

**THE GLOBAL TREND IN MEDIATION; CONFIDENTIALITY; AND  
MEDIATION IN COMPLEX COMMERCIAL DISPUTES**

**AN AUSTRALIAN PERSPECTIVE<sup>1</sup>**

**THE HONOURABLE JUSTICE P A BERGIN  
CHIEF JUDGE IN EQUITY  
SUPREME COURT OF NEW SOUTH WALES**

**MEDIATION CONFERENCE  
HONG KONG**

**20 MARCH 2014**

- 1 When this Conference was established in 2007, the judiciary and the legal profession of Hong Kong were interested in exploring the use of mediation as an alternative or additional mechanism for dispute resolution. It has been an honour to attend the Conference in 2007, 2012 and to return again this year. I have watched with great interest and pleasure the development of the additional mechanisms for dispute resolution and to see Hong Kong take a leading role in this regard.<sup>