733 months per year of litigation were saved via ADR.[38]

40. One US judge put it thus: "… *mediation helps the inevitable happen faster*...".[39]

41. The following studies support the view that mediation can save parties money:

(a) "*In 2007, the English the* [sic] *National Audit Office reported the cost of litigation versus mediation in family breakdowns. In the period October 2004 to March 2006, some 29,000 people who were funded through legal aid attempted to resolve their family dispute through mediation. The average cost of legal aid in non-mediated cases was estimated at £1,682, compared with £752 for mediated cases, representing an additional annual cost of £74 million*";[40]

(b) In a 2010 survey of mediations in UK construction disputes:

> *"[t]he cost savings attributed to successful mediations were significant…. . Only 15% of responses reported savings of less than £25,000; 76% saved more than £25,000; and the top 9% of cases saved over £300,000..*"[41]

; and

(c) The 10th CEDR Audit found that, in the UK:

- *By achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession this year will save business around £5.9 billion in wasted management time, damaged relationships, lost productivity and legal fees.*

- *Since 1990, our profession has contributed savings of £50 billion."*[42]

42. There are some interesting statistics from Singapore regarding time and money savings arising from mediation:

> *"The Singapore Mediation Centre (SMC) indicates that up to April 2006 more than 1,000 cases have been referred to the SMC. Of those mediated, about 75% were settled. The SMC reported that the Singapore the* [sic] *Supreme Court has recorded savings of more than $18 million and 2,832 court days up*

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[38] US Department of Justice, above n 31.

[39] John E. Lyhus "Stay Loyal to the ADR Process" *INTA Bulletin* (October 2002) at 8, as cited in McCarthy TeTrault "Mediating Intellectual Property Disputes — Do I HAVE to? New Ontario Rules Likely Mean Yes!" (3 February 2010) <www.mccarthy.ca/en/insights/articles/mediating-intellectual-property-disputes-do-i-have-new-ontario-rules-likely-mean-yes>.

[40] Legal Services Commission *Report on Legal aid and mediation for people involved in family breakdown* (National Audit Office, March 2007) <www.nao.org.uk/>, as cited in Law Reform Commission (Ireland), above n 36, at [3.165].

[41] Nicholas Gould, Claire King and Philip Britton *Mediating construction disputes: An evaluation of existing practice* (The Centre of Construction Law & Dispute Resolution, King's College London, January 2010) at 63 <www.fenwickelliott.com/sites/default/files/KCL_Mediating_Construction_Complete.pdf>.

[42] CEDR, above n 32, at 17.

> *to April 2006. The figures provided by the Singapore Supreme Court indicate, for example, that in a High Court case involving two parties, it is not uncommon for parties to save as much as $80,000 in total.[415]*
>
> *In a study conducted at the end of 2002, of the 1,044 disputants who mediated at the SMC and provided feedback, 84% reported costs savings, 88% reported time savings and 94% would recommend the process to other persons in the same conflict situation.[416] The responses from 900 lawyers who represented their clients and provided feedback was similar - 84% reported savings in costs, 83% reported savings in time and 97% of the lawyers indicated that they would recommend the process to others in a similar situation. It is to be noted that even parties and lawyers who did not reach a settlement reported time and cost savings.*"[43]

43. A 2007 Canadian meta-analysis on the effectiveness of mediation in civil law disputes found that:

> *"Overall, mediation processes are fairly effective in creating both time savings and costs savings. The meta-analysis shows that mediation results in improvements of at least 16% or 17% to perceptions of time and cost savings, which is supported by documented savings in the areas of time and cost."*[44]

44. A 2010 EU-funded study stated that:

> *"Assuming a range of mediation success rate from 60% to 75%, we can evaluate from 331 days to 436 days the extra time wasted in average in Europe as a result of not using a two-step approach method of "mediation-then-court" with an extra legal cost from € 12.471 to € 13.738 per case."*[45]

45. On 6 August 2011, now Chief Justice Dame Helen Winkelmann gave a significant speech to AMINZ[46] ("**2011 AMINZ Speech**"). On the issue of time and costs savings achieved when mediations do not settle, Her Honour stated:

> "*Also of great benefit to the parties is the focus and refinement of the issues that the dispute is really about that can take place in mediation. Even where settlement fails, that exercise will reap benefit for the parties in saved costs, and a shorter trial*."[47]

Others have noted that : "*[m]ediation often assists in narrowing the issues in dispute*".[48]

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[43] Law Reform Commission (Ireland), above n 36, at [3.162]-[3.163].

[44] Austin Lawrence, Jennifer Nugent and Cara Scarfone *The Effectiveness of Using Mediation in Selected Civil Law Disputes: A Meta-Analysis* (Department of Justice Canada, 2007) <www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_3/rr07_3.pdf> at 27.

[45] A Project funded by the European Commission and implemented by ADR Center *The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation* (June 2010) <https://toolkitcompany.com/data/files/Resource%20center/Research%20and%20surveys/Survey_Data_Report%20cost%20of%20not%20using%20ADR%20EU%202010.pdf> at 53.

[46] Winkelmann, above n 16.

[47] At 9.

[48] See:

a. Linklaters "Commercial mediation in Australia" (24 May 2022) <www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/global-guide-commercial-mediation/australia>; and

46. Are there other advantages to mediation? Boulle & Field state:

> "*There is a body of literature establishing that people in dispute commonly prefer consensual processes, even if the outcome achieved may not equate to an individual "win" for them. Research shows this preference arises because consensual processes are considered fair and procedurally just; such perception is said to contribute to party satisfaction with outcomes, a willingness to settle, a preparedness to abide by agreements and feelings of trust, commitment and cooperation*."[49]

Related, I suspect, mediation is also perceived to allow greater opportunities for parties to contribute to, and maintain control of, the outcome, whatever it might be. Interestingly (and perhaps related to the contribution/control factors), there is research which suggests that mediation achieves more durable results than those which have been ordered. In a Scottish mediation pilot that ran from 2006 through 2008, 90% of parties that settled at mediation reported that the terms of their agreement had been carried out, compared with 67% compliance with court orders.[50]

47. The studies do not all support efficacy claims for mediation. In the 2011 AMINZ speech, now Chief Justice Winkelmann further noted as follows:

> *"Some studies have been conducted overseas, that have assessed the impact of mediation on time to disposition and cost of the proceeding. The most significant is the Rand Study, a study ambitious in concept, and excellent in execution which was constructed around statutory reforms to civil procedure in the United States. Referring to this study in his Hamlyn lectures, Professor Michael Zander said:4*
>
> > *ADR is not some form of magic potion. The five year Rand Corporation study of civil justice reforms (in America), based on 10,000 cases in Federal Courts in 16 states, looked also at ADR (mediation and early neutral evaluation) schemes. The report found no statistical evidence that these forms of ADR "significantly affected time to disposition or litigation costs".*
>
> *Against this is to be weighed a more recent, but also much smaller study in Ontario of mandatory mediation over a two year period. The results of that study led researchers to conclude that there were significant reductions in the time taken to dispose of cases and reductions in litigation costs, by virtue of a mandatory mediation scheme.5 But more support for the Rand analysis comes from Dame Hazel Genn's "Twisting Arms" study,6 in which she analysed the cost and delays associated with a group of mediated and a group of non-mediated cases. This led her to conclude:7*

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b. T F Bathurst "The Role of the Courts in the Changing Dispute Resolution Landscape" (2012) 35(3) UNSW Law Journal 870 at 872.

[49] Laurence Boulle and Rachael Field "Re-appraising Mediation's Value of Self-determination" (2020) 30(2) Australian Dispute Resolution Journal 96 at 100.

[50] Margaret Ross and Douglas Bain *Report on evaluation of in court mediation schemes in Glasgow and Aberdeen Sheriff Courts* (Scottish Government Social Research, Queen's Printers of Scotland, 2010) at 51 https://webarchive.nrscotland.gov.uk/20190117013510/http://www2.gov.scot/Publications/2010/04/22091346/19.

> *...that there is not strong evidence to suggest any difference in case duration between mediated and non-mediated cases. Similar proportions of each type of case were resolved within 2 years of issue."*[51]

48. The Rand Corporation study was published in 1996. It was analysing discrete schemes established in six different parts of the US. It "*found no major program effects, either positive or negative*"[52] arising from those schemes. It certainly runs contrary to the other statistics quoted above. But it is consistent, on the time-saving issue, with a 2018 Michigan study, which found that mediation under a scheme in that jurisdiction had little or no effect on length of time to dispose a case when compared to cases that did not use ADR.[53]

49. Dame Hazel Genn's "Twisting Arms" report was published in 2007[54] ("**Twisting Arms Report**"). I would respectfully suggest that its title has a pejorative edge. Mediators are teased, and are happy to be teased, about a variety of things, from the *kumbaya* calls, to our annoying propensity to keep asking how much it is all going to cost. But most would take some umbrage at the suggestion we are in the business of twisting people's arms. The Twisting Arms report analysed two mediation schemes that operated in the Central London County Court: the Automatic Referral to Mediation scheme ("**ARM Scheme**"), and the Central London Voluntary Mediation scheme ("**VOL Scheme**").

50. The ARM Scheme was a one-year pilot. It dealt largely (82%[55]) with personal injury cases. The mediations lasted for three hours, and the mediation fee was GDP100 per party.[56] According to the Twisting Arms Report, the settlement rate:

> "*...followed a broadly downward trend over the course of the pilot, from a high of 69% among cases referred in May 2004, to about 38% for the cases referred in March 2025*"[57]

The settlement rate of 38% is very low. When asked why cases had not settled, parties referred to a variety of factors, including:

> "*poor skills demonstrated by the mediator, the time constraint of a three hour mediation and the physical conditions in which the mediations were held*"[58].

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[51] Winkelmann, above n 16.

[52] James S. Kakalik and others *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (The Institute for Civil Justice, RAND Corporation, Santa Monica, 1996) <www.rand.org/pubs/monograph_reports/MR803.html> at xxxiv.

[53] Michael D. Campbell and Sharon L. Pizzuti *The Use of Case Evaluation and Mediation to Resolve Civil Cases in Michigan Circuit Courts: Follow-up Study Final Report* (Michigan Supreme Court State Court Administrative Office, 1 May 2018) <www.courts.michigan.gov/498849/siteassets/reports/odr/2018-mediation-and-case-evaluation-study.pdf>.

[54] Hazel Genn and others "Twisting arms: court referred and court linked mediation under judicial pressure" (Ministry of Justice Research Series, Ministry of Justice, London, UK, 2007).

[55] At pii.

[56] At 26.

[57] At piii.

[58] At 91.

On the topic of the physical conditions in which the mediations were held, feedback included "*airless, hot basement rooms*", and "*members of one party had to stand up*".[59]

51. The VOL Scheme was longer running than the ARM Scheme, considered from 1996-2005 in the Twisting Arms Report. The VOL Scheme also involved three-hour mediations, and a fee of GDP100 per party. According to the Twisting Arms Report, the VOL Scheme:

> "*...settlement rate at mediation has declined from the high of 62% in 1998 to below 40% in 2000 and 2003*"[60]

Again, this is a low settlement rate. The most common complaints about the VOL Scheme included:

> "*...rushed mediation, facilities at the court and poor skills on the part of the mediator*"[61]

52. The ARM Scheme and the VOL Scheme may not have been, I would respectfully submit, ideal schemes against which to test the efficacy of mediation generally. Here in New Zealand, as noted above, settlement rates are much higher, which tends at least to suggest better process. Most commercial mediations are conducted over a day.[62] Mediators are very careful to ensure that conditions are conducive to good decision-making.[63]

53. It has to be acknowledged that empirical analyses of mediation generally face dataset challenges. The nature of mediation can vary country to country, mediator by mediator, and case by case. Cases that get mediated, even by order, may have a self-selecting aspect to them. When studies set out the time and cost saved by mediation, it is not always clear if/how they have taken into account the possibility that mediated matters may eventually have settled anyway (albeit surely at some further cost).

54. It must be that not every mediation will be a benefit to the parties. Some will even set them back, if there is no settlement, or issues refinement.

55. This paper is not the place for a final survey meta-analysis, to "rule them all". And we are dealing with social science that will inevitably defy finality. But I would respectfully contend that the preponderance of the research suggests that mediation saves time, costs, and has other benefits. The explosive growth of mediation since the 1990s,[64] and its now widespread worldwide use, would suggest there is something to it.

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[59] At 121.

[60] At iv.

[61] At iv.

[62] Morris and Shaw, above n 22, at 248.

[63] By way of example, see Nina Khouri's description of her process in Daniel Kalderimis and Nina Khouri, "Mediation as Access to Justice" (2023) NZLJ 369 at 375-378.

[64] See:

a. Morris and Shaw, above n 22, at 33-34; and
b. CEDR, above n 32, at 3.

56. As I survey the comparable jurisdictions later in this paper, I will comment on perceptions of the efficacy of the mediation frameworks that each have in place.

NEW ZEALAND

Mediation framework in the senior courts

57. Procedural matters in New Zealand's senior courts are dealt with in the High Court Rules 2016 ("**HCR**") and the Court of Appeal (Civil) Rules 2005 ("**CAR**"). There are some relevant provisions in other legislation, and there is some relevant case law. Those senior courts do not have a general power to order unwilling parties to mediate. They have very limited powers to encourage mediation. Further detail and commentary is set out below.

58. The Rules Committee is working on a re-draft of the HCR at the time of writing, with an emphasis on promoting access to civil justice.[65] But, as I understand it, that re-draft will not, at this point, include significant changes to the mediation framework.

Nudges

59. There are limited nudges in the New Zealand senior courts framework.

60. The objective of the HCR is set out at HCR r1.2:

> *"The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application."* (underlining added)

The focus here is exclusively on the determination, rather than the resolution, of disputes. This in contrast to the approach taken in comparable jurisdictions. See below.

61. Under HCR r7.2-7.4, cases in the High Court are subject to case management conferences. Parties to case management conferences must file a memorandum that addresses the matters listed in Schedule 5 to the HCR. The Schedule 5 matters include:

> *"8 If the proceeding is ready to go for a hearing or a trial,—*
> *…*
> *(i) is alternative dispute resolution suitable to try to facilitate settlement prior to trial?"*

The Schedule 5 8(i) provision is a little odd, in that it implies that a proceeding might only be amenable to ADR once it is ready for trial. Many cases are mediated at earlier points in proceedings. My understanding is that this issue, at least, will be addressed in the re-draft of the HCR that the Rules Committee is working on.

62. There are no express nudges towards mediation in the CAR. Interestingly, CAR r5(1), which deals with the Court of Appeal's powers to issue directions, reads as follows:

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[65] Courts of New Zealand "Current Projects" <www.courtsofnz.govt.nz/about-the-judiciary/rules-committee/projects/>.

> "*The Court may give any directions that seem necessary for the just and expeditious resolution of any matter that arises in a proceeding, whether on application by a party or on the Court's own initiative*." (underlining added)

63. Informally, in the context of case management conferences and interlocutory appearances, Judges can and do encourage parties to consider settlement and ADR. Anecdotally, I understand that some judges are more muscular in this regard than others.

Presumptions

64. There is no presumption that mediation will occur in the New Zealand senior courts framework.

65. The absence of a general presumption that mediation will occur in the New Zealand senior courts sets those courts apart from other New Zealand courts and tribunals, many of which do have frameworks that presume mediation will occur. These include the Employment Court (where mediation is considered to be practically mandatory),[66] the Environment Court,[67] and the Weathertight Homes Tribunal ("**WHT**").[68]

66. The District Court does not have a framework that presumes mediation will occur. But it does presume that a judicial settlement conference ("**JSC**") will occur (unless the matter is suitable for a "short trial").[69] A JSC is much like a mediation, but facilitated by a judge.[70] A judge who facilitates a JSC will not usually be the judge who hears the matter if it does not settle, and goes on to trial.[71]

67. These other New Zealand court and tribunal frameworks with a mediation (or JSC) presumption have, combined, resulted in large numbers of mediations (and JSCs). In some cases, the frameworks have been around for a long time. And they appear to have operated without ill effect. In particular, I am unaware of any clamour that they compromise the principles that: justice should be seen to be done; courts should treat all parties fairly; and that mediation is a voluntary process.

Mandatory mediation

68. There is no general mandatory mediation framework applicable to the senior courts in New Zealand.

69. There is one statutory exception to this, being the Farm Debt Mediation Act 2019 ("**FDMA**"). The FDMA is based on long-standing, and successful, Australian

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[66] Employment Relations Act 2000, s 188, and see Forrest Miller, Judge of the Court of Appeal "Barriers to participation in employment litigation: what might make a difference and would it work?" (speech to the AUT and Victoria University Symposium, Wellington, 22 May 2019) <https://nzpri.aut.ac.nz/__data/assets/pdf_file/0008/383093/Barriers-to-participation-speech-Justice-Miller.pdf>.

[67] Resource Management Act 1991, s 268.

[68] Weathertight Homes Resolution Services Act 2006. Note that the WHT does not have a power to require mediation (see Morris and Shaw, above n 22, at 233), but the practise has been that there is an effective presumption that matters will be mediated.

[69] District Court Rules 2014, r 7.2(3)(d).

[70] Rule 7.3.

[71] Rule 7.3(6).

legislation.[72] It sets out a discrete mediation framework for farm debt claims, which is effectively mandatory. Under the FDMA a farm creditor cannot take enforcement action (which would typically be through the High Court), unless they have attempted to mediate with the debtor farmer.[73] The FDMA was introduced with the support of farmers.[74] Since the FDMA came in to force on 1 July 2020, there have been over 117 mediations conducted pursuant to it.[75] The FDMA is an example of the Government placing confidence in mediation as a means of addressing significant issues.

Orders

70. As to orders, HCR r7.79(5) provides that:

> *"A Judge may, with the consent of the parties, make an order at any time directing the parties to attempt to settle their dispute by the form of mediation or other alternative dispute resolution (to be specified in the order) agreed to by the parties."*

A toothless tiger is still, at least, a tiger. This provision is more in the manner of a toothless local tabby. Parties can of course agree to mediate at any time in any event. It is hard to see the utility of this provision, save that perhaps it opens the door for a conversation in court about the possibility of mediation.

71. There are discrete contexts in which the High Court can order parties to mediate, against the wishes of one or more parties. One is under s145 of the Trusts Act 2019, which provides:

> *"The court may, at the request of a trustee or a beneficiary or on its own motion,—*
>
> *(a) enforce any provision in the terms of a trust that requires a matter to be subject to an ADR process; or*

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[72] Including the Farm Debt Mediation Act 1994 (NSW) (which scheme Melissa Hanks describes as mandatory mediation - see Hanks, above n 30, at 930), the Farm Debt Mediation Act 2011 (Vic), and the Farm Business Mediation Act 2017 (Qld). Comments on the success of this Australian legislation can be found in:

a. Mark Hilton "Farm Debt Mediation Act 1994 (NSW): a different landscape" *Australian Banking & Finance Law Bulletin* (Australia, June 2018);

b. Kelly McIntyre "Farm debt mediation – how does it work and is it effective?" *ADR Law Bulletin* (Australia March 2016); and

c. Rural Assistance Authority *Farm Debt Mediation Act 1994 (NSW) Review Consultation Paper* (23 March 2017).

But note that some have referred to power imbalance issues in these mediations, including: Vicki Waye "Mandatory mediation in Australia's civil justice system" (2016) 45(2-3) Common Law World Review 216, at 217.

[73] Farm Debt Mediation Act 2019, ss 10, 11 and 34 [FDMA].

[74] Federated Farmers of New Zealand "Submission to Primary Production Select Committee on Farm Debt Mediation Bill, 3 August 2018" at <www.fedfarm.org.nz/FFPublic/FFPublic/Policy2/National/2019/FFNZ_submission_on_the_Farm_Debt_Mediation_Bill.aspx>.

[75] An email to the Author, dated 5 November 2024, from the Office of Farm Debt Mediation, Ministry for Primary Industries, advised that, at that date, there had been 117 Mediation Reports received under the FDMA. Mediation Reports must be filed after each FDMA mediation under FDMA s.27, and so are a good measure of how many mediations have taken place.

(b) otherwise submit any matter to an ADR process (except if the terms of the trust indicate a contrary intention).”

This power has been considered in:

(a) *S v N.* [76] Mediation was not ordered. The Court considered that the matters that could bear on the discretion to order mediation included: cost, confidentiality, speed, seriousness and complexity, and the suitability of the proposed mediator;

(b) *Wright v Pitfield.*[77] Mediation was ordered. The Court confirmed that the power extended to compelling parties to mediate over the objection of one, and exercised that power (effectively, the case settled at mediation);

(c) *Terry v Terry.*[78] Mediation was not ordered, apparently in large part because of a sense that there was not a realistic prospect of settlement. Generally, I would respectfully suggest this can be a problematic basis on which to decline an application for an order to mediate. Many mediations look intractable at the outset. Otherwise, the parties would have settled them themselves. Many one-day mediations still look intractable in the early afternoon. But most settle. Prominent UK commentator Tony Allen has written on this issue.[79] More on this in the England and Wales section below. More generally, however, the Court in *Terry v Terry* referred to mediation in very positive terms;

(d) *Wiggins v Wiggins.*[80] Mediation was not ordered, because a third party company involved in the issues at hand would not be a party;

(e) *Gatfield v Hinton.*[81] Mediation was ordered, over the opposition of two beneficiaries;

(f) *Addleman v Lambie Trustees Ltd.*[82] Mediation was ordered. The Court stated:

> “*Parliament has clearly recognised the significant benefits that ADR might offer in contrast to the expense and damage that adversarial litigation can give rise to*.”[83]

The Court further stated that:

> “*Resolution of even some issues at mediation may materially reduce the extent of discovery eventually required as well as the length of any trial*”[84]

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[76] *S v N* [2021] NZHC 2680.
[77] *Wright v Pitfield* [2022] NZHC 385, and see: Simon Barber “Case Note ‘If you take a horse to water it usually does drink’ – mandatory mediation of trust disputes in New Zealand: *Wright v Pitfield* [2022] NZHC 385” (2022) 28(8) Trusts and Trustees 810 at 810-814.
[78] *Terry v Terry* [2023] NZHC 884.
[79] Tony Allen “Trying not to say “I told you so”: A Halsey Chronology” CEDR <www.cedr.com/trying-not-to-say-i-told-you-so-a-halsey-chronology/>.
[80] *Wiggins v Wiggins* [2024] NZHC 863.
[81] *Gatfield v Hinton* [2024] NZHC 1712.
[82] *Addleman v Lambie Trustees Ltd* [2024] NZHC 1790.
[83] At [27].
[84] At [39].

; and

(g) *Innes v Darlow.*[85] Mediation was not ordered. Lack of merit in the claim, and low prospect of settlement seem to have been the key reasons.

The Trusts Act 2019 came into force at the beginning of 2021. In the four years since, the High Court has, as above, addressed a healthy number of applications under s145, with mediation ordered on three occasions.

72. The High Court can also, in essence, order parties to mediate, against the wishes of one or more parties, where mediation is required by a contract entered into before a dispute arose. Many standard-form contracts in New Zealand (particularly in leasing and construction) have dispute resolution clauses that require parties to mediate before they can take a dispute further. The courts enforce such contracts by staying proceedings until parties have complied with their obligation to mediate.[86]

73. To the extent the High Court does order parties to mediate, in the contexts above, these orders, again, appear to have operated without ill effect. In particular, again, I am not aware of any clamour that such orders unduly compromise the principles that: justice should be seen to be done; courts should treat all parties fairly; and that mediation is a voluntary process.

74. There are no provisions for mediation orders in the CAR.

Costs sanctions

75. The New Zealand senior courts' costs regimes are set out in their respective rules. The HCR (HCR r14.1-14.23) and the CAR (CAR r53, r53A-J) are relatively similar. None refer to mediation, or ADR.

76. The senior courts retain a broad discretion on costs.[87] The case law on whether this can extend to sanctioning parties for an unreasonable failure to engage in mediation is inconsistent. At times, the New Zealand courts have been resistant to the idea. But there have been cases where it has occurred. The key cases, listed chronologically, include:

(a) *Beadle v M & L A Moore Ltd.*[88] The Court of Appeal allowed the possibility of such a costs award, but suggested it would require some particular compelling circumstance. It did not specify what that circumstance might be;

(b) *Glaister v Amalgamated Dairies Ltd.*[89] Heath J declined to reduce costs because the (largely successful) plaintiff had failed to entertain mediation. His Honour discussed the English decisions, but distinguished them on the basis of the different legislative footing that they flowed from;[90]

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[85] *Innes v Darlow (ato Innes Property Trust)* [2024] NZHC 2614.

[86] See: *Braid Motors Ltd v Scott* (2001) 15 PRNZ 508, *Waterco (NZ) Ltd v Simpson* [2012] NZCCLR 33, *Dempsey v South Island Investments Ltd* [2023] NZHC 1999, and *Jones & Ors v Tasman Motor Camp 2019 Ltd*, [2022] NZHC 207 (albeit this latter case related to the appointment of an expert, rather than a mediator).

[87] High Court Rules rr 14.6(3)(d) and 14.6(4)(f) [HCR], Court of Appeal (Civil) Rules 53E(2)(d) and (3)(f) [CAR].

[88] *Beadle v M & L A Moore Ltd* [1998] 3 NZLR 271.

[89] *Glaister v Amalgamated Dairies Ltd* (2003) 16 PRNZ 536 (HC) .

[90] At [28].

(c) *Leaderbrand Produce Ltd v Danfoss (New Zealand) Ltd* .[91] Harris J declined to increase costs for an unreasonable refusal to mediate. His Honour was not satisfied that he had jurisdiction to do so;[92]

(d) *Braeburn Dairies Ltd v McGregor & White Electrical Ltd.*[93] French J ordered indemnity costs against Braeburn, for pulling out, at a late stage, of a mediation it had agreed to.[94]

(e) *Milnes v Glenara Holdings Ltd.*[95] Heath J ordered a costs uplift on the basis of "*unreasonable behaviour*". Amongst His Honour's concerns about the defendant in this regard, were "*...doubts about the genuineness of its commitment to mediation*";[96]

(f) *Body Corporate 198900 Ltd v Bhana Investments Ltd.*[97] Toogood J declined to order an uplift in costs on the basis that a party had unreasonably refused to mediate. His Honour considered that such a costs uplift would come close to asserting that the Court had the power to direct ADR;[98]

(g) *Le Couteur v Norris.*[99] Powell J declined to increase costs in relation to a refusal to mediate, because His Honour did not consider that the refusal had been unreasonable; and

(h) *PCL Trustees (No.2) Limited v Pub Charity Ltd.*[100] Gendall J found that the costs of a planned mediation which did not take place should be included in an indemnity costs award, since the plaintiffs had prevented the mediation from proceeding with a last-minute decision not to attend.[101]

77. Nic Scampion has written an excellent article on this topic.[102] He suggests that there needs to be a clear decision on it.[103]

Observations

78. As noted, the existing framework in New Zealand's senior courts does little to encourage mediation. Morris & Shaw state:

> "*The traditional New Zealand Courts possibly play the weakest recommendatory role in the English-speaking common law world*"[104]

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[91] *Leaderbrand Produce Ltd v Danfoss (New Zealand) Ltd* HC Auckland CIV-2006-404-6531, 19 June 2008.
[92] At [6].
[93] *Braeburn Dairies Ltd v McGregor & White Electrical Ltd* HC Dunedin CIV 2009-412-668, 16 December 2011.
[94] At [15]-[18].
[95] *Milnes v Glenara Holdings Ltd* [2013] NZHC 2057.
[96] At [12] and [13].
[97] *Body Corporate 198900 Ltd v Bhana Investments Ltd* [2015] NZHC 287.
[98] At [11].
[99] *Couteur v Norris* [2019] NZHC 2075.
[100] *PCL Trustees (No.2) Limited v Pub Charity Ltd* [2022] NZHC 2278.
[101] At [26].
[102] Nic Scampion "Costs sanctions in civil courts for refusing to mediate" [2022] NZLJ 228.
[103] At [250].
[104] Morris and Shaw, above n 22, at 272.

My survey of comparable jurisdictions confirms this. It shows, as below, that the senior courts in all have greater powers than New Zealand's senior courts to encourage and/or order mediation. We are an outlier. Why? Is there something different about New Zealand's dispute resolution landscape, or even our culture, that explains why we go it alone on this issue?

79. As set out above, frameworks with a mediation (or JSC) presumption operate in other courts and tribunals in New Zealand, without obvious ill-effect. There are already discrete contexts in which senior courts matters, or matters otherwise bound for the senior courts, are mandatorily mediated, or ordered to mediate. Again, without obvious ill-effect.

80. It is also significant that, when faced with disasters that generate high volumes of civil disputes, the New Zealand Government has put mediation at the centre of its dispute resolution responses. I have already mentioned the WHT, established in response to the leaky homes crisis, and through which many mediations have occurred. Two further schemes were set up to deal with disputes between homeowners and insurers in the wake of the Canterbury Earthquake Sequence ("**CES**"). They were:

    (a) The Canterbury Earthquakes Insurance Tribunal ("**CEIT**"), established by the Canterbury Earthquakes Insurance Tribunal Act 2019 ("**CEIT Act**"). The CEIT was modelled on the WHT. Under the CEIT Act, the CEIT has the power to direct parties to mediation;[105] and

    (b) The Greater Christchurch Claims Resolution Service ("**GCCRS**").[106] The GCCRS had determinative and mediation streams. As I understand it, the mediation stream was much the better used. There appear to have been a total of 44 GCCRS mediations relating to the CES at a c.70% settlement rate.[107] The GCCRS was recently renamed the New Zealand Claims Resolution Service ("**NZCRS**"). The NZCRS is mandated to provide independent support to homeowners to resolve residential insurance issues resulting from natural disasters.[108] It continues to have mediation as a focus of its dispute resolution offerings.[109]

81. It is not apparent that the New Zealand Government has felt constrained by concerns about the fairness of mediation when setting up, and operating, the mediation schemes

[105] Canterbury Earthquakes Insurance Tribunal Act 2019, s 27(1)(h).
[106] New Zealand Claims Resolution Service "Who we are" <www.nzcrs.govt.nz/about-us/who-we-are/>.
[107] Email from NZCRS to the author's research assistant, Olivia Whineray-Kelly, regarding NZCRS mediation statistics, dated 23 January 2025. That email recoded a total of 74 mediations, but that included 14 that were settled before mediation and 16 that were withdrawn.
[108] New Zealand Claims Resolution Service, above n 106.
[109] New Zealand Claims Resolution Service "Resolving Disputes and Claims" <www.nzcrs.govt.nz/our-services/resolving-disputes-and-claims/>.

in the WHT, the CEIT, and the GCCRS/NZCRS.[110] Even though these schemes are dealing with disputes where there can be acute trauma (at least for claimants), and significant power imbalances (homeowner v institution/insurer).

82. I do not think that most of New Zealand's lawyers, or many of their clients, have an undue aversion to mediation. New Zealand has a well-developed culture of privately mediating civil disputes. Morris & Shaw describe this in the Commercial Mediation chapter of their book, Mediation in New Zealand.[111] I have some first-hand knowledge of this too.

83. New Zealand lawyers are in fact obliged by statute to keep clients advised of alternatives to litigation. The Client Care Rules state:

> *"A lawyer assisting a client with the resolution of a dispute must keep the client advised of alternatives to litigation that are reasonably available (unless the lawyer believes on reasonable grounds that the client already has an understanding of those alternatives) to enable the client to make informed decisions regarding the resolution of the dispute*."[112]

84. As far as I am aware (and I acknowledge that I am poorly qualified to comment), there is no problematic incompatibility between tikanga Māori and mediation. Writing in the NZLJ in 2021, Nina Khouri noted the provision for tikanga-Māori based mediation in the FDMA framework, and stated:

> "*This is an emerging theme of mainstream mediation practice in New Zealand….Tikanga-based mediation will vary on circumstances and location and will be tailored to the needs of particular parties and whenua. It may incorporate, for example:[28]*
>
> *(a) traditional practices such as karakia, pōwhiri, hākari, waiata;*
>
> *(b) consensual decision-making, based on kōrero, prioritising the preservation of the mana of the parties;*
>
> *(c) collective or communal decision-making; and*
>
> *(d) multi-party participation in and attendance at mediation*."[113]

Nina Khouri also spoke compellingly to some of the common themes in mediation practice and tikanga in a 2023 paper.[114]

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[110] That is not to say that fairness concerns have not been raised in relation to these mediation frameworks. Regarding the WHT, see Morris and Shaw, above n 22, at 235, with particular reference to concerns for claimants who enter the process without legal representation.

[111] Morris and Shaw, above n 22, at 247 – 274.

[112] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, above n 18, 13.4.

[113] Nina Khouri "Mediation" [2021] NZ L Rev 169 at 174.

[114] Kalderimis and Khouri, above n 63, at 375.

85. There are provisions in the Treaty of Waitangi Act 1971 which enable the Waitangi Tribunal to refer matters to mediation.[115] Although, apparently, that power has been little used.[116]

86. There are also mediation provisions in Te Ture Whenua Māori Act 1993/ Māori Land Act 1993.[117] In a recent development in this area, I understand that AMINZ is working with the MOJ as it develops the dispute resolution service provided within the Māori Land Court/Te Kooti Whenua Māori. The service provides free tikanga based mediation to landowners and whānau, to enable them to resolve disputes over whenua without having to go through formal court proceedings.[118]

87. The flexible nature of mediation should, I hope, allow it, at least in the hands of properly qualified mediators, to adapt well to tikanga Māori requirements. But it is important to tread carefully here. Morris & Shaw state:

> "*The current New Zealand model of mediation is a Western one and cannot be assumed to apply automatically to all cultures. Adaptation is necessary, but culture must be properly integrated into the process rather than added on as an afterthought."*[119]

88. One issue which may affect the senior courts' relationship with mediation in New Zealand is the judicial perception of mediation. In the 2011 AMINZ speech[120] now Chief Justice Winkelmann criticised aspects of mediation practice (or, at least, how some mediators practised), and cast some doubt on the efficacy of the process as a means for achieving time and costs savings (see above). Her Honour's central thesis was that mediation is no substitute for civil justice, and that it is wrong to promote mediation by way of "*an anti-litigation discourse*".[121] That speech was bravely made, as it went against the popular current. It has troubled New Zealand mediators ever since. It was the subject of an elegant and intelligent response by Daniel Kalderimis KC and Nina Khouri at the 2023 AMINZ Conference.[122] I could not match their prose, but do endorse their analyses.

89. In May 2020, Her Honour was interviewed by the President of the New Zealand Law Society.[123] She was asked about the suggestion that mediation might help to reduce COVID litigation. She replied:

> "*The courts have always encouraged people to mediate in appropriate cases but on the other hand, we don't sanction people for exercising their legal rights. By that I mean we do not impose cost consequences for a failure to mediate. We keep a close eye on what goes on in other jurisdictions and I am aware that some jurisdictions require mediation. That approach has however been*

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[115] Treaty of Waitangi Act 1975, sch 2, 9A-D.

[116] Tom Bennion, Geoffrey Melvin, and William Young (ed) *Laws of New Zealand* Māori Affairs, (online ed) at [166], note footnote 7.

[117] Te Ture Whenua Māori Act 1993/ Māori Land Act 1993 ss 26 and 30B.

[118] AMINZ "Kōrero: October 2024" *AMINZ monthly newsletter* (New Zealand, October 2024).

[119] Morris and Shaw, above n 22, at 108.

[120] Winkelmann, above n 16.

[121] At 11.

[122] Kalderimis and Khouri, above n 63.

[123] Interview with Helen Winkelmann, Chief Justice of New Zealand (Tiana Epati, President of the New Zealand Law Society) "The courts and lockdown: Looking for transformational opportunities" (2020) 939 LawTalk 9.

> *criticised as creating a barrier to access to justice. It's just another cost that then becomes associated with the court process*."[124]

Respectfully, there is a bit to disagree with in that statement. There is very limited scope in the New Zealand senior courts mediation framework for the courts to encourage people to mediate. That said, as above, the case law in New Zealand, albeit inconsistent, suggests that our senior courts do sometimes exercise a discretion to sanction parties with costs for an unreasonable failure to engage in mediation.

90. The contention that requiring mediation creates a barrier to access to justice (an approach similar to that stated by at least one other senior New Zealand judge[125]) is also challenging. It suggests that access to justice is only access to the courts, and cannot be achieved through mediation. This is in distinction to the MOJ and NZLS definitions of access to justice (see above). And see also the observations of Kalderimis & Khouri in their 2023 papers, with Daniel Kalderimis stating:

> "*People finding peace may not be how we commonly think about justice, but, from a practical point of view, I think it is vitally important. Indeed, it may be the most profound and meaningful form of justice there is.*"[126]

Even if access to justice is viewed through the narrower, NZBA, access to the courts, prism, the decision in *Churchill* (further detailed below) is helpful. Drawing on EU jurisprudence, the EWCA held that, to the extent requiring ADR does affect access to the courts, it can still be appropriate, provided it is done in a proportionate way, and ultimate access to the courts remains unimpaired.[127]

91. The description of required mediation as "*another cost that then becomes associated with the court process",* would likely be fair of a mediation which is unsuccessful in all respects, that is, there is neither settlement nor issues refinement. But most required (mandated/ordered) mediations do settle.[128] And, even in those which do not settle, there is often likely to be issues refinement (as Her Honour noted in the 2011 AMINZ speech, referred to above), which will save costs.

92. In the context of judicial perceptions of mediation, I have focussed on statements by the Chief Justice, but those statements appear to reflect the thinking of some other senior judges.[129] New Zealand is a small country, with a relatively short history of mediation, and very few commercial mediators. I wonder if some judicial perceptions of mediation have been shaped by discrete, and perhaps limited, experiences, contexts and feedback, which may not be reflective of the wider mediation world. In

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[124] At 10.

[125] Miller, above n 66, at 8, "...*to insist on mediation is to create a process barrier to adjudication*...".

[126] Kalderimis and Khouri, above n 63, at 374.

[127] *Churchill*, above n 1, at [50]-[58].

[128] See:

a. The quotes from Spigelman, Phillips, *Churchill*, and Hanks at paras 31-34 above; and
b. Morris and Shaw, above n 22, at 271.

[129] See:

a. Miller, above n 66; and
b. Ian Barker "Arbitration, mediation and the Courts" [2004] NZLJ 489 (albeit that Sir Ian was retired from the Bench when he wrote that article).

the UK, Tony Allen has written on how improving judicial perceptions of mediation have been a function of a development in the number of senior judges with extensive experience of, and training in, mediation.[130]

93. I would hasten to add that we mediators must also show that we, and, more importantly, what we do, are worthy of greater recognition. As recently stated in the UK on this issue:

> *"This is not a one-way street. For their part ADR practitioners must earn the trust and support of other stakeholders."*[131]

More on this later in this paper.

94. In any event, as noted, we are an outlier, when it comes to our senior courts' lack of powers to encourage, or order, parties to mediate. Beyond a need to tread carefully in the cultural context, judicial perceptions, and New Zealand mediators earning greater trust and support, there is no particular, New Zealand-specific, reason that I am aware of for us to be different. But that does not mean we should change so as to be the same. Perhaps the better questions are: why change? Is there a problem that change might help with? Well…

NEW ZEALAND: ACCESS TO JUSTICE ISSUES IN THE SENIOR COURTS

95. Access to justice issues, however defined, have been a major concern in New Zealand for some time. The NZLS has described a "*justice gap*" that has been "*slowburning for at least a generation*".[132] The issues are national, and significant. The Wayfinding for Civil Justice National Strategy document states:

> *"Between 40 and 63 percent of people in Aotearoa New Zealand will likely experience a legal problem within a two-year period.2 These problems can cause a range of negative consequences such as stress, anxiety, loss of confidence, fear, financial loss, and health problems. Providing all people with equal access to civil justice to solve these problems is a key component of the commitment to rule of law and to honour the obligations of Te Tiriti."*[133]

96. According to research conducted for the NZLS, lawyers, obviously amongst those closest to the justice system:

> *"…are concerned about access to justice in Aotearoa New Zealand. 52% rate the legal system as poor or very poor at providing everyone in Aotearoa New Zealand access to justice. A further 41% rate it as OK. Only 10% rate it as good or very good."* [134]

97. Financial barriers are a major factor. These manifest in various ways. The Rules Committee stated in 2022 that:

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[130] Allen, above n 79.

[131] Civil Justice Council *Annual Report* (2017), at 8.

[132] Rules Committee, above n 11, at 3.

[133] Bridgette Toy-Cronin and others *Wayfinding for Civil Justice National Strategy* (December 2023) <www.justice.govt.nz/assets/Documents/Publications/Wayfinding-for-Civil-Justice-English.pdf> at 3.

[134] Kantar Public "Access to Justice Research 2021" (Prepared for the New Zealand Law Society, October 2021) <www.lawsociety.org.nz/assets/Access-to-justice/Access-to-Justice-Report_OCT-2021.pdf>.

> "*Litigation, as a mechanism for obtaining resolution of civil disputes, has long been perceived as beyond the financial reach of most New Zealanders.*"[135]

This is compounded by the limited availability of civil legal aid.[136] The expense of litigation can be a particular issue in senior courts matters, which are typically more complex. The situation is getting bleaker. Dr Troy-Cronin's research has found that, lawyers' charge-out rates are increasing at a greater rate than the median weekly income.[137] In the Regulatory Impact Statement for Budget 2022, relating to legal aid funding, it was stated:

> "*Access to justice is worsening in New Zealand for people on low incomes who cannot afford legal assistance*"[138]

98. A further financial barrier can arise through New Zealand's senior courts costs regime. The stated intention of this regime is that successful parties ought to receive a costs award of approximately two-thirds of their actual reasonable costs. As litigators well know, the reality is that costs awards can amount to a third, or even less, of actual costs. So, even vindication comes at a substantial unrecoverable net cost for litigants.

99. Delay is also major factor for access to the senior courts in New Zealand. This will not be news to anyone in the dispute resolution world. But it is still worth noting some of the High Court statistics:

    (a) The national average High Court waiting time for scheduled hearings, with waiting time defined as the time between when the case is ready for hearing and its hearing date, as at 31 December 2022, was 573 days.[139] And bear in mind that it is often many months after the filing of a proceeding that a case is ready for a hearing. In Auckland, easily the largest registry, the wait time was 620 days.[140] In Rotorua it was 985;[141] and

    (b) From 2021-2022, the median waiting time increased by 26%.[142] It increased another 2% in 2023.[143]

100. I have not been able to find delay figures for the Court of Appeal. Anecdotally, I understand that delays of a year or more to hearing are common.

101. I would hasten to add that these delays arise despite the extraordinary work ethic of New Zealand's judges.

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[135] Rules Committee, above n 11, at 6.
[136] At 6.
[137] At 7.
[138] Ministry of Justice *Regulatory Impact Statement: Improving access to legal assistance for low income New Zealanders* (10 June 2022) at <www.regulation.govt.nz/assets/RIS-Documents/ria-justice-lalinz-jun22.pdf> at 1.
[139] Courts of New Zealand "High Court – general proceedings – waiting time for scheduled hearing as at 31 December 2022" <www.courtsofnz.govt.nz/the-courts/high-court/annual-statistics/annual-statistics-for-the-year-ended-31-december-2022/high-court-general-proceedings-waiting-time-for-scheduled-hearings-as-at-31-december-2022/>.
[140] Courts of New Zealand, above n 139.
[141] Courts of New Zealand, above n 139.
[142] High Court of New Zealand *Annual Report 2022* (Courts of New Zealand, 2022).
[143] High Court of New Zealand *Annual Report 2023* (Courts of New Zealand, 2023).

102. Access to justice issues have a significant personal effect. On 29 October 2024, the MOJ released the Final Report of its "ACCESS TO JUSTICE: 2023 LEGAL NEEDS SURVEY".[144] The report summarised the experience of New Zealanders who had experienced justiciable issues in the year prior to the survey. Amongst its findings:

> *"Almost three-quarters (74%) of issues had some form of specific negative impact, with poor mental health (associated with 59% of issues) and financial loss (38%) being the two most common negative impacts.*
>
> *Long-lasting issues are associated with multiple negative impacts. For issues that lasted over six months, 43% of respondents reported at least three negative impacts (compared with 19% of issues lasting up to six months)."*[145]

103. Businesses are also affected by access to justice issues. Disputes can be difficult for them too. On 29 October 2024, MOJ also released the Final Report of its "ACCESS TO JUSTICE: 2023 BUSINESS SURVEY".[146] That report summarised the experience of New Zealander businesses which had experienced justiciable issues in the year prior to the survey. Amongst its findings:

> "*…48% said the issue had a serious impact on their business…*
>
> *…Twenty six percent of respondents said the issue had a high or severe impact upon them personally"*[147]

Particularly for businesses, time is indeed money. Australia's Chief Justice Michael Black has stated:

> "*Delay does more than deny justice. It has multiple cost implications, some more apparent than others. In commercial enterprise, for example, the uncertainty resulting from delay has both direct and incidental costs. Some of these will be measurable, and some not*." [148]

104. The challenges are only mounting. The High Court's workload is increasing. In 2020 it delivered 3518 judgments. In 2023 it delivered 3882.[149] The Court of Appeal's workload is also increasing. In 2022 it delivered 648 judgments. In 2023, it delivered 672.[150]

105. So, New Zealand has access to justice issues which are national, and significant. They resonate in costs and delays. They affect individuals and businesses, with significant

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[144] Ian Binnie (Solasta Consulting) *Access to Justice: 2023 Legal Needs Survey* (Ministry of Justice, 29 October 2024) <www.justice.govt.nz/assets/Documents/Publications/Access-to-Justice-Legal-Needs-Survey-Final-Report-October-2024.pdf>.

[145] At 11.

[146] Ian Binnie (Solasta Consulting) *Access to Justice: 2023 Business Survey* (Ministry of Justice, 29 October 2024) <www.justice.govt.nz/assets/Documents/Publications/Access-to-Justice-Business-Survey-Final-Report-October-2024.pdf>.

[147] At 9.

[148] Michael Black "The Role of the Judge in Attacking Endemic Delays: Some Lessons from Fast Track" (2009) 19 Journal of Judicial Administration 88 at 88.

[149] Courts of New Zealand "Judgment Delivery Expectations" <www.courtsofnz.govt.nz/the-courts/high-court/high-court-judgment-delivery-expectations-inquiry-process-and-recent-judgment-timeliness/>.

[150] Courts of New Zealand "Annual Statistics" <www.courtsofnz.govt.nz/the-courts/court-of-appeal/annual-statistics>.

personal effects. The Courts' workload is increasing. What is to be done? The Wayfinding for Civil Justice National Strategy document states:

> *"We cannot expect to improve access to civil justice without making changes. If we want things to be different, we need to do things differently."*[151]

What does doing things differently look like? No doubt we would benefit from more courtrooms, more judges, and a better-funded legal aid system. But the political and economic climate in New Zealand at the moment is not conducive to fiscal cures. Judges work extraordinary hours. Pro bono efforts by lawyers are being expanded and encouraged. There are continuing developments in court procedures, designed to streamline process. But what about mediation? At the moment, mediation is not seen as a significant potential tool for enhancing access to justice in the senior courts.

106. In the following parts of this paper, I survey the mediation frameworks in the senior courts in comparable jurisdictions. I will also attempt to capture perceptions on the efficacy of those mediation frameworks. Do they work to save cost and time? Might they suggest that there is more that our senior courts might do with mediation to help with access to justice?

ENGLAND & WALES

Mediation framework in the senior courts

107. The mediation framework in the England and Wales High Court and the Civil Division of the Court of Appeal is set out in the Civil Procedure Rules ("**CPR**") (issued under the Civil Procedure Act 1997), the various senior court Guides, and case law.

108. That framework includes nudges, presumptions, orders (since *Churchill*), and costs sanctions. It does not include mandatory mediation. It gives those senior courts significantly greater powers to encourage, and order, parties to civil disputes to mediate than New Zealand's senior courts have.

109. That framework has developed over many years, and continues to develop. It has been the subject of significant jurisprudence, commentary, and careful research. In this paper, I will make particular reference to three reports from the Civil Justice Council ("**CJC**"), issued in 2017 ("**CJC 2017 Report**"),[152] 2018 ("**CJC 2018 Report**"),[153] and 2021 ("**CJC 2021 Report**").[154]

"*Nudges*"

110. The mediation framework in the senior courts in England and Wales includes significant nudges to encourage mediation.

111. The CPR provide, at r1.1, as "*The overriding objective*", that:

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[151] Wayfinding for Civil Justice National Strategy, above n 133, at 8.

[152] Civil Justice Council *ADR and Civil Justice CJC ADR Working Group Interim Report* (October 2017) www.judiciary.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf [CJC 2017 Report].

[153] Civil Justice Council *CJC ADR Working Group Final Report* (November 2018) www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf [CJC 2018 Report].

[154] Civil Justice Council *Compulsory ADR* (June 2021) <www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf> [CJC 2021 Report].

"(1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

…..
(f) promoting or using alternative dispute resolution
….."[155]

(underlining added).

112. The objective of the CPR, with its focus on enabling courts to *deal with* cases, reads in distinction to the objective of the HCR, as above, which is exclusively focussed on the *determination* of disputes.

113. CPR r1.1 (2) (f) was added from 1 October 2024, following the *Churchill* decision.[156] CPR r1.1 (2)(f) means that, from the outset, ADR is recognised as a means by which cases can be dealt with justly, and at proportionate cost. Thus ADR, including mediation, is seen as a means of itself to achieve access to justice.

114. The Pre-Action Conduct and Protocols Practice Direction ("**PAP**") is annexed to the CPR and approved by the Master of the Rolls. The PAP create a pre-litigation nudge. The PAP provides that:

"Objectives of pre-action conduct and protocols

3. Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to—

…

(d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
…

Settlement and ADR

8. Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.

9. Parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been started….

10. Parties may negotiate to settle a dispute or may use a form of ADR including—

[155] Civil Procedure Rules (UK) <https://www.justice.gov.uk/courts/procedure-rules> [CPR].
[156] Tony Allen "Amending the CPR to Accommodate the Impact of Churchill" (8 August 2024) CEDR <https://learn.cedr.com/blogs/amending-the-cpr-to-accomodate-the-impact-of-churchill>.

(a) mediation, a third party facilitating a resolution;

…

11. If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

…

14. The court may decide that there has been a failure of compliance when a party has—

..

(c) unreasonably refused to use a form of ADR, or failed to respond at all to an invitation to do so.

16. The court will consider the effect of any non-compliance when deciding whether to impose any sanctions which may include—

(a) an order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;

(b) an order that the party at fault pay those costs on an indemnity basis;

(c) if the party at fault is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded;

(d) if the party at fault is a defendant, and the claimant has been awarded a sum of money, an order awarding interest on that sum for a specified period at a higher rate, (not exceeding 10% above base rate), than the rate which would otherwise have been awarded."[157]

115. Via the PAP, parties are given strong encouragement to give early, and continuing, consideration to settlement through ADR, including mediation. The prospect of significant sanctions, by way of costs/interest adjustment, for a failure to comply is clearly flagged.

116. The prospect of giving the PAP even more compulsive language in relation to ADR is currently under careful consideration in England and Wales.[158]

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[157] Practice Direction – Pre-Action Conduct and Protocols (UK) <www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#:~:text=Pre%2Daction%20protocols%20explain%20the,Civil%20Procedure%20Rules%20(CPR)>.

[158] Tony Allen "Reforming the Pre-action Protocols - The Increasing Role of ADR" (11 September 2023) Lexology <www.lexology.com/library/detail.aspx?g=9d288552-7bf1-4918-bf93-16a7eb0b1fbc>.

117. Further nudges apply after proceedings are issued. The CPR provide at r1.4 that:

> *"(1) The court must further the overriding objective by actively managing cases.*
>
> *(2) Active case management includes –*
>
> *….*
>
> *(e) ordering or encouraging the parties to use, and facilitating the use of, alternative dispute resolution;*
>
> *(f) helping the parties to settle the whole or part of the case;"*[159]

This places mediation at the forefront of case management by the senior courts. This then plays out throughout the life of a proceeding.

118. Once a statement of defence has been filed, parties to proceedings fill out Form N181, a Directions Questionnaire, to enable directions to be made by the court.[160] Form N181 provides, inter alia:

> "***A. Settlement***
>
> *Under the Civil Procedure Rules parties should make every effort to settle their case before the hearing. This could be by discussion or negotiation (such as a roundtable meeting or settlement conference) or by a more formal process such as mediation. The court will want to know what steps have been taken. Settling the case early can save costs, including court hearing fees.*
>
> ***For legal representatives only***
>
> *I confirm that I have explained to my client the need to try to settle; the options available; and the possibility of costs sanctions if they refuse to try to settle.*
>
> *[ ] I confirm*
>
> ***For all***
> *Your answers to these questions may be considered by the court when it deals with the questions of costs: see Civil Procedure Rules Part 44.*

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[159] CPR 1.4 <www.justice.gov.uk/courts/procedure-rules/civil/rules/part01#1.4>. Note that the 1.4(2)(e) wording is also new, and reflects *Churchill*. Prior to 1 October 2024, it read: *encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.*

[160] Directions questionnaire: N181, at <www.gov.uk/government/publications/form-n181-directions-questionnaire-fast-track-and-multi-track>, issued, as I understand it, under CPR26.4.

1. Given that the rules require you to try to settle the claim before the hearing, do you want to attempt to settle at this stage?

[ ] Yes. Do you want a one month stay?

[ ] Yes
[ ] No

[ ] No. The reasons why I consider it inappropriate to try to settle the claim at this stage are

***Note 1**: The court may order a stay, whether or not all the other parties to the claim agree. Even if you are requesting a stay, you must still complete the rest of the questionnaire.*

More information about mediation, the fees charged and a directory of mediation providers is available online from www.civilmediation. justice.gov.uk This service provides members of the public and businesses with contact details for national civil and commercial mediation providers, all of whom are accredited by the Civil Mediation Council"

119. Regarding Form N181:

(a) The language encouraging ADR is direct, and firm. Through this form the court is again pushing the parties towards ADR, promoting its benefits, and flagging the prospect of sanctions for a failure to engage;

(b) The requirement for legal representatives to confirm that they have explained to clients the need to try to settle, the options available, and the possibility of costs sanctions is interesting. It is no doubt designed as a prompt to lawyers who are less likely to promote settlement (via mediation or otherwise) to their clients. This requirement is in addition to the ethical obligation that lawyers in England and Wales have (as we do in New Zealand – see above), to advise their clients on the possibility of ADR;[161] and

(c) The one month stay for settlement by ADR is allowed for in CPR26.5.

[161] CJC 2017 Report, above n 152, at [5.37].

120. Parties are also encouraged via the various senior court Guides to consider ADR throughout the life of proceedings. The Commercial Court Guide[162] provides at G for Negotiated Dispute Resolution ("**NDR**"), and states:

> *"G1.1 Parties who consider that NDR (referred to in previous editions of the Guide as 'ADR') might be an appropriate means of resolving the dispute or particular issues in the dispute may apply for directions at any stage.*
>
> *G1.2 Legal representatives in all cases should consider with their clients and the other parties concerned the possibility of attempting to resolve the dispute or particular issues by NDR and should ensure that their clients are fully informed as to the most cost effective means of resolving their dispute.*
>
> *G1.3 The Judges will in appropriate cases invite the parties to consider whether their dispute, or particular issues in it, could be resolved through NDR procedures (such as, but not confined to, mediation and conciliation). Where that is done, if appropriate, a hearing may be adjourned, or the proceedings may be stayed, for a specified period of time to allow for NDR, extending time as may be required for the taking of other steps in the case."*[163]

The Commercial Court Guide also contains, at appendix 3, a draft NDR order, which provides a mechanism for parties to initiate NDR.[164]

121. There are also similar ADR provisions in The Chancery Guide,[165] The Queens Bench Guide,[166] and the Technology and Construction Court Guide.[167]

122. The nudges within the England and Wales senior courts mediation framework are strongly worded, and most apply throughout the life of proceedings. They promote the advantages of ADR, particularly the prospect of cost saving. They put the onus on lawyers to make sure their clients understand the benefits of, and opportunities for, ADR. They note the risk of sanctions for a failure to engage.

"*Presumptions*"

123. There is no express general mediation presumption in the England and Wales senior courts mediation framework. But there are discrete contexts in which presumptions can operate. They include:

(a) Ungley orders;

(b) Fontaine orders;

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[162] The Business and Property Courts of England & Wales The Commercial Court Guide (incorporating The Admiralty Court Guide) (11th ed 2022) <www.judiciary.uk/wp-content/uploads/2023/06/14.341_JO_Commercial_Court_Guide_FINAL.pdf>.

[163] At G.

[164] At Appendix 3, Draft NDR Order.

[165] The Business and Property Courts of England & Wales Chancery Guide 2022 (Third update 2024) <www.judiciary.uk/wp-content/uploads/2024/11/Chancery-Guide-2024-web-26-6-24-v2-1.pdf> at 74-75.

[166] The Queen's Bench Guide 2022 <www.judiciary.uk/wp-content/uploads/2022/02/Queens-Bench-Division-Guide-2022.pdf> at [10.5].

[167] The Technology and Construction Court Guide (October 2022) <www.judiciary.uk/wp-content/uploads/2023/06/The-Technology-and-Construction-Court-Guide.pdf> at s 7.

(c) The High Court Appeals Mediation Scheme ("**HCAMS**"); and

(d) The England and Wales Court of Appeal Mediation Scheme ("**EWCAMS**").

124. Ungley orders were devised by Master Ungley, prior to 2004. As I understand it, they can be applied for by any party to a proceeding. An Ungley order provides that:

> *"1. Parties shall by [date] consider whether the case is capable of resolution by ADR.*
>
> *2. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge considered* [sic] *that such a means of resolution were appropriate, when he is considering the appropriate costs order to make.*
>
> *3. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice, save as to costs, giving reasons upon which they rely for saying that the case was unsuitable."*[168]

125. Ungley orders were referred to with approval by the EWCA in *Halsey v Milton Keynes General NHS Trust.*[169] They are apparently usually made at the second or third case management conference, later in the life of a proceeding.[170] I think they are best categorised, for the purposes of this paper, as a presumption framework, because, once such an order is granted, there is plainly a strong presumption that ADR will occur.

126. The Fontaine order is an extension of the Ungley order, formulated by former Senior Master Fontaine.[171] It reads:

> *"At all stages the parties must consider settling this litigation by any means of ADR (including [round table conferences, early neutral evaluation] mediation [and arbitration]) and in any event no later than [date]: any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the judge until questions of costs arise."*[172]

127. Fontaine orders are apparently usually made at the first case management conference.[173] They were reported in 2017 to be in "wide use".[174] But they are not universal. The CJC 2018 Report recommended that they become part of standard directions.[175]

128. The HCAMS is described as follows in the Chancery Guide 2022:

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[168] CJC 2017 Report, above n 152, at 32.
[169] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002, at [32] and [33].
[170] CJC 2017 Report, above n 152, at 32.
[171] Tony Allen "Mediation Case Law in 2024 - Mid Year Review" (1 August 2024) <https://learn.cedr.com/blogs/mediation-case-law-2024-mid-year-review>.
[172] CJC 2017 Report, above n 152, at 26.
[173] At 32.
[174] At 26.
[175] CJC 2018 Report, above n 153, at [8.23].

> *"10.14 Where a High Court Judge ('HCJ') grants permission to appeal against a decision of the County Court or adjourns the application for permission to appeal or permission to appeal out of time, or both, for a hearing, the appeal will be recommended for mediation unless the HCJ otherwise directs.*
>
> *10.15 All parties will be notified of the recommendation, as will the Centre for Effective Dispute Resolution ('CEDR'), which operates the scheme. The recommendation will be accompanied by a letter explaining the operation of the scheme. CEDR will liaise with the parties to facilitate the mediation (further information about the scheme can be found on the CEDR website).*
>
> *10.16 A failure to mediate following a recommendation may have consequences for any order for costs at the end of the appeal*."[176]

129. The EWCAMS has been running since 2003.[177] The EWCAMS is administered by CEDR, which states:

> *"The scheme applies to eligible cases for which permission to appeal is sought and obtained via the Court of Appeal.*
>
> *Unless a judge exceptionally directs otherwise, the parties in such cases are notified by the Court that case papers have been automatically referred to CEDR for the appointment of a mediator. Parties are then asked to confirm if they wish to proceed to mediation. Mediation under the pilot scheme is* ***voluntary*** *but parties may be required to justify to the Court of Appeal their decision not to attempt mediation at subsequent court hearings."*[178]

130. Cases which are eligible for the EWCAMS include:

- *All cases involving a litigant in person (other than immigration and family cases).*
- *All appeals in personal injury, clinical negligence and all other professional negligence claims.*
- *All contractual disputes of any nature with a judgment or claim value of up to £500,000.*
- *All inheritance disputes.*
- *All boundary disputes.*
- *Appeals from the Employment Appeal Tribunal."*[179]

131. In any other type of appeal, a Lord Justice can suggest mediation, when considering permission to appeal, or parties can elect to use the scheme.[180]

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[176] Chancery Guide, above n 165.
[177] CJC 2017 Report, above n 152, at [4.27].
[178] CEDR "Court of Appeal Mediation Scheme" <www.cedr.com/commercial/mediationschemes/courtofappeal/>.
[179] CEDR, above n 178.
[180] CJC 2017 report, above n 152, at [4.27].

132. The CJC 2027 Report described the EWCAMS as "*under-used*".[181] I have been unable to find further material on the HCAMS or the EWCAMS. But I do think it is interesting that these schemes, both of which at least ostensibly create a mediation presumption, are in place in the appellate context. Cleary, there is at least a perception in England and Wales that mediation has a role to play in appeals.

"Mandatory mediation"

133. There is no mandatory mediation framework applicable to the senior courts in England and Wales.

"*Orders*"

134. The issue of whether England's senior courts can order unwilling parties to mediation has had an interesting recent history, culminating, as mentioned in the outset of this paper, in *Churchill*, in which the EWCA found that courts can.

135. Prior to 2004, senior courts in England did, on occasion, order unwilling parties to mediate, using inherent jurisdiction powers.[182] Then, in *Halsey v Milton Keynes General NHS Trust,*[183] the EWCA veered away from this. Lord Dyson stated in that case:

> "*to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court*"[184]

136. The *Halsey* decision was subsequently seen as a bar to senior courts ordering unwilling parties to mediate. There was criticism of this position, from judges and others. It was seen as inconsistent with the European and US approach.[185] Lord Dyson himself later sought to walk back the above quote.[186]

137. The issue came up for further consideration in 2023, in *Churchill*. In *Churchill*, the EWCA considered *Halsey*, and held that its apparent prohibition on ordering unwilling parties to mediate was *obiter.*[187]

138. The EWCA examined whether ordering ADR was inconsistent with the constitutional right of access to the Court. It found that it was not.[188] In the crux of the decision, Vos MR stated:

> *"The court can lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's right to proceed to a judicial*

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[181] CJC 2017 report, above n 152, [4.27].
[182] See *Kinstreet Ltd v Balmargo Corp. Ltd* [1999] ADR.L.R. 07/23, and *Shirayama Shokusan Co Ltd v Danovo Ltd* [2003] ADR.L.R. 12/05.
[183] *Halsey*, above n 169.
[184] At [9].
[185] Allen, above n 79.
[186] Lord Dyson "A word on Halsey v Milton Keynes" (speech given CIArb's Third Mediation Symposium, October 2010, and published in (2011) 77(3) *Arbitration* 337).
[187] *Churchill*, above n 1, at [20].
[188] At [43]-[49].

> *hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost."*[189]

139. Regarding the principle that the Courts should promote access to justice, the EWCA stated:

> "…*the court has a long-established right to control its own process. That right is entrenched in the 1997 Act which established the CPR to govern practices and procedures of the court, and provided that rule-making should make the civil justice system accessible, fair and efficient. The settling of cases as quickly as can be fairly achieved and at a proportionate cost to the parties supports those aims*"[190]

140. The Bar Council, appearing as one of a number of interveners in *Churchill*, submitted a list of 11 factors which it said should be relevant to the exercise of a court's discretion to order ADR.[191] The EWCA steered clear of prescription, stating that:

> "*I do not believe that the court can or should lay down fixed principles as to what will be relevant to determining these questions"*[192]

The question of what factors might be relevant to the exercise of a court's discretion to order mediation against the objection of one or more parties has been considered in each of the comparable jurisdictions (and in New Zealand in relation to s145 of the Trusts Act). In **Appendix 1**, I have set out commentary and jurisprudence in this regard (including the Bar Council's 11 factors), and my thoughts.

141. *Churchill* was perceived to be a seminal moment in England and Wales, marking a significant development in the courts' role as a promoter of ADR.[193] I would also suggest that, in circumstances where England and Wales already had extensive nudges, some presumptions, and costs sanctions (see below), it neatly closed a gap in their mediation framework.

142. As a consequence of the *Churchill* decision,[194] the CPR have been amended, to make the courts' powers to order ADR, including mediation, clear. In particular CPR r3.1(2)(o), which took effect on 1 October 2024, provides that the court may:

> "*order the parties to engage in alternative dispute resolution*"[195]

No factors to take account of in making such an order have been prescribed by the CPR.

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[189] At [74].
[190] At [46].
[191] At [61].
[192] At [65].
[193] CIArb "Joint intervention success as *Churchill* judgment allows the courts to order parties to mediate" (29 November 2023) <www.ciarb.org/news-listing/joint-intervention-success-as-churchill-judgment-allows-the-courts-to-order-parties-to-mediate/>.
[194] Allen, above n 156.
[195] CPR r 3.1(2)(o), at <www.justice.gov.uk/courts/procedure-rules/civil/rules/part03#3.1>, and see also CPR r 28(7)(1)(d), CPR r 28(14)(1)(f), and CPR r 29.2 (1A).

143. The new rule was applied by the England and Wales High Court most recently in *DKH Retail Ltd & Ors v City Football Group Ltd.*[196] That case was a trademark dispute between the owners of the "Superdry" brand, and Manchester City Football Club. The claimants sought an order for compulsory mediation. The defendant opposed such an order. It contended that mediation was not likely to lead to settlement, and that it was too late in the day, with trial imminent. Justice Miles stated:

> *"Experience shows that mediation is capable of cracking even the hardest nuts. The process sometimes succeeds in cases where the parties appear at first to have intractable differences….*
>
> *I see some force in the defendant's submission that it is late in the day to be seeking an order, but it may also be said that there is some advantage in the parties' positions having been crystallised through pleadings and the service of witness statements. It is indeed sometimes an objection to mediation that it is premature, proposed at a stage when the parties' positions are unknown. That cannot be said here.*
>
> *There is also some force in the submission of counsel for the defendant that these are commercial parties with experienced solicitors and that if there was realistically to be a settlement, one would have expected it already to have been reached. But that argument does not do full justice to experience, which shows that bringing the parties together through mediation can overcome an entrenched reluctance of parties to negotiate, even where sincere. The purpose of mediation is to remove roadblocks to settlement. I am unable to accept the submissions of the defendant that a mediation here has low prospects of success and that adjudication by a court is necessarily required. The range of options available to the parties to resolve the dispute through mediation goes beyond the binary answer a court could provide.*
>
> *There may be solutions other than yes or no.*
>
> *A mediation of this case will be short and sharp, and the documents needed for it would be brief. The defendant did not suggest that mediation would significantly disrupt the parties' preparations for trial."*[197]

144. Mediation was ordered. A postscript in the judgment records:

> "*on 13 January 2025 the parties notified the court that they had settled their dispute."*[198]

145. Since *Churchill*, there has also been at least one case, *Heyes v Holt,*[199] where a senior court has ordered a stay for a second mediation.

146. I should also note that, as in New Zealand, the senior courts of England and Wales do also order parties to mediate (or at least stay a proceeding for that purpose), where mediation is required by contract.[200]

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[196] *DKH Retail Ltd & Ors v City Football Group Ltd* [2024] EWHC 3231 (Ch).
[197] At [38]-[41].
[198] At [44].
[199] *Heyes v Holt* [2024] EWHC 779 (Ch).
[200] *Cable and Wireless v IBM* [2002] EWHC 2059.

"*Costs sanctions*"

147. As is apparent above, the senior courts of England and Wales can, and do, use costs sanctions to encourage mediation. Since at least 2002, when *Dunnett v Railtrack plc*[201] was decided:

> *"English courts have recognised a discretionary power (under r 44.2 of the Civil Procedure Rules 1998 (UK)) to make retrospective costs orders (after a trial) reflective of an assessment as to whether or not a party's conduct in refusing to mediate (during the interlocutory stages of the action) was reasonable or unreasonable. In other words, contrary to the presumptive position that costs follow the event, the court will order a successful party to bear some or all of the costs of the unsuccessful party if the successful party unreasonably refused to enter into a mediation either at all or at an appropriate stage in the proceedings. The burden of proving that an opponent's conduct was unreasonable lies on the party alleging it. English courts have frequently punished litigants for refusal or failure to mediate."*[202]

148. Whilst the 2004 *Halsey*[203] decision was later perceived to be problematic in terms of the views it expressed on whether the courts could order mediation, it was otherwise supportive of mediation. This resonated in the context of costs. In *Halsey*, the EWCA considered the courts' power to award costs for an unreasonable refusal to mediate as a part of the courts' suite of powers to encourage mediation. The EWCA set out some of the factors that might be relevant to an whether costs should be awarded. It stated:

> *"We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success."* [204]

149. The last factor, (f), has been the subject of some particular criticism. Tony Allen stating:

> "*In a slightly tetchy article entitled Halsey; myths about impossible mediations written in November 2005, I commented as follows:*
>
> > *"Sadly, there is little that can be done to feed back to procedural and trial judges the fact that what looked like a hopelessly intractable dispute did settle through mediation, and the constraints of confidentiality properly make case studies somewhat anaemic.*
> >
> > *….*
>
> *Jumping ahead for a moment, the high point of mediator frustration with judicial opinion on this topic came with the reaction of mediators to the Court of Appeal*

[201] *Dunnett v Railtrack plc* [2002] 2 All ER 850.
[202] McNamara, above n 24a, at 231.
[203] *Halsey*, above n 169.
[204] At [16].

> *decision in Swain v Mills & Reeve* [[205]], *in which Davis LJ went on record as saying (of a £750,000 "gap"):*
>
> > *"At all stages the parties were in reality a hundred miles apart,"*
>
> *and chose to reverse a sanction for not mediating imposed at trial. This was a case where a judge had earlier recommended mediation (which was ignored} and the trial judge had penalised the defendants for their refusal to mediate. Davis LJ's assertion led me to circulate a large number of experienced mediators for their views and to put together an article entitled Mediations where parties are "a hundred miles apart": thoughts on Swain v Mills & Reeve. The article expressed shared surprise and criticism at such an approach, and included seven case studies of cases where the parties appeared t be "hundreds of miles apart" nevertheless were settled at mediation* [sic]*."* [206]

150. In any event, the decisions on costs in *Dunnett* and *Halsey* were intended I think to have a salutary effect on the market, by encouraging acceptance of offers to mediate. This was highlighted by the EWCA in 2005 in *Burchell v Bullard and Others,*[207] in which it was stated that:

> "*Halsey has made plain not only the high rate of successful outcome* [sic] *being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate*."[208]

151. In 2014, the EWCA held, in *PGF II SA v OMFS 1 Ltd*[209] that silence in the face of an invitation to participate in mediate is, as a general rule, of itself unreasonable, even if a refusal might have been justified by the identification of reasonable grounds. A more recent, 2024, EWCA case of a costs uplift arising from silence in response to an offer to mediate was *Northamber PLC v Genee World Ltd & Ors* (Rev1).[210]

152. A detailed survey of England and Wales cases on costs for refusal to mediate is set out in Ronan Feehily's 2019 article, "*Commercial Mediation and the Costs Conundrum*".[211]

153. The courts in the above decisions awarded costs on the basis of a broad discretionary costs power. As a further consequence of the *Churchill* decision, the CPR have, since 1 October 2024, been amended, to record, and clarify, the courts' powers. CPR r44.2(5)(e) now provides that, regarding costs, the courts can consider:

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[205] *Swain v Mills & Reeve* [2012] EWCA Civ 498.

[206] Allen, above n 79.

[207] *Burchell v Bullard and Others* [2005] 3 Costs LR 507.

[208] At [43].

[209] *PGF II SA v OMFS 1 Ltd* [2013] EWCA Civ 1288, [2014] 1 WLR 1386.

[210] Northamber PLC v Genee World Ltd & Ors (Rev1) [2024] EWCA Civ 428.

[211] Ronan Feehily "Commercial Mediation and the Costs Conundrum" (2019) 23(1) Vindobona Journal of International Commercial Law and Arbitration 1.

> "...*whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution*."[212]

154. Tony Allen commented as follows on the use of the work "engage" in the new provision:

> "*Note that the word "participate" in the original draft has been changed to "engage" as a result of the consultation. CMC/CEDR/Ciarb pointed out in their response that "participate" might allow an intrusive judge to feel entitled to assess the nature of a party's participation during a mediation behind the veil of privilege and confidentiality and suggested "failed to agree to participate" as an alternative. "Engage" connotes "initial engagement" and answers the point. Arguably, this amendment encapsulates settled law since 2002 set out in such court decisions as Dunnett v Railtrack and indeed in Halsey itself*."[213]

155. The PAP provisions, as set out above, note the prospect of costs sanctions against those who unreasonably refuse to mediate (or are silent in response to an invitation to mediate). Parties are also reminded of the risk of such costs sanctions in the N181 form referred to above.

Appellate context

156. A note on the mediation framework in the appellate context, referring in particular to the EWCA (like the Supreme Court in New Zealand, different considerations obviously apply to the UK Supreme Court). Most of the CPR nudges (r1.1, and r1.4), the CPR orders (r3.1(2)(o), and the CPR costs sanctions (r44.2(5)(e) apply to the EWCA. There is also the EWCAMS scheme, referred to above.

Efficacy

157. And so, as foreshadowed, and as is apparent from the above, the senior courts in England and Wales do indeed have significantly greater powers than those in New Zealand to encourage, and now order, parties to mediate. These powers are exercised through a mediation framework that contains nudges, presumptions, orders, and costs sanctions. Does it all work? Do those powers enable the courts to enhance access to justice?

158. The mediation framework in the senior courts in England and Wales has developed over time, piecemeal. *Churchill*, which added a significant part to that framework, was only decided in late 2023, and reflected in the CPR in late 2024. So, it is hard to gain an overall sense of how well what they now have works. But there is empirical material, evidence obtained through experience and observation by those within the framework, and material from the courts, that speaks to efficacy in different ways.

159. When I initiated this research project, I sought input from the profession on it. Multiple New Zealand lawyers with England and Wales experience contacted me about the PAP, and spoke positively of its effect in practice. Essentially, they said, it sharpens the collective focus on early settlement, including via mediation.

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[212] CPR r 44.2(5)(e) <www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs#rule44.4>.

[213] Allen, above n 156.

160. Bathurst NSW CJ refers to the 2012 Civil Procedure White Book, and notes as follows regarding the PAP:

> "*In reply to the question 'Have the protocols been a success?', the Civil Procedure White Book for 2012 responds: 'Anecdotally without a doubt. New litigation post CPR has reduced by 80 per cent in the High Court and 25 per cent in the County Court – the protocols and Pt 36 offers are certainly a factor in this.'38 This evidence is undoubtedly promising. However, the White Book also notes that some solicitors have expressed concerns in response to the growing number of protocols and the front-loading of costs.*39"[214]

161. But, at least as far as money claims are concerned, there has been a more recent suggestion that the impact of the PAP on claim volumes was temporary.[215]

162. The CJC 2017 Report (pre-*Churchill*) made some observations on efficacy of the mediation framework in the England and Wales senior courts as it then was. It:

(a) Described the Ungley and Fontaine orders in positive terms, but stated that there was no research its authors were aware of that assessed the efficacy of these orders, in terms of increasing the gross number of mediations, or getting them convened earlier;[216]

(b) Discussed the effect of cost sanctions for unreasonable failure to engage in mediation. It referred to *Dunnett*[217] (see above), and stated:

> "*Dunnett undoubtedly caused an upward spike in the usage of mediation…*[and]*...the statistics suggest that the Dunnett effect has been lasting";* [218]

(c) Stated that:

> "*There is no convincing evidence that ADR is less successful when compulsory*"[219]

and;

(d) Stated that mediation is:

> "*...still significantly underused in the civil justice system*".[220]

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[214] Bathurst, above n 48b, at 880.
[215] Ministry of Justice (UK) "Civil Justice Statistics Quarterly: October to December 2023" (7 March 2024) <www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2023/civil-justice-statistics-quarterly-october-to-december-2023#money-and-damages-claims>.
[216] CJC 2017 Report, above n 152, at [5.44].
[217] *Dunnet v Railtrack* [2002] 2 All ER 850.
[218] CJC 2017 Report, above n 152, at 33.
[219] At [8.5.6].
[220] At [9.4].

163. The above observation about the effect of *Dunnett* dovetails with the earlier quote from *Burchell v Bullard and Others*. The reference to a lasting upward spike is consistent with CEDR figures. In particular:

> *"CEDR estimates that the use of mediation increased by 35% in the two years following Dunnett"*[221]

Through *Dunnett* and *Halsey*, the courts sent a message to the market, in support of mediation. That message seems to have been heard

164. The CJC 2018 Report (again, of course, pre-*Churchill*) stated:

> *"Mediation is flexible, massively successful and consistently surprises professionals and parties alike in its ability to achieve settlements where the parties appear implacably opposed"* [222]

165. The CJC 2021 Report (and again, pre-*Churchill*, but cited with approval in that case[223]) stated:

> "*The rules of civil procedure in England and Wales have already developed to involve compulsory participation in ADR at a number of points. These compulsory processes are both successful and accepted."*[224]

166. The CJC 2021 Report further stated that:

> *"Inside the courts the existing nudges and prompts leading the parties towards ADR still have a significant role to play. No doubt cost penalties against those who unreasonably refuse ADR will continue to play an important part."*[225]

167. The Chancery Guide states that:

> *"The settlement of disputes by means of ADR can:*
>
> *(a) save significant expense;*
>
> *(b) provide a resolution expeditiously;*
>
> *(c) preserve existing commercial relationships and market reputation;*
>
> *(d) provide a wider range of solutions than those offered by the determination of the issues in the claim; and*
>
> *(e) ensure confidentiality"*[226]

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[221] Michael Bartlet "Mandatory Mediation and The Rule of Law" (2019: Series 2) 1(1) Amicus Curiae 50 at 62.
[222] CJC 2018 Report, above n153, [3.3].
[223] *Churchill*, above n 1, at [57].
[224] CJC 2021 Report, above n 154, at [9].
[225] At [115].
[226] Chancery Guide, above n 165, at [10.3].

168. The Technology and Construction Court Guide sates that:

> "*Although the TCC is an appropriate forum for the resolution of all IT and construction/engineering disputes, the use of ADR can lead to a significant saving of costs..."*[227]

169. I have not been able to find delay data for the senior courts in England and Wales which is comparable to that which I have for New Zealand's. There has been recent reporting which has referred to an 85.7-week delay from claim to hearing for multi/fast track claims.[228] This has been described as "*carnage*".[229] If these cases are equivalent to claims in New Zealand's High Court, they are still getting resolved more quickly (noting that the average delay in New Zealand's high Court of 573 days (81.9 weeks) is from when the case is ready for hearing, and it will have taken many months to get to that point).

170. Stepping away from the senior courts, I note an extraordinary efficacy claim made in the context of a recent UK government proposal to make mediation compulsory for small claims of up to GBP10,000. The government stated:

> *"It is expected that up to 20,000 extra cases every year could be settled away from court under these proposals – sparing people the time and cost of litigation. This would also free up vital court capacity with up to 7,000 judicial sitting days being available to help reduce waiting times for more complex cases which require a hearing. Overall around 272,000 people should be able to access the free mediation.*
>
> *Justice Minister Lord Bellamy QC said:*
>
> *"Millions of businesses and individuals go through the civil courts every year and many of them simply do not need to."*
>
> *"Mediation is often a quicker and cheaper way of resolving disputes and under our proposals this will be free of charge for claims up to £10,000."*
>
> *"This could also help free up vital capacity in the civil courts to deal with more complex cases quicker."*[230]

171. One empirical metric which is available is on the growth of mediation in England and Wales over the last 20 years. CEDR undertakes a biannual audit, surveying civil and commercial mediators. That audit has shown significant growth in mediation over that time, from fewer than 3,000 mediations in 2003, to c.17,000 in 2022, as captured by the following graph:[231]

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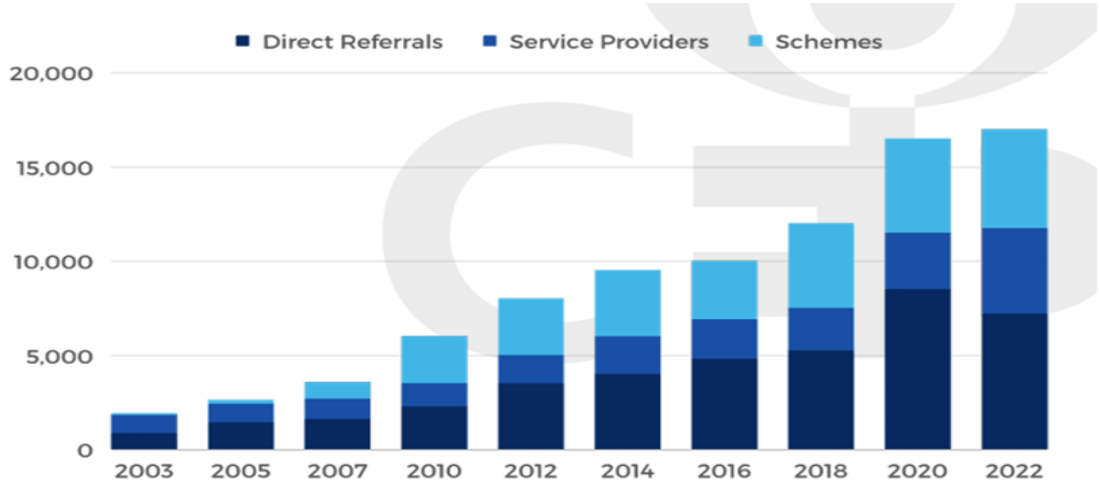
[227] Technology and Construction Court Guide, above n 167, at [7.1.2].

[228] Ministry of Justice (UK), above n 215.

[229] The Association of Consumer Support Organisations "Carnage in our Civil Courts after delays increase again" (7 March 2024) <https://acso.org.uk/news/202403/carnage-our-civil-courts-after-delays-increase-again>.

[230] Ministry of Justice, HM Courts & Tribunals Service and Lord Bellamy "Government reveals plans to divert thousands of civil legal disputes away from court" (press release, 26 July 2022) <www.gov.uk/government/news/government-reveals-plans-to-divert-thousands-of-civil-legal-disputes-away-from-court>.

[231] CEDR, The Tenth Mediation Audit, above n 32, at 3.



172. We do not have a longitudinal study in New Zealand, to compare against the figures above. Morris & Shaw suggest that, based on 2014 data, on a rough per capita basis, commercial mediation numbers in New Zealand were comparable to those in England and Wales.[232] But mediation numbers in England and Wales seem to have nearly doubled since then. I doubt very much that is the case in New Zealand, particularly with the tailing off of the leaky buildings and earthquake insurance litigation waves (thankfully for all parties), which made up a substantial portion of mediators' caseload for many years.

173. It will be interesting to see what develops on the wake of *Churchill*, and the changes to the CPR that case has brought about. Tony Allen has suggested that the effect will be significant, stating:

> *"These amendments to the CPR, alongside the Court of Appeal decision in Churchill, coupled also with the parallel developments over small claims introduced on 22 May 2024 can only have a dramatic effect on the position of ADR, and mediation in particular, in civil justice.*
> *…*
> *The fundamental change for general litigation lies in the fact that courts will now be able to mobilise mediation during the life of any case..."*[233]

Appellate context

174. Beyond the suggestion that the EWCAMS scheme is "underutilised", I have not been able to find further detail on the use of mediation by the EWCA, or the efficacy of the EWCA mediation framework.

Observations

175. There appears to have been a strong, and ever-strengthening, sense in England and Wales that ADR should be encouraged at all stages of the court process, and woven through it. In 2008, Sir Anthony Clarke, Master of the Rolls, stated:

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[232] Morris and Shaw, above n 22, at 253.
[233] Allen, above n 156.

> "*ADR must become an integral part of our litigation culture. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and our thought processes, as standard considerations like what, if any, expert evidence is required and whether a Part 36 offer ought to be made and at what level*"[234]

176. There has also been a related sense that mediation is still under-appreciated as a dispute resolution option, and needs to be better promoted. Lord Justice Jackson stated in 2009:

> "*...many disputing parties are not fully aware of the full benefits to be gained from mediation and may, therefore, dismiss this option too readily*"[235]
>
> …
>
> "*Although many judges, solicitors and counsel are well aware of the benefits of mediation, some are not"*[236]

177. There has been openness to the potential benefits of compulsion. The CJC 2017 Report, in the context of listing some of the arguments in favour of mandatory mediation, noted as follows:

> *"Sometimes parties were quietly relieved when they felt externally compelled to use an ADR process and did not have to propose it, which they feared might lead an opponent to suspect weaknesses in their case. Compulsion gets rid of the "who blinks first" issue.*
>
> *The fact is that in England and Wales there are a number of ADR processes that are effectively or actually compulsory…. If compulsory ADR represents a constitutional Rubicon then it does seem to have been crossed a number of times already."* [237]

178. The CJC 2021 Report is particularly pertinent when considering the prospect of greater compulsion in New Zealand. Its authors were sage, and extremely senior. Its focus was the propriety of compulsory ADR, at a time when, pre-*Churchill*, the compulsive powers of the courts in England and Wales were perceived to be limited. The CJC 2021 Report stated:

> "*Particularly at a time when the civil justice system in general and the court system as a whole are struggling to cope with its case-load, concerns about diverting too many parties into settlement seem misplaced*"[238]

179. The 2021 CJC Report also stated:

> *"Looking, as we must, at ADR more widely it is inescapable that compulsion to participate is now an accepted and successful part of the system, at a number*

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[234] Quote from CJC 2018 Report, above n 153, at [8.21], attributed to a speech to the Civil Mediation Conference May 2008.
[235] Lord Jackson "Review of Civil Litigation Costs: Final Report" (December 2009) at c 36, [1.2].
[236] At c 36, [3.1].
[237] CJC 2017 Report, above n 152, [8.5.7] and [8.5.8].
[238] CJC 2021 Report, above n 154, at [84].

> *of points. It has been introduced in response to particular challenges in particular jurisdictions and has not been the subject of either legal challenge or public or professional disquiet. The introduction of these measures has not been surreptitious but equally has not attracted melodrama. Some of the compulsory ADRs, such as perhaps MIAMs, have their critics in various respects and may well be capable of improvement. But we would suggest that it is not the element of compulsion that is the focus of that criticism."* [239]

These observations resonate with those above, about the various contexts in which there is already compulsion to mediate in New Zealand, without apparent harm.

180. The sense that compulsion to mediate will be part of alleviating pressure on the court system was also apparent in the legal market pre-*Churchill*. A 2022 Mills & Reeve post stated:

> "*Make no mistake, change is on its way. The civil justice system is struggling to cope with its case-load. Compelling parties to mediate is now an essential element in the plan to ensure the effective running of the courts*."[240]

181. As noted above, lawyers in England and Wales are, like those in New Zealand, under a discrete professional obligation to advise their clients as to the possibility of ADR.[241] The significant, and increasing, role of the senior courts in encouraging, and now ordering, mediation, has been in addition to that prompt.

182. The principles that: justice should be seen to be done; courts should treat all parties fairly; and that mediation is a voluntary process all apply in England and Wales. They have not stood in the way of the development of the mediation framework I have described.

AUSTRALIA

Mediation framework in the senior courts

183. By senior courts in Australia, I am referring to the Federal Courts, and state Supreme Courts.[242] Each state's Supreme Court also includes that state's Court of Appeal.

184. The mediation framework in the senior courts of Australia is set out in Federal and state legislation, rules of courts, practice directions/notes, and case law. That framework includes nudges, presumptions, orders, and costs sanctions. That framework gives those courts significantly greater powers to encourage, and order, parties to civil disputes to mediate than New Zealand's senior courts have.

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[239] CJC 2021 Report, above n 154, at [87].

[240] Mills & Reeve "Taking the "Alternative" out of ADR" (20 July 2022) <www.mills-reeve.com/publications/taking-the-alternative-out-of-adr/>.

[241] CJC 2017 Report, above n 152, at [5.37].

[242] State Supreme Courts all have, as I understand it, unlimited monetary jurisdiction. The NSW Supreme Court and the Queensland Supreme Court handle claims of more than $750,000. See NSW Government "New South Wales courts and tribunals" <https://courts.nsw.gov.au/about-us/about-the-courts-and-tribunals.html>, and Queensland Law Society "Understanding Queensland's court system" <https://www.qls.com.au/For-the-community/Legal-brochures/Understanding-Queensland-s-court-system>.

185. I have not captured all of the details of the mediation framework in all the senior courts of Australia, but have hopefully noted key material, particularly from the Federal Court, and the senior courts of Victoria and NSW.

"*Nudges*"

186. Australia's senior courts use various nudges to encourage mediation.

187. The Civil Dispute Resolution Act 2011 (Cth) creates a pre-litigation nudge. It applies to the Federal Court of Australia. The stated object of the Act, at s3, is as follows:

> ***"****The object of this Act is to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted."*

The Act is not prescriptive about what those genuine steps must be. It has a list of examples which includes:

> "*considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process*"[243]

188. There are exemptions to this Federal pre-litigation "*genuine steps*" nudge, including: appellate proceedings, judicial review of tribunal decisions, ex parte proceedings, and proceedings to enforce an undertaking.[244] The framework was informed by the England and Wales PAP framework described above,[245] but is considered less ambitious.[246]

189. A relatively prescriptive pre-litigation nudge applies in the Northern Territory Supreme Court. This is via Practice Direction 6 ("**PD6**"), which states, at para 11:

> *"The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the plaintiff and defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if this paragraph is not followed then the Court may have regard to such conduct when determining costs."*[247]

190. But pre-litigation nudges are not supported by all in Australia. Concerns have been raised about the undue front-loading of costs which can arise in this context.[248]

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[243] Civil Dispute Resolution Act 2011 (Cth), s 4(1)(d).

[244] Sections 15-17.

[245] Waye, above n 72, at 218.

[246] At 218.

[247] Supreme Court of The Northern Territory of Australia, Practice Direction No 6 of 2009 (NT) <https://supremecourt.nt.gov.au/__data/assets/pdf_file/0003/727572/PD-6-2009-Trial-Civil-Procedure-Reforms.pdf>.

[248] Tania Sourdin "Civil Dispute Resolution Obligations: What is Reasonable" (2012) 35(3) UNSW Law Journal 890.

Apparently, attempts to introduce pre-litigation genuine steps nudge frameworks in NSW and Victoria state contexts floundered.[249]

191. There are other nudges in operation, state by state, to encourage mediation during the course of proceedings. An example is Victoria's Civil Procedure Act 2010. This Act applies to Victoria's Supreme Court. The Act:

(a) Has an overarching purpose at s7 which reads as follows:

> *"(1) The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.*
>
> *(2) Without limiting how the overarching purpose is achieved, it may be achieved by—*
>
> *(a) the determination of the proceeding by the court;*
>
> *(b) agreement between the parties;*
>
> *(c) any appropriate dispute resolution process—*
>
> *(i) agreed to by the parties; or*
>
> *(ii) ordered by the court."*

(underlining added)

Note the reference to the "*resolution*" of disputes, in contrast to the "*determination*" of disputes in the HCR; and

(b) Also provides for "*overarching obligations*", which apply to parties and lawyers,[250] and states at s22 that:

> *"A person to whom the overarching obligations apply must use reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by appropriate dispute resolution, unless—*
>
> *(a) it is not in the interests of justice to do so; or*
>
> (b) *the dispute is of such a nature that only judicial determination is appropriate*."

192. See also South Australia's Uniform Civil Rules 2020 ("**SAUCR**"), which apply to the Supreme Court of South Australia, which includes South Australia's Court of Appeal. The SAUCR:

(a) Have an object at r1.5 which reads:

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[249] Tania Sourdin *Exploring Civil Pre-Action Requirements Resolving Disputes Outside Courts* (Australian Centre For Justice Innovation (ACJI) Monash University, 2012) at [2.67]-[2.73].

[250] Civil Procedure Act 2010 (Vic), s 10.

> "*The object of these Rules is to facilitate the just, efficient, timely, cost-effective and proportionate resolution or determination of the issues in proceedings governed by these Rules*"
>
> (underlining added)

; and

(b) Provide that:

> *"3.1—Overarching obligations*
>
> *(2) A party or a person appearing or required to appear before the Court must in relation to a proceeding or an appellate proceeding—*
>
> *…*
>
> *(g) use reasonable endeavours to resolve, or alternatively narrow the scope of, a dispute in or the subject of the proceeding by agreement;"*.

193. The nudges in Australia's mediation framework are, in general, less ostensibly muscular than those in England and Wales. But I suspect that is because Australia's senior courts have, for a long time, had, and regularly exercised, powers to order mediation. See below.

"*Presumptions*"

194. At least in Victoria and NSW, it appears that the senior courts' powers to encourage (see above and below), and order (see below) mediation has created a dynamic where mediation is effectively a presumption.

195. This has manifested most strongly in Victoria. In a 2009 speech, Victoria Chief Justice Marilyn Warren stated:

> *"The Primary ADR method employed in Victoria has been mediation. It has been extraordinarily successful. It is now accepted as part of the justice system. In the Supreme Court of Victoria, no civil case except for Magistrates' Court & VCAT appeals and judicial review matters, goes to trial without at least one round of mediation."*[251]

196. Her Honour also noted that, since 2007, mediation had become common in Victoria's Court of Appeal, on the instigation of the then President.[252]

197. In NSW, the sense that mediation has since become deeply embedded into the legal culture is borne out by comments from Bathurst NSW CJ, who, in 2012, stated that:

> "*In NSW, the vast majority of commercial cases are referred to mediation, generally with the consent of the parties*."[253]

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[251] Marilyn Warren, Chief Justice of Victoria "ADR and a Different Approach to Litigation" (speech to the Serving up Insights Series, Law Institute of Victoria, 18 March 2009) at 2.

[252] At 5.

[253] Bathurst, above n 48b, at 878.

198. Comments on how these mediation presumptions have panned out in Victoria and NSW are set out in the efficacy section below.

"*Mandatory mediation*"

199. There is no general mandatory mediation framework in Australia's senior courts.

200. Mandatory farm debt mediation frameworks do apply, including in: NSW,[254] Queensland,[255] and Victoria.[256] These are very similar to the FDMA.

201. Given Warren CJ's comment that no Victoria Supreme Court civil case, except for Magistrates' Court & VCAT appeals and judicial review matters, goes to trial without at least one round of mediation, the mediation framework in Victoria could be described as close to mandatory.

"*Orders*"

202. Philip McNamara states that:

> "*parliaments in all Australian jurisdictions have conferred power on the superior courts of each jurisdiction to compel mediation in civil proceedings*".[257]

Examples include:

(a) The Federal Court of Australia Act 1976, which provides at s53A that:

> *"1) The Court may, by order, refer proceedings in the Court, or any part of them or any matter arising out of them:*
>
> *(a) to an arbitrator for arbitration; or*
> *(b) to a mediator for mediation; or*
>
> *(c) to a suitable person for resolution by an alternative dispute resolution process;*
>
> *in accordance with the Rules of Court.*
>
> *…*
>
> *(1A) Referrals under subsection (1) (other than to an arbitrator) may be made with or without the consent of the parties to the proceedings."*

(b) In Victoria, the Civil Procedure Act 2010 (Vic), provides for mediation to be ordered via ss7(2)(c)(ii) and 48(2)(c). Rules and practice notes also apply as follows:

(i) Victoria's Supreme Court (General Civil Procedure) Rules 2015 provide at 50.07 (1) that:

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[254] Farm Debt Mediation Act 1994 (NSW).
[255] Farm Business Debt Mediation Act 2017 (Qld).
[256] Farm Debt Mediation Act 2011 (Vic).
[257] McNamara, above n24a, at 216.

> "*At any stage of a proceeding the Court may, with or without the consent of any party, order that the proceeding or any part of the proceeding be referred to a mediator*";

(ii) The Commercial Court in Victoria (a division of the Supreme Court which hears complex commercial disputes) is subject to Practice Note SCCC1, which states:

> *"5.6 **Mediation:** It is the practice of the Commercial Court to order the parties to mediate during the course of the proceeding. The parties should consider the possibility of early mediation before significant costs associated with trial preparation have been incurred."*;[258]

(iii) The Supreme Court of Victoria's also has a Major Torts List (dealing, inter alia, with defamation and tortious claims for economic loss) which is subject to Practice note SC LL 4, which provides that:

> *"8.1 Interlocutory timetables will usually include an order that the parties attend a mediation.";*[259]

(c) NSW's Civil Procedure Act 2005 (NSW), which provides:

> ***"26 Referral by court***
>
> *(1) If it considers the circumstances appropriate, the court may, by order, refer any proceedings before it, or part of any proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned.*

In the NSW Supreme Court, the procedures for the exercise of the above power are set out in a practice note.[260] Inter alia, that practice note provides a basis on which accredited mediators who provide mediation services suitable for Supreme Court proceedings can be appointed;

(d) Queensland's Civil Proceedings Act 2011, which provides at s43 for the courts to refer disputes to an ADR process (including mediation); and

(e) The Northern Territory of Australia Supreme Court Rules 1987, r48.1, which allows that court to direct proceedings to mediation.

203. The power of the Victoria and NSW Supreme Courts to order mediation, and the frequency with which they do so, has, as noted above, contributed to mediation becoming so common as to appear to be a presumption in those courts. Again, more on this in the efficacy section below.

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[258] Supreme Court of Victoria, Practice Note SC CC1 Commercial Court (second revision) (Vic) <www.supremecourt.vic.gov.au/areas/legal-resources/practice-notes/sc-cc-1-commercial-court-second-revision>.

[259] Supreme Court of Victoria, Practice Note SC LL (Vic) at <www.supremecourt.vic.gov.au/areas/legal-resources/practice-notes/sc-cl-4-major-torts-list>.

[260] Practice Note SC Gen 6 – Mediation 2018 (NSW) <www.practicenotes.justice.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/fc1007ce9d398164ca25824b00017416/$FILE/2018_03_09_Practice%20Note%20SC%20Gen%206%20-%20Mediation.pdf>.

204. There have been numerous cases in Australia testing the limits of court-ordered mediation.[261] Philip McNamara considers that those cases suggest 12 factors which the courts might take into account when ordering mediation against the objection of one or more parties.[262] I have listed those 12 factors in **Appendix 1**, below, along with my thoughts. There is some overlap with the 11 factors referred to by the Bar Council in *Churchill*.

205. I should also note that, as in New Zealand, and England and Wales, the senior courts of Australia can order parties to mediate (or at least stay a proceeding for that purpose), against the wishes of one or more parties, where mediation is required by contract.[263]

"*Costs sanctions*"

206. The senior courts of Australia can, and do, use costs sanctions to encourage mediation. Powers include:

(a) Under the Civil Dispute Resolution Act 2011 (Cth), the Federal Court of Australia can take account of the genuine steps taken by a party to resolve a dispute before proceedings are issued, including via ADR, in exercising a discretion to award costs;[264]

(b) As per the passage above, the Northern Territory Supreme Court can have regard to non-compliance with the PD6 when determining costs. That Court can also order costs for a failure to attend or participate in a court-ordered mediation;[265] and

(c) Costs sanctions to encourage mediation are also available via Queensland's Civil Proceedings Act 2011,[266] and Victoria's Civil Procedure Act 2010.[267] In NSW:

> "*…the court is specifically empowered to take any failure to comply with the requirement to resolve the dispute by agreement (which can include using mediation) into account when determining costs in the proceedings generally*."[268]

207. Case law on costs for a failure to engage in mediation is relatively thin on the ground in Australia. The context is different, because the courts so often order parties to mediate. As observed by Feehily:

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[261] McNamara, above n 24a, see cases cited at 228-230.
[262] At 228-230.
[263] Robert S Angyal "The Enforceability of Agreements to Mediate" (1994) ACLN #34 <https://classic.austlii.edu.au/au/journals/AUConstrLawNlr/1994/4.pdf>, and *WTE Co-Generation & Anor v RCR Energy Pty Ltd & Anor* [2013] VSC 314 .
[264] Civil Dispute Resolution Act 2011 (Cth), s 12.
[265] Northern Territory of Australia Supreme Court Rules 1987 (NT), r 48.13(13).
[266] Civil Proceedings Act 2011 (Qld), s 44(2).
[267] Civil Procedure Act 2010 (Vic), s 28.
[268] Linklaters, above n 48a, and see also The Civil Procedure Act 2005 (NSW), s 56(5).

> "*Australia…provides relatively few examples of cases where costs sanctions have been imposed for a refusal to mediate, and it has been suggested that this is due to the wide discretion given to the courts to order parties to mediate, and their willingness to exercise that discretion*."[269]

So, a failure to engage in mediation will be a breach of a court order, irrespective of what other costs liability might attach to it. This changes the focus of any costs argument, and must mean that the risk on a defaulting party is greater.

208. Case examples include:

(a) *Al Mousawy (by his tutor Khamis) v JA Byatt Pty Ltd.* [270] The NSW Supreme Court had ordered the parties to mediate. One party pulled out of the mediation the day before it was due to occur, without a satisfactory explanation. Costs were awarded;

(b) *Re Stanaway Pty Ltd (in Liq) (recs apptd).*[271] The NSW Supreme Court had ordered the parties to mediate. The plaintiffs sent their lawyers to the mediation, but did not attend themselves. The "*mediation got nowhere*".[272] The Court found that the plaintiffs had disregarded their obligations under a court order, produced a situation where the mediation would necessarily fail, and had caused the other party to waste substantial costs.[273] Costs were awarded;

(c) *Capolingua v Phylum Pty Ltd,*[274] where a court refused to grant a successful defendant costs, in part because the defendant had refused to co-operate at a mediation, with counsel instructed to give "yes"/"no" answers only; and

(d) *Emmanuel Tam Ezekiel-Hart V The Law Society of The Australian Capital Territory, Robert Reis, Larry King and Rod Barnett (No 2)*[275] and *ET Petroleum Holdings P/L v Clarendon P/L,*[276] in both of which cases the courts cited *Halsey*[277] on costs with approval.

Appellate context

209. A note on senior appeal courts in Australia. They include, for these purposes, the Federal Court of Appeal, and the state courts of appeal (like the Supreme Courts in New Zealand, and England and Wales, different considerations obviously apply to the High Court of Australia). The Federal, and state by state, statutory mediation frameworks referred to above also largely apply to the senior appeal courts.

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[269] Feehily, above n 211, at 2.
[270] *Al Mousawy (by his tutor Khamis) v JA Byatt Pty Ltd* [2008] NSWSC 264.
[271] *Re Stanaway Pty Ltd (in Liq) (recs apptd)* [2017] NSWSC 485 (McDougal J).
[272] At [3].
[273] At [19].
[274] *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137.
[275] *Emmanuel Tam Ezekiel-Hart V The Law Society of The Australian Capital Territory, Robert Reis, Larry King and Rod Barnett (No 2)* [2012] ACTSC 135.
[276] *ET Petroleum Holdings P/L v Clarendon P/L* [2005] NSWSC 562.
[277] *Halsey*, above n 169.

Efficacy

210. From an early stage, case law from Australia's senior courts has asserted efficacy benefits for their mediation framework. For example:

(a) In the 2001 NSWSC case of *Remuneration Planning Corp v Fitton*[278] Hamilton J discussing the power to order mediation against a party's wishes, stated:

> "...*since the power was conferred upon the Court, there have been a number of instances in which mediations have succeeded, which have been ordered over opposition, or consented to by the parties only where it is plain that the Court will order the mediation in the absence of consent. It has become plain that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered*."[279]

And;

(b) The 2004 NSWSC case of *Browning v Crowley*[280] which involved a $30M relationship property dispute. The plaintiff sought mediation, and the defendant opposed it. Browning J ordered mediation, stating:

> *"Even in cases where, as in this case, there is a large gulf between the parties' positions, which are clearly defined in a way which does not seem to allow for compromise, experienced teaches that mediations have in a recognisably significant number of cases produced results with which the parties are prepared to agree."*[281]

211. There has/have also been research, reports, studies and commentary that provide insight into the efficacy of the mediation framework in Australia's senior courts.

212. Research on "pre-action requirements" (what I have described above as pre-litigation nudges), including the Northern Territory's PD6, found that: such requirements work well, are regarded as procedurally fair and just, can be effective in saving time, and can lead to cost and time savings even when litigation is commenced.[282]

213. The Federal Court's Annual Report 2023-2024 stated:

> *"Assisted dispute resolution (ADR) is an important part of the efficient resolution of litigation in the Court context, with nearly 30 per cent of original jurisdiction proceedings being referred to mediation. In addition to providing a forum for potential settlement, mediation is an integral part of the Court's case management practices."* [283]

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[278] *Remuneration Planning Corp v Fitton* [2001] NSWSC 1208.
[279] At [3].
[280] *Browning v Crowley* [2004] NSWSC 128.
[281] At [6].
[282] Sourdin, above 249, at XI.
[283] Federal Court of Australia *Annual Report 2023–24* (2024) <www.fedcourt.gov.au/about/corporate-information/annual-reports/annual-report-2023-2024/pdf/FCA-Annual-Report-23-24.pdf> at 28.

214. In 2017, the Australasian Institute of Judicial Administration Incorporated published the results of a study entitled: *Court-Referred Alternative Dispute Resolution: Perceptions of Members of the Judiciary.*[284] The study was based on questionnaire and interview data from judges in the Local Court NSW, District Court NSW, Supreme Court NSW, Federal Court, and Federal Circuit Court. The study found that:

> "*...judges have a positive view of CADR* [Court-Referred Alternative Dispute Resolution]*...*
>
> *…judges report engaging with CADR and perceive it to contribute to court efficiency...*
>
> *Judges report deriving satisfaction from the fact that CADR assisted the court to manage its workload efficiently and provided them with a platform for delivering outcomes that would not be achievable in court.*
>
> *The positive experience overall, even where some judges saw CADR as slightly increasing rather than decreasing their workload, confirms the potential for CADR to improve the efficiency, accessibility and outcomes for the courts*."[285]

215. As noted above, Victoria's Warren CJ has described the use of mediation in the Supreme Court of Victoria as "*extraordinarily successful*". Her Honour went on to say that:

> "*...we have seen settlement after settlement come forward in long and complex litigation…The saving to Government has not been measured. It has been extraordinary…If I take the Biota case with an estimate of up to six months. The saving calculated by an appropriate multiplier factor applied to judge time, court staff time, trial resources, IT, paper and power together with saving to the community and the Victorian economy is dramatic. The calculator produces a number with many zeros*."[286]

216. A study by Professor Sourdin, examining court-annexed mediations in the Supreme and County Courts of Victoria, found:

> "…*high levels of satisfaction, high settlement rates, cost savings and enduring outcomes*"[287]

However, Professor Sourdin also found that:

> "…*in many instances court-annexed mediations followed a settlement rather than interest-based, problem solving or transformative model*."[288]

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[284] Nicky McWilliam and others *Court-Referred Alternative Dispute Resolution: Perceptions of Members of the Judiciary An overview of the results of a study* (The Australasian Institute of Judicial Administration Incorporated, October 2017).

[285] At ix-x.

[286] Warren, above n 251, at 2 and 3.

[287] Tania Sourdin *Mediation in the Supreme and County Courts of Victoria* (Department of Justice, Victoria, Australia, 2009), as cited in Waye, above n 72, at 220.

[288] Sourdin, above n 287, at 220.

217. The Supreme Court of Victoria's Annual Report 2022-2023 ("**SCVAR 22-23**") has a section on mediation. Of note:

(a) It states:

> *"The Court's focus on mediation reflects a commitment to resolving disputes in a timely and cost-efficient manner."*[289]

(b) It records that 559 cases were referred for mediation that year;

(c) It states:

> *"Settling matters at mediation saved approximately 1,043 trial days and millions of dollars in legal costs for litigants. Costs Court mediations saved an approximate further 475 hearing days.*[290]

(d) It does not specify how many Victoria Court of Appeal matters were mediated that year (but refer to Chief Justice Warren's earlier comments above).

218. The SCVAR 22-23 also has figures on time to resolution of filed cases. It states that in the 2022-2023 year:

(a) 62.2% of total filed cases were resolved within 12 months, and 86.5% were resolved within 24 months;[291] and

(b) Specifically in relation to the Victoria Court of Appeal, 79.3% of filed cases were resolved within 12 months, and 100% were resolved within 24 months.[292]

I appreciate that there are many variables that can affect clearance rates between courts. But these figures compare very favourably to those in New Zealand's High Court. In New Zealand, the waiting time from when a proceeding is ready for trial to its hearing date is, on average, a year and half (see above). A proceeding is ready for trial when discovery and other interlocutories are concluded, and these steps can often take many months if not more.

219. In NSW, Vicki Waye states:

> "…*the introduction of court-directed mediation was supply-driven at the instigation of the Chief Justice with support from the New South Wales Law Society. At that time, New South Wales' superior courts were experiencing significant increases in litigation rates and substantial delay in the finalization of proceedings (Callinan, 2002), and so the major purpose of the amendment was to reduce cost and delay.44 The other potential demand-driven benefits of mediation such as the attainment of enduring, interest-based outcomes and a less adversarial culture were not highlighted objectives. Nonetheless, since its*

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[289] Supreme Court of Victoria *Annual report 2022-2023* (2023), at <www.supremecourt.vic.gov.au/sites/default/files/2023-11/SCV_Annual-Report-2022-23.pdf> at 32 [SCVAR].

[290] At 32.

[291] At 5.

[292] At 6.

> *introduction mediation has become integral to the court's processes (Spigelman, 2001) and well embedded into New South Wales' legal ethos (Bergin, 2012)*."[293]

220. The Supreme Court of NSW Annual Review, 2023 ("**SCNSWAR 23**"), has a section on alternative dispute resolution. It states:

> *"The Supreme Court supports mediation as a method of alternative dispute resolution for civil proceedings. Litigants in any contested civil case (including appeals) can consider using mediation."*[294]

It records 2,746 referrals to mediation in that year.[295] It is not apparent what proportion of these were ordered over the objection of one or more parties.

221. The SCNSWAR 23 has a section on listing delays, "*measured by the time between the establishment of readiness for hearing and the first group of available hearing dates*".[296] The SCNSWAR states that, from 2019-2023:

(a) Court of Appeal delays were 1.0-2.2 months (averaging 1.8 months);

(b) Common Law Division Civil Lists delays were 4.0-12.5 months (averaging 8.4 months); and

(c) Equity Division delays were 1.3-6.7 months (averaging 4.4 months).

This method of measuring delay seems similar to that used in New Zealand's High Court (wait from when a proceeding is ready for trial to its hearing date). The delay in New Zealand's High Court is, on average, a year and half (see above).

222. The fact that costs awards for an unreasonable failure to mediate seem relatively rare in Australia, despite the courts' powers to make such awards, may be evidence of a relatively mature market, which now mediates most cases that should be mediated.

223. Commentary in Australia has also noted some issues with mediation efficacy in cases of particular power imbalance, including franchise disputes and farm debt.[297] The perception being that the stronger party holds all of the cards, and will only settle to its benefit.

Appellate context

224. I have only been able to find limited material on the efficacy of the Australian mediation framework in the appellate context.

225. Warren CJ has spoken on this in Victoria, stating in 2009:

> *"Another lateral approach we have tried in the Supreme Court is the application of mediation to civil appeals. The President of the Court of Appeal, Justice*

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[293] Waye, above n 72, at 220.
[294] Supreme Court of New South Wales [SCNSWAR] *Annual Review 2023*, at <https://supremecourt.nsw.gov.au/documents/Publications/Annual-Reviews-+-Stats/2023_ANNUAL_REVIEW_FINAL_web.pdf> at 55.
[295] At 55.
[296] At 57.
[297] Waye, above n 72, at 215, 217 and 224-226.

> *Maxwell started with this now over two years ago. The success has been outstanding. In a little over two years 46 appeals have resolved at mediation*."[298]

226. The SCNSWAR 23 has a section on NSW Court of Appeal mediations. These seem to be minimal, running at 0-2 per year 2019-2023.[299]

Observations

227. Australians are not famous for their timidity. Dealing with Australian litigators can leave bashful kiwis wondering if our cousins' law school advocacy courses are taught by Nick Kyrgios. But, nonetheless, mediation plays a central role in the resolution of disputes in the Australian senior courts I have surveyed, and has done for many years. The relationship is something of a given. The conversations are more about how to get best use of mediation. In 2012, Bathurst NSW CJ put it thus:

> "*The courts and ADR are both important elements of the dispute resolution landscape and it is important that we give thought to the ways in which they can further complement and support one another*"[300]

228. A further notable aspect of the commentary in Australia is the widely shared sense that mediation is part of the answer to access to justice challenges. Bathurst NSW CJ stated:

> "…*for some Australians, access to justice is becoming less attainable; this is especially the case for middle-income earners (1). In this context, appropriate or alternative dispute resolution ('ADR') mechanisms serve an increasingly important role in facilitating access to dispute resolution services for all citizens and reducing the time and costs spent on litigation."*[301]

229. Vicki Waye has stated:

> "*As courts have buckled under the pressure to provide quick and efficient access to justice the practice of mandatory or quasi-mandatory mediation has proliferated across Australia, and, indeed, now occupies the position of Australia's default dispute resolution mechanism.*"[302]

230. Another, distinctive, feature of the Australian system is that many court referred mediations are conducted by mediation-trained and accredited registrars.[303]

231. I note that lawyers in Australia are, like those in New Zealand, and England and Wales, under a discrete professional obligation to advise their clients about ADR.[304] The significant role of the senior courts in encouraging, and ordering, mediation, has been in addition to that prompt.

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[298] Warren, above n 251, at 5.
[299] At 56.
[300] Bathurst, above n 48b, at 870.
[301] At 870.
[302] Waye, above n 72, at 214.
[303] Federal Court of Australia, above n 283, at 28, and, for example: in Victoria, see SCVAR 22-23, above n 289, at 32, and in NSW, see Bathurst, above n 48b, at 885.
[304] For example: Australian Solicitors Conduct Rules 2012 (Qld) r 7.2.

232. I appreciate that anecdotes and evidence have but a passing acquaintance at best. But indulge me in one, which was part of what encouraged me to write this paper. At a recent conference dinner, I sat next to a senior Australian judge. I asked her how long it took, on average, from filing a claim to getting a hearing for a civil matter in her Court. "*About nine-12 months*", she replied. I gasped, and said that was much quicker than New Zealand. I asked whether she thought that was a function of their judicial system being better resourced. "*No*", she said, "*we get them all to mediate*".

233. The principles that: justice should be seen to be done; courts should treat all parties fairly; and that mediation is a voluntary process, all apply in Australia. They have not stood in the way of the development of the mediation framework I have described.

CANADA

Mediation framework in the senior courts

234. By senior courts in Canada, I am referring to the Federal Courts, and the provinces' Superior Courts. Each province's Superior Court is divided into trial-level courts (variously called Supreme Court, Court of King's Bench or Superior Court of Justice), and that province's Court of Appeal.

235. The mediation framework in the senior courts of Canada is set out in Federal and provincial legislation, rules of courts, practice directions/notes, and case law. That framework, to the extent I have captured it, includes: nudges, presumptions, mandatory mediation, orders, and costs sanctions. That framework gives those courts significantly greater powers to encourage, and order, parties to civil disputes to mediate than New Zealand's senior courts have.

236. I have not captured all of the details of the mediation frameworks in all the senior courts of Canada, but have hopefully noted key material, particularly from the Federal Court, and the senior courts of British Columbia ("**BC**"), Ontario and Alberta.

"*Nudges*"

237. Canada's senior courts use various nudges to encourage mediation (or judge-led equivalents).

238. Canada's Federal Courts Rules ("**FCR**"), which apply to the Federal Court and the Federal Court of Appeal,[305] state at r 3 that:

> "*These Rules shall be interpreted and applied*
>
> ***(a)*** *so as to secure the just, most expeditious and least expensive <u>outcome</u> of every proceeding; and*
>
> ***(b)*** *with consideration being given to the principle of proportionality, including consideration of the proceeding's complexity, the importance of the issues involved and the amount in dispute*."

[305] Federal Court Rules (SOR/98-106) [FCR].

(underlining added)

This wording is a recent change. Formerly, the rule referred to: "*the just, most expeditious and least expensive <u>determination</u> of every proceeding on its merits*" (underlining added).[306] There is further material on the context of this recent change in the efficacy section below.

239. The FCR encourage settlement at an early stage in proceedings. FCR 257 states:

> "Within *60 days after the close of pleadings, the solicitors for the parties shall discuss the possibility of settling any or all of the issues in the action and of bringing a motion to refer any unsettled issues to a dispute resolution conference.*"[307]

The backstop here, a dispute resolution conference, is like a JSC in New Zealand.

240. Under the FCR, a pre-trial conference is held after the close of pleadings.[308] Under FCR263(a), participants at a pre-trial conference must be prepared to address:

> "*the possibility of settlement of any or all of the issues in the action and of referring any unsettled issues to a dispute resolution conference*"[309]

241. The Federal Courts state that they take a pro-active role in encouraging ADR throughout proceedings. The Federal Courts' website reads as follows:

> "*Parties are encouraged to seek the Court's assistance at any time to pursue alternative dispute resolution. The Court will also proactively raise these options throughout the proceeding, including at those junctures where it would lead to the most efficient and cost-effective disposition of the action, such as the close of pleadings, or immediately following documentary production or oral discoveries, and even at the pre-trial conference. The party or the parties wishing to initiate mediation should seek a case conference with their Case Management Judge or, if the matter is not case managed, request the hearings co-ordinator to set a date for mediation.*
>
> *After filing the Statement of Claim and the Statement of Defence, the Court strongly recommends that the parties discuss the possibility of mediation during the requisite settlement discussion period pursuant to Rule 257. The parties should also discuss the opportunity of having the case specially managed pursuant to Rule 383. Case management is a system designed to reduce unnecessary delay and cost, facilitate early and fair settlements, and bring cases promptly to a just conclusion. The Case Management Judge or associate*

[306] FCR, Version of section 3 from 2006-03-22 to 2022-01-12.
[307] FCR, above n 305, r 257.
[308] Rule 260.
[309] Rule 263(a).

judge will help the parties determine the opportune time to have a meaningful mediation."[310]

242. In BC, there is a Notice to Mediate scheme which applies to claims in the Supreme Court.[311] This scheme is part nudge, part mandatory mediation. It was initially introduced for motor vehicle actions,[312] but is now of general civil application (with prescribed exceptions, including sexual abuse, and judicial review matters[313]). It provides that:

(a) A party can issue a notice to their opponent in a specified form requiring mediation;

(b) A notice can be issued at any time between 60 days after the filing of the first statement of defence and 120 days before the date of trial, unless the court orders that it can be used before or after this timeframe;

(c) A mediation process is then set in train, with certain specified process requirements. Unless they are exempted, parties must then mediate. An exemption may be granted by the Court if "*it is materially impracticable or unfair to require the party to attend*".[314] There is a high bar for exemption. The BCSC case of *Matsqui First Nation v Canada (AG)*[315] saw the Crown seeking an exemption from a Notice to Mediate, issued by the First Nations plaintiff, on the basis that the case was a test case with broad implications. The exemption was declined; and

(d) The parties can appoint a mutually acceptable mediator.[316] Otherwise, they must apply to a "*roster organisation*". Apparently, the relevant roster organisation, Mediate BC, has qualifications for admissions to its rosters. It has been contended that this structure addresses concerns about requiring mediation without ensuring that mediations can be conducted by properly qualified persons.[317]

243. BC's Notice to Mediate scheme is a nudge in the sense that it is optional for parties to initiate. It is mandatory mediation in the sense that, once the process is set in train, there is a high bar for exemption.

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[310] Federal Court of Canada "Resolving your case - FAQ" <www.fct-cf.gc.ca/en/pages//representing-yourself/resolving-your-case/faq#cont>.
[311] Notice to Mediate (General) Regulation, B.C. reg. 4/2001.
[312] Law Reform Commission (Ireland) above n 36, at 77.
[313] Notice to Mediate (General) Regulation, above n 311, r 2.
[314] Rule 23.
[315] *Matsqui First Nation v Canada (AG)* 2015 BCSC 1409.
[316] Notice to Mediate (General) Regulation, above n 311, r 6.
[317] Catherine Morris "The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws" in Wang Guigio and Yang Fan (eds) *Mediation in Asia Pacific: A Practical Guide to Mediation and its Impact on Legal Systems* (Wolters Kluwer Law & Business, Hong Kong, 2013) at 97.

244. Ontario does not seem to have any nudges, but it does have a mandatory mediation framework (see below).

245. Alberta's Rules of Court ("**ARC**")[318] provide nudges as follows:

(a) At r1.2:

"***Purpose and intention of these rules***

"***1.2 (1)*** *The purpose of these rules is to provide a means by which claims can be fairly and justly <u>resolved</u> in or by a court process in a timely and cost-effective way.*

(2) *In particular, these rules are intended to be used*

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

…

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) *To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,*

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

…"

(underlining added); and

(b) At r4.1-4.2:

*"**Responsibility of parties to manage litigation***

4.1 *The parties are responsible for managing their dispute and for planning its resolution in a timely and cost-effective way.*

246. Alberta has a mandatory ADR framework too (see below).

[318] Alberta Rules of Court AR 124/2010.

"*Presumptions*"

247. It does not appear that any mediation presumptions per se operate in the senior Canadian courts I have looked at. However, the approach described by the above quoted passage from the Federal Courts' website comes close to presumption. The mediation frameworks in Canada also provide more muscular, mandatory, powers, as below.

"*Mandatory mediation*"

248. As I understand it, there is no general mandatory mediation framework in Canada's Federal Courts.

249. As noted, the BC Notice to Mediate scheme is part mandatory. Once a Notice to Mediate has been issued, mediation is required. Exemptions are limited, and subject to a high bar (see above).

250. Ontario has had mandatory mediation since 1999. The framework is set out in Ontario's Rules of Civil Procedure[319] ("**ORCP**"), which apply to civil proceedings in the Ontario Court of Appeal and in the Superior Court of Justice, at r24.1. Key provisions of the framework are as follows:

    (a) It applies to all actions commenced in Ottawa, Toronto, or the County of Essex, but does not apply elsewhere in Ontario;[320]

    (b) There are limited exemptions;[321]

    (c) Mediations must take place within 180 days after the first defence has been filed, unless the court orders otherwise;[322]

    (d) The parties (or insurance representatives) and lawyers if engaged, must attend the mediations;[323] and

    (e) Mediators can be chosen, or assigned, from a list compiled by a local committee. Or a person who is not on such a list can conduct a mediation with the parties' consent.[324]

251. Ontario also has province-wide a mandatory mediation framework for claims arising from motor vehicle accidents, under the Insurance Act 1990.[325]

252. In the Alberta Supreme Court, participation in a form of ADR is mandatory (subject to waiver on application) under ARC r4.16, which provides in this regard as follows:

> *"Dispute resolution processes*

[319] R.R.O. 1990, reg. 194: Rules of Civil Procedure [ORCP].
[320] Rule 24.1.04(1)2.
[321] Rules 24.1.04 (2.1), (3), and 24.1.05.
[322] Rule 24.1.09.
[323] Rule 24.1.11.
[324] Rule 24.1.08.
[325] Insurance Act R.S.O 1990, c I.8., s 258.

4.16(1) The responsibility of the parties to manage their dispute includes good faith participation in one or more of the following dispute resolution processes with respect to all or any part of the action:

(a) a dispute resolution process in the private or government sectors involving an impartial third person;

(b) a Court annexed dispute resolution process;

(c) a judicial dispute resolution process described in rules 4.17 to 4.21 [Judicial Dispute Resolution]*;*

(d) any program or process designated by the Court for the purpose of this rule.

(2) On application, the Court may waive the responsibility of the parties under this rule, but only if

(a) before the action started the parties engaged in a dispute resolution process and the parties and the Court believe that a further dispute resolution process would not be beneficial,

(b) the nature of the claim is not one, in all the circumstances, that will or is likely to result in an agreement between the parties,

(c) there is a compelling reason why a dispute resolution process should not be attempted by the parties,

(d) the Court is satisfied that engaging in a dispute resolution process would be futile, or

(e) the claim is of such a nature that a decision by the Court is necessary or desirable."

253. Jurisprudence in Canada suggests that the courts will apply a stringent approach to applications for exemption from/waiver of mandatory mediation requirements. Refer to *Matsqui First Nation v Canada (AG)*[326] above. *IBM Canada Limited v. Kossovan*[327] was a Queen's Bench of Alberta case, which is considered to be Canada's leading decision in this area.[328] The decision summarises previous cases (including one in which an exemption was declined even though the Court might have been disposed to grant summary judgment to the applicant on the claim[329]*).* I have added fuller reference to *IBM Canada Limited v. Kossovan* in **Appendix 1**, which, as noted above, contains commentary on factors the courts might take account of in ordering mediation against the objection of one or more parties.

254. Canada also has farm debt legislation which requires parties to mediate farm debt matters which would otherwise be dealt with by the senior courts.[330]

"*Orders*"

255. Canada's senior courts can order parties to mediate.

256. The FCR provide for orders to mediate (or judge-led equivalent) at r386-391, which state:

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[326] *Matsqui First Nation v Canada (AG),* above n 315.

[327] *IBM Canada Limited v. Kossovan* 2011 ABQB 621 at [14]-[23].

[328] Barbara Billingsley and Masood Ahmed "Evolutions, revolution and culture shift: A critical analysis of compulsory ADR in England and Canada" (2016) 45 (2-3) Common Law World Review 186 at 199.

[329] At 18.

[330] Farm Debt Mediation Act SC 1997 c 21.

> ***"386 (1)*** *The Court may order that a proceeding, or any issue in a proceeding, be referred to a dispute resolution conference, to be conducted in accordance with rules 387 to 389 and any directions set out in the order.*
>
> *…..*
>
> ***387*** *A dispute resolution conference shall be conducted by a case management judge or prothonotary…, who may*
>
> ***(a)*** *conduct a mediation, to assist the parties by meeting with them together or separately to encourage and facilitate discussion between them in an attempt to reach a mutually acceptable resolution of the dispute;*
>
> *…"*

An example of such an order being made was in *Merck & Co. v. Nu-Pharm Inc.*[331] But it is not apparent that this power is frequently used.

257. In BC, the Supreme Court Civil Rules ("**BCSCCR**") allow for the Court to order mediation, whether or not on the application of a party, at a Case Planning Conference.[332] The Court can also order a settlement conference[333] (again, like a JSC in New Zealand, as I understand it).

258. In Ontario, it is not apparent that the senior courts have the power to order mediation, beyond what is provided for in Ontario's (comprehensive) mandatory mediation framework.

259. In Alberta, in addition to the mandatory ADR framework described above, the Supreme Court can order mediation under ARC r4.16, which provides in this regard as follows:

> *"(4) A case management judge or a case conference judge may, on application or on the Court's own motion, by order direct that the parties participate in a dispute resolution process."*

260. I should also note that, as in New Zealand, England and Wales, and Australia, the senior courts of Canada do also order parties to mediate (or at least stay a proceeding for that purpose) against the wishes of one or more parties, where mediation is required by contract.[334]

"Costs sanctions"

261. The senior courts in Canada can, and occasionally do, use costs sanctions to encourage mediation.

262. The Federal Courts have broad discretion on costs under FCR r400.

263. In BC:

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[331] *Merck & Co. v. Nu-Pharm Inc.* 2007 Carswell Nat 1380; 2007 FC 537 (F.C. Proth.).
[332] British Columbia Supreme Court Civil Rules [BCSCCR], BC Reg 168/2009, r 5-3(1)(o).
[333] Rule 9-2.
[334] Eg *Alarium Inc. v. De La Rue International Ltd* 2013 QCCS 505.

(a) The Supreme Court of BC has the ability to make costs orders against parties who fail to comply with BC's notice to mediate scheme.[335] Such an order was made in *Schwabe v Dr Lisinski;*[336] and

(b) The BCSCCR also provide for costs orders for a breach of an order requiring mediation.[337]

264. In Ontario:

(a) The OCRP give Ontario's senior courts broad discretion on costs under r57.01. Costs have been awarded under that section for unreasonable refusal to mediate (in circumstances not covered by Ontario's mandatory mediation framework) in cases including: *David v Transamerica Life Canada*[338] and *Canfield v Brockfield Ontario Speedway;*[339]

(b) The ORCP also provide for costs sanctions for failure to attend a scheduled mandatory mediation session.[340] *Shahi v Greater Toronto Airports Authority*[341] was a case in which costs were awarded against a party in that context; and

(c) The Insurance Act 1990 provides at s258.6 (2) that a failure to comply with the mediation provisions of that Act can be considered by the court in awarding costs. *Keam v Caddey*[342] was a case in which Ontario's Court of Appeal ordered costs against an insurer under this section. The Court stated that:

> "*...the legislature's approach recognises that participation in mediation could have a salutary effect on one or both sides, with input from an experienced and respected mediator*."[343]

Keam v Caddey was followed in *Williston v Hamilton (Police Services).*[344]

265. In Alberta, costs can be awarded under ACR r10.31(2)(c) and r10.41(1)(2)(d) for "*serious misconduct in the course of the dispute resolution process or judicial dispute resolution process*". *A.S. v N.L.H.*[345] was a Queen's Bench of Alberta case in which costs were awarded for an unwarranted adjournment of a JDR.

Appellate context

266. A note on Canada's senior appeal courts. They include, for these purposes, the Federal Court of Appeal, and provincial courts of appeal (like the Supreme Courts in New Zealand, and England and Wales, and the High Court of Australia, different considerations obviously apply to the Supreme Court of Canada).

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[335] Notice to Mediate (General Regulation), above n 311, r 34(f).
[336] *Schwabe v Dr Lisinski* 2005 BCSC 1284.
[337] BCSCCR, above n 332, r 5-3(6).
[338] *David v Transamerica Life Canada* 2016 ONSC 1777.
[339] *Canfield v Brockfield Ontario Speedway* 2018 ONSC 3288.
[340] OCRP, above n 319, r 24.1.13.
[341] *Shahi v Greater Toronto Airports Authority* 2022 ONSC 2341.
[342] *Keam v Caddey*, 2010 ONCA 565.
[343] At [23].
[344] *Williston v Hamilton (Police Services)* 2013 ONCA 296.
[345] *A.S. v N.L.H.* 2006 ABQB 708.

267. As noted, the FCR apply to the Federal Court of Appeal. But I have not been able to find any material on mediation in the Federal Court of Appeal.

268. It is not clear to me how the powers I have described above, province by province, are utilised by the provincial appeal courts. However, judicial commentary indicates that ADR/mediation is being used by provincial appeal courts, at least in BC, Quebec and Ontario. In particular:

(a) In a speech in 2023, The Hon. Robert J. Bauman, Chief Justice of BC, stated:

> "*The Court of Appeal itself has built an ADR function into its processes. While well-known in trial courts, it is less well known that the Court of Appeal has a judicial settlement conference program too (albeit much under-utilized)*."[346]

And;

(b) In a speech in 2007, The Hon. Warren K. Winkler, Chief Justice of Ontario, stated:

> "*At the appellate level, the Court of Appeal for Quebec has introduced mediation as an alternative under the conciliation service program. Participation is on a consent basis, with settlements requiring the Court's approval. The success rate is in the area of eighty percent. In Ontario, a designated panel of judges at the Court of Appeal have adopted pre-hearing mediation for certain family law cases, for example, where the facts have changed since the lower court decision. In these cases, this has resulted in significant cost saving for the litigants and a reduction of the emotional trauma. On a very limited basis, the Court of Appeal for Ontario has also experimented with mediation in certain civil cases with some success. While some are of the view that mediation at the appellate level cannot succeed because one party has a judgment in hand in its favour, there are many disputes where the issue in litigation is much more narrowly defined than the actual matter in dispute. Therefore, a judicial determination cannot provide a global solution. Appellate mediation is able to address this situation. The success of the Quebec and Ontario initiatives speak for themselves; they are other examples of mediation's capacity to enhance access to justice on the global scale as well as in individual cases.*"[347]

Efficacy

269. Material on the efficacy of Canada's senior courts mediation framework can be found in reports, statements, cases, rules and submissions.

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[346] Robert J. Bauman "Intersocietal Approaches to Dispute Resolution: Learning from Indigenous Legal Orders" (Keynote Address, Alternative Dispute Resolution BC Symposium, 5 June 2023) <www.bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/speeches/Speech_Intersocietal_Approaches_to_Dispute_Resolution.pdf> at 37.

[347] Warren K. Winkler "Access to Justice, Mediation: Panacea or Pariah?" (2007) 16(1) Canadian Arbitration and Mediation Journal 5.

270. In October 2012, a Subcommittee of the Federal Court's Rules Committee released a major report on possible changes to the FCR. This report pre-dated to the amendment to FCR r3 noted above. The report stated:

> "*It is fair to say that when the Federal Courts Rules were enacted in 1998 their primary and perhaps sole aim was to bring the parties to final determination of their proceeding. Rule 3 still reflects this. It speaks of the rules being interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. "Determination" implies a decision on the merits after trial.*
>
> *But circumstances have changed since 1998. For one thing, the case management and mediation provisions in the rules have proven to be effective in achieving settlement. In some subject areas of practice, trials are increasingly rare.*
>
> *To the extent that trials are rare in some areas of practice, we believe that this should not be seen as a failure of the Federal Courts system or its rules, but rather an achievement brought about, in part, by the good work done under the case management and mediation provisions in the rules.*
>
> *We believe that Rule 3 should be amended to recognize that the Federal Courts Rules often lead parties in directions other than a "determination." Although it is not our mandate to settle on the wording of an amended Rule 3, we think that words such as "disposition" or "resolution" might better reflect the current reality in the Federal Courts."*[348]

271. As noted above, FCR r3 was recently amended, with the word "determination" replaced by the word "outcome".

272. There is further support for the efficacy of mediation at the highest Federal levels. The Action Committee on Modernizing Court Operations ("**Action Committee**") is a national leadership body co-chaired by the Chief Justice of Canada, and the Minister of Justice and Attorney General of Canada.[349] In an online statement last modified on 20 November 2024, the Action Committee states:

> "...*promoting early Judicial Dispute Resolution (JDR) and Alternative Dispute Resolution (ADR) plays a key role in reducing backlog and delays by optimizing court processes and resources. JDR and ADR can also increase access to justice by providing a process that is more accessible to litigants, particularly if they are self-represented*."[350]

273. The BC government website has a section on BC's Notice to Mediate scheme, which states that:

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[348] Subcommittee on Global Review of the Federal Courts Rules *Report of the Subcommittee* (Federal Court Rules Committee, 16 October 2012) <www.fct-cf.gc.ca/Content/assets/pdf/base/ENG_Global%20review%20report%20FINAL.pdf>.

[349] Action Committee on Modernizing Court Operations [Action Committee] "Terms of Reference" Office of the Commissioner for Federal Judicial Affairs Canada <www.fja.gc.ca/COVID-19/reference-eng.html>.

[350] Action Committee "Improving Access to Justice Through Judicial Dispute Resolution" Office of the Commissioner for Federal Judicial Affairs Canada <www.fja.gc.ca/COVID-19/Improving-Access-to-Justice-Ameliorer-lacces-a-la-justice-eng.html>.

> "*The Notice to Mediate requires the parties to attend a mediation session. It does not require them to settle the dispute. The experience in many other jurisdictions, and the experience with B.C.'s Notice to Mediate for motor vehicle actions, is that mediation works even when a party is forced to mediate.*
> *From 2002 to 2010, about 30,000 motor vehicle actions were mediated. About 24,000 resolved for an average settlement rate of about 80 per cent*."[351]

The focus on motor vehicle actions no doubt arises because it was this form of dispute for which the Notice to Mediate scheme was initially introduced. However, as noted, it is now of general civil application.

274. In *Matsqui First Nation v Canada (AG),*[352] as noted above, the Court declined to grant an exemption to a Notice to Mediate. Justice Kent accepted that settlement faced formidable obstacles. However, he was still of the view that the mediation could have efficacy, even if it did not settle. He formed this view, at least in part, on the basis of his own experience. He stated that he had participated "*in dozens of mediations in more than 30 years of practice at the bar before joining the bench*".[353]

275. The CJC 2017 Report stated:

> "*Our enquiries suggest that the establishment of the Notice to Mediate procedure in the British Columbia civil justice system has led to the growth of informally agreed mediation as a norm, with the formal procedure itself only rarely being invoked rarely*."[354]

276. The CJC 2018 Report was sufficiently impressed by BC's notice to mediate scheme that it supported the idea of introducing such a scheme in England and Wales.[355]

277. In Ontario, confidence in the efficacy of mandatory mediation is baked into the relevant Rules of Civil Procedure, with r24.1.01 stating:

> *"This Rule provides for mandatory mediation in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.*"

278. There is compelling evidence of efficacy for mandatory mediation in Ontario. A 2018 submission from the Ontario Bar Association ("**OBA 2020 Submission**")[356] captures the early history as follows:

> *"In 1994, the ADR Centre of the Ontario Court (General Division) was introduced to provide enhanced, more timely and cost-effective access to justice for defendants and plaintiffs, and to determine whether the conduct of civil cases would be improved with the presence of mediation.5 In 1995 the*

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[351] Government of British Columbia "Notice to Mediate (General) Regulation" <www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/mediation/notice-to-mediate/notice-to-mediate-general-regulation>.

[352] *Matsqui First Nation v Canada (AG)*, above n 315.

[353] At [17].

[354] CJC 2017 Report, above n 152, at 43.

[355] CJC 2018 Report, above n 153, at [8.39-8.42].

[356] Ontario Bar Association "Submission to the Attorney General of Ontario: Expanding Mandatory Mediation in Ontario" (2020) <www.oba.org/CMSPages/GetFile.aspx?guid=4f756ca7-2962-417b-aec6-18e1ae760d12>.

> *ADR Centre was evaluated by a third-party expert6 who concluded that compared with a control group the cases referred to the ADR Centre had reduced the median time period in which cases were resolved and accordingly reduced client costs.7 Statistics revealed that 40% of the cases referred to mediation resulted in settlement in the very early stages of the case. Lawyers reported that costs were reduced even for cases that did not settle because parties were forced at an early stage to evaluate the merits of their case.8 A second pilot project in 1997 also had positive outcomes.9*
>
> *At the same time that the ADR Centre was experimenting with the use of mandatory mediation, two major reviews on civil justice were being carried out by the Province of Ontario10 and the Canadian Bar Association ("CBA")11. Both reviews concluded that mandatory mediation would be beneficial, including to increase access to justice as well as improve the efficiency of the justice system."*[357]

279. After the mandatory mediation framework I have described above was introduced in Ontario in 1999, it was the subject of a major independent evaluation, the results of which were captured in a report known as the Hann Report[358] ("**Hann Report**"). The Hann Report reviewed 23,000 cases, 3000 mediations, and responses to questionnaires by 600 litigants, 1,130 lawyers and 1,243 mediators.[359] The Hann Report's key findings were as follows:

> "*In light of its demonstrated positive impact on the pace, costs and outcomes of litigation, Rule 24.1 must be generally regarded as a successful addition to the case management and dispute resolution mechanisms available through the Ontario Superior Court of Justice in both Toronto and Ottawa. More specifically, the evaluation provides strong evidence that:*
>
> - *Mandatory mediation under the Rule has resulted in significant reductions in the time taken to dispose of cases.*
> - *Mandatory mediation has resulted in decreased costs to the litigants.*
> - *Mandatory mediation has resulted in a high proportion of cases (roughly 40% overall) being completely settled earlier in the litigation process – with other benefits being noted in many of the other cases that do not completely settle.*
> - *In general, litigants and lawyers have expressed considerable satisfaction with the mediation process under Rule 24.1.*
> - *Although there were at times variations from one type of case to another, these positive findings applied generally to all case types – and to cases in both Ottawa and Toronto*."[360]

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[357] At 7.

[358] Robert G. Hann and others *Evaluation of the Ontario Mediation Program (Rule 24.1) Final Report: The First 23 Months* (Queen's Printer of Ontario, Toronto, 2001) <https://digitalcommons.osgoode.yorku.ca/faculty_books/115> [Hann Report].

[359] At 3-4.

[360] At 2.

280. There is also evidence of that mandatory mediation in Ontario has had continued efficacy. The OBA 2020 Submission stated that it results in:

> *"• significant reductions in the time taken to dispose of cases;*
>
> *• decreased costs to litigants;*
>
> *• high proportion of cases being completely settled earlier in the litigation process, with other benefits being noted in many of the other cases that do not completely settle; and*
>
> *• in general, litigants and lawyers expressed considerable satisfaction with the pilot mandatory mediation process."*[361]

281. An OBA member survey in June/July 2019 had 90% of respondents in favour of expanding mandatory mediation.[362]

282. Regarding Alberta, the efficacy material that I have been able to find has focussed on the Judicial Dispute Resolution ("**JDR**") process (the equivalent of JSCs in New Zealand). As I understand it, JDRs are the most popular form of ADR in Alberta's senior courts.[363] They became so popular that the framework had to be suspended for want of judicial resources from 2013-2019.[364]

283. In Alberta decision *IBM Canada Limited v. Kossovan,*[365] Mahoney J stated:

> "[26] *The experience in this Court plus ample informed commentary suggests that requiring participation in an alternative dispute resolution process leads to many settlements that would otherwise not occur. Often disputants, when choosing between a settlement process or proceeding to trial, lack information, make distorted assessments, misjudge the cost, have an overly optimistic or constricted view of potential trial risks and outcomes and fail to understand the hidden benefits of entering structured settlement negotiations, like a JDR.*
>
> *[27] Even if a final agreement is not reached on all issues, the parties, by engaging in the process, can address their dispute sooner, learn valuable information to help sharpen their understanding of the real issues, reduce the costs of final resolution, and in some cases, improve their relationship. This*

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[361] Ontario Bar Association, above n 356, at 10-11.

[362] At 12.

[363] Morris, above n 317, at 99-100.

[364] See:

a. Morris, above n 317, at 99-100; and

b. Court of Kings Bench of Alberta "Notice to the Profession & Public - Enforcement of Mandatory Alternative Dispute Resolution Rules 8.4(3)(a) and 8.5(1)(a)" (2 July 2019) <https://albertacourts.ca/kb/resources/announcements/notice-to-the-profession-public---enforcement-of-mandatory-alternative-dispute-resolution-rules-8.4(3)(a)-and-8.5(1)(a)>.

[365] *IBM Canada Limited v. Kossovan*, above n 327, at [26] and [27].

> *Court has seen that even in major commercial litigation that was dealt with by way of a JDR, the process has led to quite unexpected positive results…"*[366]

Appellate context

284. I have only been able to find limited material on the efficacy of the Canadian mediation framework in the appellate context. In particular, refer to the excerpts from the speeches of Bauman J (BC), and Winkler CJ (Ontario) above.

Observations

285. In the Canadian jurisdictions I have surveyed, like those I surveyed in Australia, there is a sense that mediation is part of the answer to access to justice challenges. In Winkler CJ's 2007 speech, he stated:

> *"...as access to justice has now become a concern of major proportion, mediation has emerged as a possible partial solution to what many have come to believe is an insoluble problem.*
>
> *Not everyone, of course, is sanguine about mediation's potential to alleviate the barriers to speedy, affordable justice. Opponents argue that mediation is "soft justice," nothing more than an additional layer of costs in the litigation stream and a process fundamentally at odds with the role of the court as decision maker. They add that judges are not equipped for, and are not comfortable with, the unstructured nature of mediation.*
>
> *Proponents, on the other hand, say that mediation can be an integral part of our civil justice system, providing a timely solution for disputes and thus minimizing costs to litigants. They argue that outside mediators are the only expandable resource for an already financially strained court system, and that we should capitalize on this valuable resource, not reject it. Moreover, they point out that mediation has succeeded in ameliorating systemic problems in the civil justice system in the Toronto Region of the Superior Court of Justice. On balance, my experience has been that the benefits of mediation outweigh the detriments, and that mediation can be most useful in mitigating the depth and severity of the problem of access to justice*.
> …
>
> *As a matter of public policy, mediation as part of our civil justice system is here to stay. On balance, it tends to promote and enhance access to justice, because it enables parties to resolve their disputes as cheaply and as quickly as possible. Mediation is not a cure-all. But many cases that would otherwise drag on interminably at considerable cost and anxiety to the parties can be resolved through the efforts of skilled mediators*."[367]

[366] At [26]-[27].
[367] Winkler, above n 347.

286. Ontario's mandatory mediation framework was initiated after, and was a recommendation of, an extensive Civil Justice Review that sought to address concerns about access to justice.[368]

287. The Cromwell Report was issued in Canada in 2013.[369] It referred to "*a serious access to justice problem in Canada*". It suggested that Canadians should look at access to justice as more than access to the courts. It stated:

> *"We need a system that provides the necessary institutions, knowledge, resources and services to avoid, manage and resolve civil and family legal problems and disputes. That system must be able to do so in ways that are as timely, efficient, effective, proportional and just as possible:*
>
> *• by preventing disputes and by early management of legal issues;*
>
> *• through negotiation and informal dispute resolution services; and*
>
> *• where necessary, through formal dispute resolution by tribunals and courts"*[370]

288. There has been at least some encouragement from the Federal Court for the mediation of First Nations' Disputes.[371] There is also cautionary commentary from Canada on the cultural dynamics in mediation. It has been noted that Canadian mediation methods assume values of individual autonomy and equality which are not shared by all cultures.[372]

289. I note that lawyers in Canada are, like those in New Zealand, England and Wales, and Australia, under a discrete professional obligation to advise their clients as to the possibility of ADR.[373] The significant role of Canada's senior courts in encouraging, and ordering (or more particularly mandating), mediation, has been in addition to that prompt.

290. The principles that: justice should be seen to be done; courts should treat all parties fairly; and that mediation is a voluntary process, all apply in Canada. They have not stood in the way of the development of the mediation framework I have described.

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[368] Morris, above n 317, at 101.
[369] Action Committee on Access to Justice in Civil and Family Matters *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa, October 2013) ["**Cromwell Report**"] <www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>.
[370] At 2.
[371] Memorandum from Leonard Mandamin (Justice of the Federal Court of Canada) to Sylvia MacKenzie (Senior Counsel, Federal Court) regarding Alternative Dispute Resolution for First Nations Judicial Review Issues (11 January 2013) <www.fct-cf.gc.ca/Content/assets/pdf/base/Alternative_Dispute_Resolution.pdf>.
[372] Morris, above n 317, at 87.
[373] The Canadian Bar Association Code of Professional Conduct 2009 www.cba.org/getattachment/Publications-Resources/Resources/Ethics-and-Professional-Responsibility/Code-of-Conduct/Code-of-Professional-Conduct-(2009)/codeOfConduct2009Eng.pdf at 65.

CONCLUSIONS: SHOULD NEW ZEALAND'S SENIOR COURTS HAVE GREATER POWERS TO ENCOURAGE, OR ORDER, PARTIES TO CIVIL DISPUTES TO MEDIATE? AN ACCESS TO JUSTICE OPPORTUNITY?

291. Should New Zealand's senior courts have greater powers to encourage, or order, parties to civil disputes to mediate? Is there an access to justice opportunity here? As foreshadowed, I think the answers to these questions are "yes". I set out why below, considering in turn:

    (a) The New Zealand context – three important factors;

    (b) The efficacy of greater court powers;

    (c) Is there an unmet need in New Zealand?

    (d) Other arguments against;

    (e) The appellate context; and

    (f) Wrapping it up.

292. In the next section, "Conclusions: what might such greater powers be? A suggested enhanced mediation framework", I set out where I think New Zealand should go. I note at this stage that I do not suggest mandatory mediation. I think that a suite of greater powers that includes nudges, a presumption, orders, and costs sanctions, will suffice.

The New Zealand context – three important factors

293. There are three factors which are contextually important in New Zealand. First and foremost is that New Zealand has a chronic, and worsening, access to justice problem. The broad details of this are set out above, and are incontrovertible. It has a severe effect on matters that the senior courts deal with. Proceedings are subject to chronic delays. Parties suffer undue financial and human costs. This is not a political issue. It is a problem for everyone, from businesses, to iwi, individuals, charities, advocacy groups, community groups and beyond.

294. The second contextually important factor is that mediation is simply not part of the toolkit that New Zealand's senior courts are currently using to address that access to justice problem. I refer to my summary of the mediation framework in New Zealand's senior courts above, which shows that framework does little to encourage mediation. We are outliers in this. Nina Khouri puts it neatly:

> *"There is no comparable jurisdiction that so comprehensively excludes mediation from the access to justice conversation as New Zealand*."[374]

295. It is odd that New Zealand is an outlier. As noted above, beyond a need to tread carefully in the cultural context, judicial perceptions, and New Zealand mediators earning greater trust and support, there is no reason for us to be different in terms of the powers our senior courts have to encourage or order mediation. It is odder still that New Zealand is an outlier, in circumstances where every other possible solution to the access to justice problem in New Zealand's senior courts is being explored.

[374] Kalderimis and Khouri, above n 63, at 375.

Meanwhile, judges are working extraordinary hours, and lawyers are being exhorted to do more pro bono work.

296. The third contextually important factor is that there is support in New Zealand for the courts having an enhanced role in encouraging, and/or ordering, mediation. That support even extends, amongst some, to mandatory mediation. If, with my occupational affection for mediation, I was sailing this boat on my own, I accept that I should be allowed to sail off. But I am not.

297. The Law Commission considered the issue in its 2004 report, "*Delivering Justice for All A Vision for New Zealand Courts and Tribunals*"[375] ("**NZLC 2004 Report**"). The NZLC 2004 Report stated:

> "*During this review, we have given a great deal of consideration to whether courts should have the power to order parties to attempt to mediate a solution to their dispute.… We have concluded that the benefits offered in terms of the speedier resolution of disputes, greater choice and satisfaction for many litigants, and savings to the court system warrant the introduction of a court-mandated mediation rule*."[376]

298. Dr Grant Morris surveyed judicial attitudes towards, and support for, mediation in 2021. Roughly 71% of the judges surveyed were open to the possibility of mandatory mediation,[377] broadly defined.[378]

299. Many of the lawyers to whom I have spoken about this research have expressed support for the courts to have greater powers. A separate survey by Dr Morris found that 30% of mediation "gatekeepers" (lawyers) supported some form of mandatory mediation.[379] As I set out below, I do not think that we in fact need to go quite that far.

300. So, in terms of context: the senior courts have an access to justice problem, mediation is not part of the courts' current toolkit for addressing that problem, and there is some support for the courts having an enhanced role in encouraging, and/or ordering, mediation. What more is needed to justify change in New Zealand? I suspect there are still those who doubt the efficacy of greater court powers; those who doubt there is an unmet need for mediation in the matters before New Zealand's senior courts; and, those who think that other arguments against prevail. I address each of these in turn below.

The efficacy of greater court powers

301. Earlier in this paper, I surveyed research on the efficacy of mediation generally. The preponderance, but not all, of that research suggests that mediation saves time, costs, and has other benefits.

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[375] Law Commission *Delivering Justice for All A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) [NZLC 2004 Report].

[376] At 93.

[377] Grant Morris "To Promote or Not to Promote? The Role of the Judiciary in the New Zealand Commercial Mediation Market" (2022) 53(1) VUWLR 85 at 99 <https://doi.org/10.26686/vuwlr.v53i1.7584>.

[378] At 98.

[379] Morris and Shaw, above n 22, at 270-271.

302. But, "not so fast", some might say; even if mediation has efficacy, it does not necessarily follow that there is efficacy in giving courts greater powers to encourage, or order, mediation. In my view, this contention is comprehensively answered by the above survey of the mediation frameworks in comparable jurisdictions. In all three jurisdictions:

(a) Research and commentary (including from senior judges, both in cases and extra-curially) speak to the efficacy of the greater powers their courts have;

(b) Mediation is seen by the senior courts to have a significant role in dispute resolution, and a role which the courts should push; and

(c) Mediation is seen as part of addressing access to justice in terms of delays and costs, and court caseloads.

In this sense, it is heartening to know that there is some esteemed company on the boat. Support for the efficacy of greater court powers to encourage, or order, mediation, can be found in statements from: the EWCA,[380] the CJC,[381] a Master of the Rolls,[382] the Federal Court of Australia,[383] a Chief Justice of Victoria,[384] a Chief Justice of NSW,[385] the Federal Court of Canada,[386] and a Chief Justice of Ontario.[387]

303. The efficacy of giving courts greater powers to encourage, or order, mediation is also supported by the various material I have cited to the effect that compulsion to mediate does not significantly affect settlement rates. If the courts push parties to mediate, mediation still works (at least in the sense of getting cases settled), just as well.

Is there an unmet need in New Zealand?

304. I think there will also be those who doubt there is an unmet need for mediation in the matters before New Zealand's senior courts. They will point to New Zealand's well-developed culture of privately mediating civil disputes, and say that caters for all that need it. I am not sure how a truly empirical lens could be brought to this contention. But the following strongly suggest there is such an unmet need:

(a) The fact that in all three of the comparable jurisdictions I have surveyed, the research and commentary speak to the efficacy of the greater powers their courts have. All three of those jurisdictions also have thriving private mediation cultures (and have done for as long as, if not longer than, New Zealand);

(b) The healthy number of applications there have been under s145 of the Trusts Act, in the four years since it came into force. Given the chance to ask the High Court to order mediation, parties have seized it. Some might say that trusts cases are more amenable to mediation than other civil claims, because they

[380] See the reasoning in *Churchill* above.
[381] See the three CJC reports referenced above.
[382] See para 175 above.
[383] See para 213 above.
[384] See paras 195, 215, and 225 above.
[385] See paras 197, 227, and 228 above.
[386] See paras 241, 270, and 272 above.
[387] See para 285 above.

often involve close relationships. But in that sense trusts cases are no different to estates cases, and many shareholder and partnership disputes;

(c) The facts that, despite New Zealand's well-developed culture of privately mediating civil disputes:

(i) The Employment Court (where mediation is considered to be practically mandatory),[388] the Environment Court, and the WHT have all seen the need to have frameworks that presume mediation will occur;

(ii) The District Court has seen the need to have a JSC presumption;

(iii) When faced with disasters that generate high volumes of civil disputes, the New Zealand Government has put mediation at the centre of its dispute resolution responses, including via the CEIT, and the GCCRS/NZCRS; and

(iv) The government saw the need to enact the, now very well-used, FDMA.

In all of those contexts, New Zealand's well-developed culture of privately mediating civil disputes was plainly not doing the trick. How are senior courts matters so different?

305. Writing on the need for the courts to treat all parties fairly earlier in this paper, I suggested a couple of hypotheticals in which it might be unfair for parties *not* to be encouraged, or ordered, to mediate. They were:

(a) If all but one party (or their lawyer) to a, say, six party claim want to mediate; or

(b) If all parties would be prepared to mediate, but one or more (or their lawyer/s) is anxious that, by suggesting or agreeing to it, they will be showing weakness.

I am sure that many New Zealand lawyers, and judges, have seen these, or similar, circumstances play out in actual senior courts cases. They are circumstances which would plainly benefit from the courts having the power to encourage, or order, parties to mediate.

306. Leading New Zealand mediator Geoff Sharp has said:

> "...*there has always been a raft of mid-range civil cases that should be mediated but are not*".[389]

[388] Anecdotally, employment lawyers tell me that Employment Court matters are disposed of promptly, with judicial resources readily available to hear the cases that need to be heard. In 2019, the percentage of cases on hand in the Employment Court that were fewer than 12 months old was 76% (see speech by Forrest Miller, Judge of the Court of Appeal above n 66, at 7). But it does need to be acknowledged that the Employment Court sits as a second tier to most matters, which are dealt with at first instance in the Employment Authority.
[389] Geoff Sharp "How Mediation Will Help Flatten the Curve in New Zealand's Civil Courts" published on LinkedIn April 23, 2020.

I have had anecdotal feedback to similar effect.

307. Even if those who doubt there is an unmet need for mediation in the matters before New Zealand's senior courts are right (and for the reasons above, I do not think they are), surely that just means that any greater powers that the senior courts get will not be used much. That does not seem like a real downside to giving the senior courts such powers.

Other arguments against

308. At the outset of this paper, I referred to applicable principles, including some that are sometimes used as arguments against Courts encouraging, or ordering, mediation. These included the principles that: justice should be seen to be done; courts should treat all parties fairly; and that mediation is a voluntary process.

309. These principles have not stood in the way of: the extensive mediation/JSC presumption frameworks applicable in other New Zealand Courts; or, the extensive use of mediation, including mandatory mediation (FDMA), by the New Zealand Government to address significant issues.

310. These principles all apply in England and Wales, Australia, and Canada. Yet they have not stood in the way of the development of the mediation frameworks I have described in those jurisdictions. The law reports of those countries still bulge with precedents. There will always be debate about specifics, but there is no clamour in those countries to roll back from encouraging and ordering mediation because it is unfair to do so. Mediation in those countries has not suffered, as best as I can see, from a sense that its essentially voluntary character has been compromised.

311. Capturing these points, and others, the NZLC 2004 Report stated:

> "*132 Commentators have raised concerns that court-mandated mediation:*
>
> *• is a barrier to access to court-administered justice*
>
> *• places a further hurdle in the court process that can waste time and increase cost160*
>
> *• is an unwarranted interference with the parties' autonomy to choose how they wish to progress their case*
>
> *• may be inappropriate where there is a significant power imbalance, or threat of violence, between the parties to the dispute*
>
> *• attacks one of the core purposes of the civil justice system – to resolve disputes by principled decision-making based on the rule of law, which maintains a body of law that people and commerce can rely on and which benefits other potential litigants161*
>
> *• undermines the very features that make mediation popular and successful*

> • *will result in an unjustified restraint on the evolutionary development of mediation.162*
>
> *133 There is some validity to these concerns. However we consider that careful design and management of a court-mandated mediation rule will minimise the hazards. In particular, we consider it is possible to create a system in which party autonomy can be accommodated.*."[390]

312. The NZLC 2004 Report further noted:

(a) At p94:

> "*The suggestion that court-mandated mediation by definition denies access to justice is not sustainable – the parties are always able to have their case decided by a judge if they are unable to agree at the mediation. Compulsion to mediate does not mean compulsion to agree*."[391]

And:

(b) At p95:

> "*The Law Commission sees no reason why the body of law will be diminished by the introduction of court-mandated mediation. At present only a tiny percentage of cases filed in New Zealand actually go to a full hearing in any event. Experience abroad is not that court-mandated mediation significantly reduces the number of cases that go to court, but rather that it helps others to settle earlier, thus enabling court resources to be managed more efficiently*."[392]

313. There are some further, discrete, potential arguments against giving New Zealand's senior courts greater powers to encourage, or order, mediation. I note, and comment on, those that seem most obvious as follows:

(a) Some may argue that mediation will become a "tick-box exercise", which parties/lawyers will pay only perfunctory attention to. The CJC 2017 Report refers to Italian precedent for this, in the context of a mandatory mediation scheme there.[393] But this has not been a significant issue, as best as I can discern, arising out of the mediation frameworks in the comparable jurisdictions I have surveyed, or in other New Zealand contexts. In any event, as below, I do not suggest mandatory mediation. I think that any mediation framework should have clear off-ramps, such that cases which really are not ready, or suitable, for mediation are not obliged to mediate. In my view, that would minimise the "tick-box exercise" risk;

(b) Some may argue that mediation is an undue cost. Mediators, lawyers and experts all charge for their time, and there can be venue costs. I think the following points are relevant to this argument:

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[390] NZLC 2004 Report, above n 375, at 93.
[391] At 94.
[392] At 95.
[393] CJC 2017 Report, above n 152, at [7.9]-[7.11].

(i) Most importantly, the likelihood, as canvassed extensively above, is that, through mediation, whether by way of settlement, or issues refinement, parties will achieve net costs savings;

(ii) Any interlocutory step in a proceeding comes at a cost to the parties;

(iii) New Zealand has an over-supply of mediators.[394] If mediator cost is a problem, the market can address that;

(iv) I am aware of cases where civil legal aid has extended to mediation costs;

(v) Costs can be saved by running mediations online. International research suggests that mediating online does not significantly affect settlement rates;[395]

(vi) If undue cost is a truly prejudicial factor in a particular case, that can always to be something that courts can take into account in any decision to order mediation (see **Appendix 1**);

(c) Some may argue that more mediation will cause undue delays. However, that can surely only be an issue where the mediation does not result in settlement or issues refinement. Such cases are rare in my view. If undue delay is a truly prejudicial factor in a particular case, that can always to be something that courts can take into account in any decision to order mediation (see **Appendix 1**);

(d) Some may argue that lawyers are already obliged by statute to keep clients advised of alternatives to litigation, and that is enough of a prompt. But, as noted, lawyers in all three of the comparable jurisdictions surveyed also have such obligations. And yet the further powers to encourage or order mediation those jurisdictions have are still deemed necessary;

(e) Some may argue that mediators work in an unregulated market, and, consequently, the courts should not push parties towards them. I can understand this concern. No-one has to have any particular qualification in order to call themselves a mediator. Mediators do not need to be members of AMINZ or RI, which do both have codes of conduct,[396] and complaints and discipline regimes,[397] albeit that this may not be widely known. It is important to note in this context that mediators have no actual power over parties. I also suspect that, in large part, the market naturally gravitates towards mediators who are well-qualified, and members of AMINZ and/or RI. But I think this is an

[394] Morris and Shaw, above n 22, at 5.

[395] James Claxton "Mediators Like Online Mediation and Other Verifiable Facts" (31 May 2021) International mediation Institute <https://imimediation.org/2021/05/31/mediators-like-online-mediation-and-other-verifiable-facts/>.

[396] See AMINZ Code of Ethics and RI Code of Ethics, above n 19.

[397] See:

a. For AMINZ, "Complaints Process" <www.aminz.org.nz/make-a-complaint>; and
b. For RI, "By-laws for the investigation and discipline of members" https://resolution.institute/common/Uploaded%20files/Resolution%20Institute/2022/By-laws-for-the-investigation-and-discipline-of-members.pdf

area where mediators can do some work to show that they are worthy of greater recognition. I comment on these matters further below;

(f) Some may argue that mediation is a blunt tool in specific cultural contexts. This may be true. But so too, with respect, are the courts. I think this is a reason to be careful about how mediation is approached in such contexts, rather than a reason not to do it. But I do also think that this is another area where mediators can do more work to show that they are worthy of greater recognition. Again, I comment on these matters further below; and

(g) Related, some may argue that there is limited diversity of mediators. This is a valid concern. Most New Zealand commercial mediators are older pākehā men. Diversity is a concern which has also been identified in other jurisdictions.[398] AMINZ and RI have initiatives to try to address this (including the AMINZ Scholarship program[399]), but more needs to be done. Again, there is an opportunity here for mediators to show that they are worthy of greater recognition. Again, I comment further below.

314. Overall, for the reasons set out, I do not think that these other arguments against giving New Zealand's senior courts greater powers to encourage, or order, mediation, hold water. The potential benefits significantly outweigh the downsides. Issues can be addressed.

The appellate context

315. The mediation frameworks in England and Wales, Australia, and Canada extend, at least to a degree, to their senior appeal courts (excluding final appeal courts). Save for in the Victoria Court of Appeal, it is not apparent that these frameworks see a lot of use. But they do get used.

316. Many cases do settle between the filing of a notice of appeal, and the hearing of the appeal. There will be cases where mediation would be particularly apt. An example might be a multi-party estate case, with appeals and cross-appeals, where just one party is unduly resistant to settlement.

317. The Law Commission, in NZLC Report 2004, addressed appellate mediation, and stated:

> "*171 Appellate mediation differs from pre-trial mediation. A major aim of pre-trial mediation is to get the parties face to face, whereas in the appellate context they have had ample opportunity to negotiate. There is therefore less to be gained from appellate mediation and correspondingly less reason for compulsion. Also, mediation should not offer another avenue to a vexatious opponent, who seeks to drag out the appeal process.*

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[398] See:

a. CEDR Foundation *Improving diversity in commercial mediation – Executive Summary Report* (March 2019) <www.cedr.com/wp-content/uploads/2019/10/Executive-Summary-Report.pdf>; and

b. Aaron Sidhu "Breaking Barriers in Order to Access Justice: Improving Diversity in Canada's Mediation Field" (30 April 2023) Mediate.com <https://mediate.com/breaking-barriers-in-order-to-access-justice-improving-diversity-in-canadas-mediation-field/>, who states: "*..the vast majority of mediators in Canada are middle-aged, white, male, and from a high socio-economic background*"

[399] AMINZ "AMINZ Scholarships" <www.aminz.org.nz/aminz-scholarships>.

> *172 On the other hand, experience abroad suggests that appellate mediation can offer real additional benefits. Appeals involve different risks that may make an out of court settlement more attractive to the parties concerned: they raise the possibility of adverse precedent for both parties, and the chance of having the first instance judgment overturned.178 Further, mediation after a judgment can help the parties re-establish their relationship – business or personal – can recognise a need for relief not taken account of in the court judgment, and can enable the parties to negotiate structured payments over time that might make the judgment easier to implement. It may offer benefits even to cases that have been mediated before.*
>
> *173 Although settlement rates for appellate mediation are lower than for pre-trial cases (40–50%), it can also lead to significant savings for the court and parties.179 We propose that on appeal, judges should be able to order cases to go to mediation but without a presumption in favour of it*."[400]

318. I think there is a case to give New Zealand's Court of Appeal greater powers to encourage, or order, mediation. I do not think that the mediation framework in the Court of Appeal needs to be as comprehensive as that in the High Court. I address this below.

Wrapping it up

319. Access to justice should be promoted by the courts. For the reasons traversed in this paper, giving New Zealand's senior courts greater powers to encourage, or order, mediation has the potential to get cases settled earlier and at less cost, and enable issue refinement for many of the cases that do not settle. This in turn has the potential to enhance access to justice:

    (a) For the parties to the cases that settle via mediation (who will have saved time and cost, and found peace on a basis they can accept). This is access to justice in the broader senses described in the MOJ and NZLS quotes in para 15 above;

    (b) For the parties to the cases that do not settle via mediation but achieve issues refinement, via the time and costs savings arising from the issue refinement. This is enhanced access to the kind of justice described by the NZBA in para 15 above, since it allows for more timely, and less costly, access to the courts; and

    (c) For the parties to cases that do not mediate, or which mediate without settlement or issues refinement, via time and costs savings, as reduced caseloads reduce delays in getting to trial. Again, this is access to the kind of justice described by the NZBA.

320. The CJC 2017 Report talked about the courts in England and Wales crossing a constitutional Rubicon.[401] The metaphor bears updating and extending for these purposes. If giving courts greater powers to encourage, or order, mediation represents a constitutional Rubicon, nearly everyone in the comparable jurisdictions, and elsewhere in New Zealand's judicial system, is now on the other side. I would respectfully suggest that it is time for New Zealand's senior courts to wade over.

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[400] NZLC 2004 Report, above n 375, at 102.

[401] CJC 2017 Report, above n 152, at [8.5.8.]

321. There is an access to justice opportunity here. There is support for change. What might change look like?

CONCLUSIONS: WHAT MIGHT SUCH GREATER POWERS BE? A SUGGESTED ENHANCED MEDIATION FRAMEWORK

322. I suggest that changes are made to the applicable rules, to give New Zealand's senior courts greater powers, by way of nudges, a presumption, orders, and costs sanctions. This will create an enhanced mediation framework, with combined "framework effect". I do not suggest that mandatory mediation be introduced in New Zealand's senior courts.

323. I will comment firstly on the High Court, then on the Court of Appeal.

High Court

324. For the High Court, I set out suggested rule changes to create an enhanced mediation framework in the following order:

(a) Nudge – the objective;

(b) Presumption;

(c) Nudge – case management;

(d) Orders; and

(e) Costs sanctions.

I then address the "framework effect", thoughts on a pre-litigation nudge, and why I do not suggest that mandatory mediation be introduced.

325. In some of the suggested rule changes, I have used/retained the phrase "*mediation or other alternative dispute resolution*". This is to give courts and parties options, and to maintain consistency with what is already in the HCR. Referring to other forms of ADR is also consistent with how such powers are often set out in the comparable jurisdictions I have surveyed. But, of course, other forms of ADR have not been addressed in this paper.

"*Nudge" - the Objective*

326. Suggested rule change - I suggest that, as a starting point, the Objective of the High Court rules at HCR r1.2 be amended as follows:

> "***1.2 Objective***
>
> *The objective of these rules is to secure the just, speedy, and inexpensive ~~determination~~ resolution of any proceeding or interlocutory application*."

327. This suggested rule change is generally consistent with the following provisions in the comparable jurisdictions, as already noted above (underlining added):

(a) In England and Wales, CPR r1.1(1), which provides:

> "*These Rules are a procedural code with the overriding objective of enabling the court to <u>deal with</u> cases justly and at proportionate cost..."*

(b) In Australia:

(i) Section 7 of Victoria's Civil Procedure Act 2010, which provides:

> *"(1) The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective <u>resolution</u> of the real issues in dispute."*;

(ii) R1.5 of the SAUCR, which provides:

> "*The object of these Rules is to facilitate the just, efficient, timely, cost-effective and proportionate <u>resolution or determination</u> of the issues in proceedings governed by these Rules*";

(c) In Canada:

(i) FCR r3, which provides:

> "*These Rules shall be interpreted and applied*
>
> ***(a)** so as to secure the just, most expeditious and least expensive <u>outcome</u> of every proceeding..."*

; and

(ii) ARC r1.2(1), which provides:

> *"The purpose of these rules is to provide a means by which claims can be fairly and justly <u>resolved</u> in or by a court process in a timely and cost-effective way."*

328. I think, as do the Victorians and the Albertans, that "*resolution"/"resolved*" can incorporate "*determination*". But wording that referred to "*resolution or determination*", as per that in South Australia, would also be fine. I prefer "*resolution*" to "*deal with*" or "*outcome*".

329. This suggested rule change recognises the reality that most civil cases settle, rather than have a decision imposed on them by a judge. It also recognises what Nina Khouri has called, in the context of an article on the Christchurch High Court Earthquake List, the "*dialogic relationship*" between the courts and inter-partes settlement dynamics.[402] That is to say, it recognises that the courts have a role in helping parties to get cases settled.

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[402] Nina Khouri "Civil justice responses to natural disaster: New Zealand's Christchurch High Court Earthquake List" (2017) 36(3) CJQ 316.

330. This suggested rule change effects a re-set, such that for the High Court to encourage, or order, mediation becomes consistent with the objectives of the HCR.

331. The replacement of the word "*determination*" with the word "*resolution*", ought also to be carried through, for consistency, elsewhere in the HCR, such as at r7.1.

"*Presumption*"

332. Suggested rule change - I suggest that the following be added to the HCR, probably at r7.1:

> "*There is a presumption that, as soon as practicable, parties will endeavour to resolve their dispute by mediation or other alternative dispute resolution, unless there is reasonable justification not to ("the ADR Presumption")*"

333. This suggested rule change does not have a direct ancestor in the comparable jurisdictions. But, in my view, it captures the combined essence of the mediation frameworks in Victoria and NSW, and even, arguably, the direction in which England and Wales are heading. In each of those jurisdictions the Courts are saying to parties: we encourage you to mediate/ADR, and can order you to do so, and sanction you with costs for not doing so, unless you have a good reason not to. The overall message is presumptive. The consequence in Victoria and NSW has been presumptive, as I have noted above. I suspect that, in England and Wales, with *Churchill*, and the changes that has brought about to the CPR, along with the mediation framework that already existed there, the consequence may also tend towards the presumptive (and I think they were already mediating much more there).

334. This suggested rule change is consistent with, although it does not go as far as, the more muscular mediation frameworks I have described in the comparable jurisdictions, such as those which provide for mandatory mediation/ADR in Ontario and Alberta. There is a shared recognition of the utility of having mediation/ADR as a central component of the senior courts' dispute resolution toolkit.

335. This suggested rule change is consistent, in effect, with the presumptive frameworks that operate elsewhere in New Zealand's judicial system, such as in the Employment Court, the Environment Court, the WHT, and (albeit with JSCs rather than mediation) the District Court.

336. This suggested rule change also recognises the reality that most civil cases settle.

337. The suggested presumption is that parties will endeavour to resolve their dispute by mediation or other ADR "*as soon as practicable*". Obviously, the sooner parties mediate, the greater the potential savings in terms of time and costs. But parties need to be ready to mediate, particularly in the sense that they have sufficient information to make good decisions. There can also be other practical considerations, in terms of party/witness/expert/lawyer/mediator availability, mediator selection, and venue booking.

338. The suggested presumption is rebuttable, if "*there is reasonable justification not to".* This obviously provides an off-ramp for unsuitable cases. I do not think courts should be prescriptive about what reasonable justification not to might be. I think that relevant

factors might include those which have been considered in relation to mediation orders. See **Appendix 1**.

339. This is not a new idea in New Zealand. The NZLC 2004 Report recommended:

> "*...a presumption that cases filed on the standard case management track in the proposed Primary Civil Court and the High Court will go to mediation before the 13th week after filing*."[403]

I do not think that all cases are ready to be mediated 13 weeks after filing. In my view, the HCR should not be so prescriptive about timing, unless and until an order to mediate is required. Rather, as noted, parties should simply be exhorted to mediate as soon as practicable. But the essence of the suggested rule change is otherwise very similar to what the NZLC 2004 Report recommended.

"Nudge" – Case Management

340. Suggested rule change - I suggest that the following be added to the HCR, again probably at r7.1:

> *"At each case management conference, the Court will check:*
>
> *(a) Compliance with the ADR Presumption;*
>
> *(b) What more needs to be done to enable parties to comply with the ADR Presumption; and*
>
> *(c) Whether an order under HCR 7.79(5) is required."*

341. Again, this suggested rule change does not have a direct ancestor in the comparable jurisdictions. But again, in my view, it is consistent with the essence of them.

342. This suggested rule change will enable the court to check in on whether mediation/ADR has occurred, and if not, why not. It will also enable the court to assist the parties to get to mediation/ADR. For example, courts can check whether further discovery, particularisation of pleadings, and/or expert conferral, is necessary to make mediation practicable, and can make orders accordingly. This will further the opportunity for the "*dialogic relationship*" between the courts and inter-partes settlement dynamics which Nina Khouri has described.

343. The reference to "*an order under HCR 7.79(5)"* is to a further suggested rule change set out below, whereby the court will have the power to order mediation. Including that reference here provides a reminder to the parties that, if they do not get on with mediation/ADR, or provide a reasonable justification not to, the court may order them to get on with it.

344. Again, something along these lines is not a new idea in New Zealand. Geoff Sharp, in the context, at the time, of concerns about a Covid caseload deluge, suggested that:

> "*...we need judges to (pro) actively consider the suitability of mediation during case management and encourage parties to consider it – often by*

[403] NZLC 2004 Report, above n 375, at 93.

> *accommodating a mediation window in the trial timetable. To some extent, depending on the judge, this happens now but it needs to be given life and formalised. A consistent approach across the High Court is needed."*[404]

"*Orders*"

345. Suggested rule change - I suggest that HCR r7.79(5) be amended as follows:

> *"A Judge may~~, with the consent of the parties,~~ make an order at any time directing the parties to attempt to settle their dispute by ~~the form of~~ mediation or other alternative dispute resolution means (to be specified in the order) ~~agreed to by the parties~~."*

346. This suggested rule change is consistent with:

(a) In England and Wales: *Churchill,* and now CPR r3.1(2)(o);

(b) In Australia: powers granted to the courts federally, and state by state, via the statutory provisions, and civil procedure rules, set out above;

(c) In Canada: powers granted to the courts federally, in BC, and Alberta, via the statutory provisions, and civil procedure rules, set out above; and

(d) Section 145 of the Trusts Act.

347. This suggested rule change gives HCR r7.79(5) some teeth. It is also consistent with what was proposed by AMINZ in a recent submission to the Rules Committee.[405]

"Costs sanctions"

348. Suggested rule change - I suggest that a further clause is added to HCR r14.7, which sets out the bases on which costs can be refused or reduced, a clause (f)(vi), which states:

> *"failing, without reasonable justification, to engage in mediation or other alternative dispute resolution"*

349. This suggested rule change is consistent with:

(a) The New Zealand cases listed above which ordered costs, or allowed for the possibility that costs might be ordered, for a failure to engage with mediation;

(b) The line of England and Wales cases from *Dunnet*, and now CPR r44.2(5)(e);

(c) The Australian costs frameworks and cases set out above; and

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[404] Sharp, above n 389.

[405] AMINZ "Improving Access to Justice Comments of The Arbitrators' and Mediators' Institute of New Zealand on the Paper of the Rules Committee of the High Court dated 14 May 2021" (July 2, 2021) <www.courtsofnz.govt.nz/assets/4-About-the-judiciary/rules_committee/access-to-civil-justice-consultation/Submissions-to-further-consultation/Arbitrators-and-Mediators-Institute-of-New-Zealand.pdf>.

(d) In Canada, the costs frameworks (albeit that these are sometimes more general, and sometimes mandatory mediation specific), and the cases, set out above.

350. The wording is similar to that used in CPR r44.2(5)(e). I note, and endorse, Tony Allen's comments, as set out above, on the thinking that went into the use of the word "*engage*" in CPR r44.2(5)(e). I do not consider that, as in CPR r44.2(5)(e), it is necessary to specify that costs may follow on from a failure to comply with an order for ADR/mediation. Costs are always a potential consequence of a failure to comply with a court order in any event.

351. Other New Zealand commentators have written on this issue. Geoff Sharp, again in the context, at the time, of concerns about a Covid caseload deluge, suggested that:

> "*...if a party to litigation is invited to mediate and is found to have unreasonably declined, there should be costs consequences."*

352. Nick Scampion has stated:

> *"One way to encourage mediation is to sanction litigants who (unreasonably) refuse to mediate, and there is, in my view, no insuperable objection in principle"*[406]

The "framework effect"

353. Some of the above suggested rule changes could be made individually. The suggested rule change regarding costs is perhaps the most low-hanging fruit, since it is consistent with some existing High Court authority. The suggested rule change regarding orders could, given what has happened with s145 of the Trusts Act, be helpful even if it were the only change made.

354. But, in my view, the best way to enable the High Court to enhance access to justice via mediation is to give it a suite of powers, with a presumption at its core, combining the suggested rule changes above. Such a suite of powers will:

(a) Best enable the High Court to give encouragement, and make orders, most apt to each case;

(b) Promote mediation/ADR as a central, significant, part of the process of resolving civil disputes;

(c) Consequently, encourage a culture change towards a more pro-mediation/ADR approach amongst those lawyers, judges and parties who are still unduly resistant. The culture-changing significance of such powers is often referred to in the commentary on comparable jurisdictions. Such culture change increases voluntary take-up (see, for example, the commentary on NSW above); and

(d) Consequently, create a "framework effect", such that the whole is greater than the sum of its individual parts.

355. All of the comparable jurisdictions I have surveyed have a combined suite of powers, to a lesser or greater degree. The "framework effect" is, in my view, most apparent in

[406] Scampion, above n 102, at 232.

Victoria and NSW. It is also visible in England and Wales. I suspect it will become more so as the consequences of *Churchill* filter through. (Canada is a little different for these purposes, at least in Ontario and Alberta, because of their emphasis on mandatory mediation/ADR.)

A pre-litigation "Nudge"?

356. I think that developing a pre-litigation nudge towards mediation/ADR, is also a change worth at least considering in New Zealand. Pre-litigation nudges have been approached in different ways in the comparable jurisdictions. In particular, and as set out above:

(a) In England and Wales, parties are strongly encouraged to address ADR prior to litigation via the PAP;

(b) Cases in Australia's Federal Courts are subject to the "*take genuine steps to resolve disputes before certain civil proceedings are instituted*" requirement under the Civil Dispute Resolution Act 2011 (Cth); and

(c) Cases in the Northern Territory Supreme Court are subject to the PD6 requirement to "*consider whether some form of alternative dispute resolution procedure would be more suitable than litigation".*

357. As noted, multiple New Zealand lawyers with England and Wales experience contacted me about the PAP, and spoke positively of its effect in practice. Essentially, they said, it sharpens the collective focus on early settlement, including via mediation. The White Book has been positive about the PAP. But there has also been a more recent suggestion that the impact of the PAP on claim volumes was temporary.

358. The PAP, in particular, involves more than just consideration of ADR, extending to pre-litigation information exchange and issue identification. A conversation about introducing that kind of nudge in New Zealand would need to assess broader issues than are the subject of this paper.

359. As also noted, concerns have been raised in Australia about the undue front-loading of costs which can arise through pre-litigation requirements. Attempts to introduce pre-litigation genuine steps frameworks in NSW and Victoria state contexts floundered.

360. Generally, I support encouraging parties to consider mediation as early as possible, as this can enhance time and cost savings. But there is a need to tread carefully about being prescriptive when disputes are nascent. I think the idea of a pre-litigation nudge should be considered as part of a broader conversation about what, if any, pre-litigation obligations might be placed on parties looking to bring cases in New Zealand's senior courts.

Why I do not suggest that mandatory mediation be introduced in New Zealand's senior courts

361. I do not suggest that mandatory mediation, of the types I have described in the comparable jurisdictions, be introduced in New Zealand's senior courts. The mandatory mediation frameworks on Ontario and Alberta seem to work well in those provinces, and are, in that sense, tempting to imitate. But I do not think we can, or need to, go that far.

362. The mandatory mediation framework in Alberta has relied heavily on the judge-led JDR, which are the equivalent of JSCs in New Zealand. Whilst there is some precedent for this in the District Court, I do not think there is an appetite, or available resource, for New Zealand's High Court judges to be running large numbers of JSCs (nor, as an aside, do I think there is an appetite, or available resource, for New Zealand's High Court registrars to be running large numbers of mediations, as they do in Australia).

363. The mandatory mediation framework in Ontario has some particularly compelling evidence of efficacy. But, for my part, I am hesitant about the requirement that all cases be mediated within 180 days of a defence being filed. Certainly in New Zealand, not all cases are ready to be mediated at that point.

364. Ontario has had mandatory mediation since 1999. Mediation of civil disputes would have been a relatively recent development, even in Ontario, at that time. The Hann Report, which found such compelling efficacy evidence for mandatory mediation in Ontario, came out in 2001. I suspect that, in New Zealand in 2025, we are in need of a more nuanced change than was likely required in Ontario in 1999, and evidenced by the Hann Report two years later. To that extent at least, I think we can lend some credence to our well-developed culture of privately mediating civil disputes.

365. As above, I think the best way to enable the High Court to enhance access to justice via mediation is to give it a suite of powers, combining the suggested rule changes above, to encourage, and order, mediation.

Court of Appeal

366. As noted, I do not think that the mediation framework in the Court of Appeal needs to be as comprehensive as that in the High Court.

367. As noted earlier, CAR r5(1), which deals with the Court of Appeal's powers to issue directions, already refers to the "*resolution*", rather than the "*determination*", of matters. I think this is helpful. If the Court of Appeal has the further powers I suggest below, that wording can have the effect of a nudge.

"*Orders*"

368. Suggested rule change - I suggest that the CAR be amended to allow for the Court of Appeal to order mediation, in line with the proposed change to HCR r7.79(5) above.

369. This suggested rule change is consistent with:

(a) In England and Wales: *Churchill,* and now CPR 3.1(2)(o) (which applies to the Civil Division of the Court of Appeal);

(b) In Australia: powers granted to the appeal courts federally, and state by state, via the statutory provisions set out above; and

(c) In Canada: at least FCR 386-391, which apply to the Federal Court of Appeal. It is not clear to me how the powers I have described above, province by province, are utilised by the provincial appeal courts. However, judicial commentary indicates that ADR/mediation is being used by those courts.

370. In note that the NZLC 2004 Report 2004 recommended that:

> "*Judges should be able to order the parties to an appeal to attend mediation prior to the hearing*"[407]

"*Costs sanctions*"

371. Suggested rule change - I suggest that the CAR be amended to allow for the Court of Appeal to sanction parties with costs for failing, without reasonable justification, to engage in mediation or other alternative dispute resolution, in line with the proposed HCR r14.7, (f)(vi) above.

372. This suggested rule change is consistent with the costs provisions I have cited in respect of the comparable jurisdictions, which generally, as I understand it, can also apply to costs in appellate contexts.[408] That said, I am not aware of a case in those jurisdictions where costs have been awarded for a failure to mediate in an appeal.

373. The HCR and the CAR generally line up on costs, and I would suggest that it would make sense for this change to carry through in both. Even if such costs awards are rare in appeal cases, the possibility that they might be made will encourage mediation in cases for which it is particularly apt.

AND SOME RELATED SUGGESTIONS FOR THE MEDIATORS

374. We mediators must also show that we, and, more importantly, what we do, are worthy of greater recognition by the courts. The UK quote above bears repeating:

> "*This is not a one-way street. For their part ADR practitioners must earn the trust and support of other stakeholders*."[409]

375. Aspects of this have been alluded to in this paper. Drawing the threads together, I think that New Zealand's mediators should look to: enhance trust in our competence, and the fairness of what we do; ensure that we are responsive to cultural dynamics, and that our ranks better reflect our community; and, communicate more with other stakeholders about what we do, how we can help, and how we can get better.

376. To help to achieve these things, I suggest as follows:

    (a) AMINZ and RI should create panels of mediators who are accredited by those organisations to mediate senior court matters. The purpose of this would be to enhance trust in competence. I note in this regard that:

        (i) The NZLC 2004 Report recommended that there be work done on the qualification level for mediators to be placed on a court list;[410]

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[407] NZLC 2004 Report, above n 375, at 102.

[408] In England and Wales, the CPR apply to the Civil Division of the Court of Appeal. The costs provisions in Queensland's Civil Proceedings Act 2011, Victoria's Civil Procedure Act 2010, and NSW' Civil Procedure Act 2005 all apply, as I understand it, to those states' Courts of Appeal.

[409] CJC 2017 Report, above n 152, at 8.

[410] NZLC Report 2004, above n 375, at 98.

(ii) Such panels already exist for mediators who are authorised to undertake mediations under the FDMA;[411] and

(iii) Such panels appear to exist in NSW, Ontario, and BC;[412]

(b) AMINZ and RI should oblige member mediators to make parties aware that they are subject to ethical standards, and a complaints and discipline regime. The purpose of this would be to enhance trust in competence and fairness. I note in this regard that:

(i) This would be consistent with the obligations lawyers have under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008;[413]

(ii) The NZLC Report 2004 considered that the availability of ethical standards and a complaints procedure would be important to court-mandated mediation;[414]

(c) AMINZ and RI should continue, and enhance, the work they are already doing with other stakeholders on *tikanga* dynamics in mediation, and consider other cultural contexts;

(d) AMINZ and RI should continue and improve their efforts to enhance the diversity of mediators, and report on improvements;

(e) I think we need regular surveys of the mediation landscape in New Zealand that assess the use of mediation, and changes over time. Such surveys can and should also canvas and feed into cultural and diversity developments. I commend the extraordinary work that Dr Grant Morris has already done in this regard. But there is certainly an opportunity for more. Other reference points include the biannual CEDR audits,[415] and the New Zealand Arbitration Survey.[416] There is, perhaps, another research project in this…; and

(f) Last but not least, I would like to see enhanced communication between mediators (AMINZ, RI), lawyers (NZLS, the Bar Association), and the Courts (Judges, the Rules Committee) about the place of mediation in senior courts cases, how we can help, and how we can do better. In fairness to AMINZ and RI, they do regularly submit on relevant law and rule changes, and otherwise look to engage. But I think there are other possibilities. Interestingly in this regard, I note that the NZLC 2004 Report 2004 recommended that:

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[411] See:

a. FDMA ss 44-49; and

b. Agriculture & Investment Services "Mediators and mediation organisations for the Farm Debt Mediation Scheme" Ministry for Primary Industries <www.mpi.govt.nz/funding-rural-support/farming-funds-and-programmes/the-farm-debt-mediation-scheme-2/mediators-and-mediation-organisations-for-the-farm-debt-mediation-scheme/>.

[412] See paras 202(c), 242(d), and 250(e) above.

[413] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, above n 18, rr 3.4 (d) and 3.4A (d)

[414] NZLC 2004 Report, above n 375, at 98.

[415] CEDR "The CEDR Mediation Audit" <www.cedr.com/foundation/mediation-audit/>.

[416] Royden Hindle and Anna Kirk *The Inaugural Aotearoa New Zealand Arbitration Survey* (NZDRC, 2022) <www.roydenhindle.co.nz/wp-temp/wp-content/uploads/2022/09/The-Inaugural-Aotearoa-New-Zealand-Arbitration-Survey.pdf>.

> "*a multi-disciplinary working group of mediation practitioners, lawyers, policy-makers and trainers should oversee the implementation of court-mandated mediation*"[417]

Perhaps a multi-disciplinary working group could help with some of the changes suggested in this paper.

377. The above suggestions place significant requirements on AMINZ and RI. This is harsh. Both organisations run with minimal, but extremely hard-working, staff. They do wonderful work with what they have. But, hopefully, there is capacity within the amazing volunteers who support both organisations to assist.

378. It is a privilege to be able to help people resolve their disputes. It is a privilege that mediators do not, in my experience, take lightly. We should highlight and enhance what we do. We should take further steps, including, in my view, those above, to ensure that we have the trust and support of other stakeholders.

CONCLUDING REMARKS

379. This paper has not, I hope, been an anti-litigation discourse. This paper has been about how, with the help of mediation, the senior courts can improve litigation for those who become parties to it.

380. As set out in this paper, there are compelling reasons to give New Zealand's senior courts greater powers to encourage, or order, mediation. The three comparable jurisdictions I have traversed have all given their senior courts such powers. There is an access to justice opportunity here. Giving New Zealand's senior courts such powers has the potential to get cases settled earlier and at less cost, and enable issue refinement for many of the cases that do not settle. This in turn has the potential to enhance access to justice:

(a) For the parties to the cases that settle via mediation (who will have saved time and cost, and found peace on a basis they can accept);

(b) For the parties to the cases that do not settle via mediation but achieve issues refinement, via the time and costs savings arising from the issue refinement; and

(c) For the parties to cases that do not mediate, or which mediate without settlement or issues refinement, via time and costs savings, as reduced caseloads reduce delays in getting to trial.

381. Mnookin & Kornhauser coined the phrase "*bargaining in the shadow of the law*".[418] I prefer to think of us mediating bathed in the law's sunny light. I think those rays will shine more brightly if the delays and costs of litigation are reduced, and access to justice can be enhanced.

382. In 2015, the keynote speaker at the AMINZ Conference was the extraordinary Scottish lawyer, mediator, and peacebuilder, John Sturrock KC. He held us spell-bound with a

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[417] NZLC 2004 Report, above n 375, at 98.

[418] Robert H Mnookin and Lewis Kornhouser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale Law Journal 950.

speech about how the world might better communicate in conflict. The motif of the speech was an optimistic “what if?”. I remember that speech so fondly, I will borrow its motif to close. What if New Zealand’s senior courts had greater powers to encourage, or even order, parties to civil disputes to mediate? What if that were part of the access to justice toolkit? What if that was a way of doing things differently that could really make a difference?

Mark Kelly

14 February 2025

Appendix 1 – Commentary and jurisprudence on factors the courts might take account of in ordering mediation against the objection of one or more parties, and my thoughts

1. In the jurisdictions I have surveyed, there has been commentary and jurisprudence on factors the courts might take account of in ordering mediation against the objection of one or both parties. I set out some of it below, with my own thoughts.

Australia

2. There have been numerous cases in Australia testing the limits of court-ordered mediation.[419] Philip McNamara considers that those cases suggest 12 factors which the courts will find relevant to the exercise of a discretion to order a mediation against the objection of one or both parties ("**McNamara Factors**").[420] I have listed the McNamara Factors below, along with my comments on each in [ ] brackets.

> *(1) The entirety of the issues, factual and legal, joined in the proceedings and the parties' respective positions and interests at the stage of the action at which an order for mediation is sought...*
>
> [Agree]
>
> *(2) Whether the parties are experienced or institutional litigants, or otherwise.*
>
> [I think the implication here is that the court might not order mediation against the wishes of experienced or institutional litigants. If so, I disagree. Being an experienced or institutional litigant does not necessarily imply greater objectivity or judgment, and consequently less of a need to be encouraged to try settlement.]
>
> *(3) Whether the proposed mediation has sufficient prospects of success.*
>
> [I disagree that courts should try to assess this. The courts will never have a complete data set in terms of the parties' cost/risk analyses, and true appetite for trial. Many of the mediations I do look unlikely to settle until after 3pm on the day, much less before mediation has been initiated.
>
> I refer also to the Tony Allen passage, quoted in para 149 above.
>
> In 2023 NSWSC Case *Aversa v Transport for New South Wales (No 2)*[421] Robb J, dealing with an opposed application for orders to mediate, said of the court's discretion to make such an order:
>
> > "*This is a judgment that must be based on experience, as the Court will rarely have objective evidence that is sufficient to enable it to make a fully educated forecast as to the prospects of success of the mediation."*[422]]
>
> *(4) Whether the cost of the mediation can be justified…*

[419] McNamara, above n 24a, see cases cited at 228-230.
[420] At 228-230.
[421] *Aversa v Transport for New South Wales (No 2)* [2023] NSWSC 892.
[422] At [19].

[Agree]

(5) As a corollary, mediation is warranted if the cost of litigation will be disproportionate to the amount at stake...

[Agree]

(6) The burden in personal attendances which the litigation will impose on the parties if it goes ahead...

[Agree]

(7) Whether the litigation involves what one party reasonably regards as a question of legal principle…

[I agree to the extent that the litigation involves an untested, or uncertain legal principle, which all parties want, and can afford, to take as far as obtaining a judicial decision

But claims of this nature should be closely scrutinised. Many are the litigants who have cloaked unwarranted positionality in claims to principles]

(8) Whether other alternative forms of dispute resolution have been unsuccessfully attempted by the parties...

[Many mediated matters will have been the subject of prior unsuccessful negotiations, so I would suggest that ought not to be a factor. If the matter has already been the subject of an unsuccessful mediation, or a JSC, that might be relevant (although dynamics can change as a case develops through discovery and briefing)]

(9) Whether the matter is likely or unlikely to be listed for trial in the immediate future...

[I agree that a mediation should not be ordered at a time which would affect parties' ability to prepare for an imminent trial]

(10) Whether it is likely that the parties fully understand the case of the opposing party, at both the factual and legal level or whether, by contrast, they would be assisted by a candid exchange of views and contentions in the protected environment of a mediation…

[Respectfully, I think this factor is misshaped. Parties should go into a mediation having already undertaken a thorough risk analysis, including an assessment of the case of the opposing party. To enable this to happen, lawyers, and judges, should do what they can to ensure that parties exchange all of the information they need to understand each other's cases in advance of the mediation. Whilst parties should go into mediations prepared to have a degree of flexibility in their risk assessments, depending on how the mediation goes, the mediation is not where they should go to learn about the case.

> But there is often value in the opportunity for a candid without prejudice exchange of views and contentions that mediation presents. An argument that counsel might purport to die for in court can be acknowledged as the long shot that it is in a mediation, with risk analysed for settlement purposes accordingly on all sides.]
>
> *(11) Whether it is unlikely that the parties will be able to achieve settlement by means of direct negotiations between their respective legal advisers, without the intervention of a mediator…*
>
> [Agree. If counsel say, "we think we can sort this out between us", they should be given time to do so.]
>
> *(12) Whether a settlement of the dispute might be able to be brought about by agreement to take specific action, or engage in specific conduct, which the court is not able to order.*
>
> [Agree]

England & Wales

3. In *Churchill*:

> *"The Bar Council submitted that the following factors were relevant to the exercise of the court's discretion: (i) the form of ADR being considered, (ii) whether the parties were legally advised or represented, (iii) whether ADR was likely to be effective or appropriate without such advice or representation, (iv) whether it was made clear to the parties that, if they did not settle, they were free to pursue their claim or defence, (v) the urgency of the case and the reasonableness of the delay caused by ADR, (vi) whether that delay would vitiate the claim or give rise to or exacerbate any limitation issue, (vii) the costs of ADR, both in absolute terms, and relative to the parties' resources and the value of the claim, (viii) whether there was any realistic prospect of the claim being resolved through ADR, (ix) whether there was a significant imbalance in the parties' levels of resource, bargaining power, or sophistication, (x) the reasons given by a party for not wishing to mediate: for example, if there had already been a recent unsuccessful attempt at ADR, and (xi) the reasonableness and proportionality of the sanction, in the event that a party declined ADR in the face of an order of the Court."*[423]

As can be seen, there is overlap between these factors, and the McNamara Factors identified in Australian cases. Of particular additional note are the references at (ii) and (iii) to whether parties are legally represented or not. I agree that this factor should at least be considered. I suspect that a Court would, and should, be cautious about ordering an unrepresented party to attend a mediation with represented parties against their wishes. To the extent they are not already captured by the McNamara Factors, I think (v), (vi), and (ix) should also be considered.

3. As noted, in *Churchill*, the Court steered clear of being prescriptive on when to order ADR. It stated:

> *I do not believe that the court can or should lay down fixed principles as to what will be relevant to determining those questions. The matters mentioned by the*

[423] *Churchill,* above n 1, at [61].

> *Bar Council and Mr Churchill, and by the Court of Appeal in Halsey are likely to have some relevance. But other factors too may be relevant depending on all the circumstances. It would be undesirable to provide a checklist or a score sheet for judges to operate. They will be well qualified to decide whether a particular process is or is not likely or appropriate for the purpose of achieving the important objective of bringing about a fair, speedy and cost-effective solution to the dispute and the proceedings, in accordance with the overriding objective.*[424]

I agree with this.

Canada

4. In *IBM Canada Limited v. Kossovan,*[425] considered to be the leading Canadian decision on mandatory ADR,[426] the Court of Queen's Bench of Alberta reviewed the cases and commentary on applications for exemption from/waiver of mandatory mediation requirements. The Court's summary,[427] along with my thoughts in [ ] brackets, is below:

> *"In attempting to determine which types of matters may fall under the exemptions established under Rule 4.16(a)-(e), a summary of the findings of those provinces with mandatory alternate dispute resolution may serve as a helpful resource. A review of these cases, as well as academic commentary, reveals the following:*
>
> [Agree]
>
> *- The fact that the parties consent to an exemption from mediation is not a compelling reason to grant an exemption: Ross v. Seib (1996), 1996 CanLII 7114 (SK KB), 145 Sask. R. 62 (QB) paras. 7-8;*
>
> [I suspect that courts in New Zealand would be hesitant to order mediation over the objection of all parties, but can conceive cases where that might be apt, such as an unduly entrenched *Jarndyce v Jarndyce*-style estate dispute]
>
> *- maintaining a position that one party is simply unwilling to settle the action is an insufficient reason to grant an exemption: Cassidy v. Westwood Holdings, [2000] O.J. No. 5396 (Ont. S.C.J.) (Master) at para. 2; Dumoulin v. Ontario, [2004] O.J. No. 2778 (Ont S.C.J.) at para. 6;*
>
> [Agree]
>
> *- an exemption should not be granted on the anticipated strength of one party's claim: Pelham, at para. 8;*

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[424] At [66].
[425] *IBM Canada Limited v Kossovan*, above n 327.
[426] Billingsley and Ahmed, above n 328, at 199.
[427] *IBM Canada Limited v Kossovan,* above n 327, at [30]-[31].

- a party's belief that he or she may not be able to meaningfully participate is not necessarily a reason to exempt the party, unless that party is incapable or disabled from participating: O.(G.);

[Agree]

- application for summary judgment does not, of itself, entitle an exemption: Pelham, at para. 10;

[Agree]

- a complex case that involves such things as a catastrophic claim, a large exposure, multiple defendants, cross-claims, and third-party complaints for indemnity, coverage issues, and other complex obstacles to settlement may qualify for waiver;

[I disagree. I (and other mediators I am sure) have mediated many such claims.]

- an exemption may be granted where one party lives in a foreign jurisdiction and the expense of attending the mediation outweighs the probable advantages of the session: Ross para. 9; but see Wheataliba Farms Ltd. v. Alhauser, 2010 SKQB 391, 363 Sask. R. 287, and Chase where the courts refused to exempt a party from attendance at mediation, even though the party resided outside of Canada;

[The ability to mediate online ameliorates this factor]

- forcing mediation of an individual action before it is known whether a class action would be certified would be unreasonable and unproductive and is reason to grant an exemption: Dumoulin, at para. 6;

[Agree]

- issues of abuse or violence where it would be detrimental to the emotional, mental or physical health of either party to participate and a mediator trained to address the parties' concerns is not an option, may qualify for waiver: O.(G.);

[Agree]

[31] More circumstances outside this list will likely arise in which an exemption may or may not be granted. Though exemptions will be addressed on a case by case basis, the threshold for obtaining them is high and parties can assume that they are used sparingly.

[Agree]

5. There has been commentary to the effect that Canada's courts have been too stringent in their position on applications for exemption from/waiver of mandatory mediation requirements, particularly in the context of potential test cases.[428]

New Zealand

6. In the cases under s145 of the Trusts Act, summarised in para 71 above, some of the above considerations have also been at play.

[428] Nicholas Hay "*Matsqui First Nation v Canada (AG):* The Dangers of Mandatory Mediation" (21 September 2016) the Court.ca <www.thecourt.ca/matsqui-first-nation-v-canada-ag-dangers-mandatory-mediation/>.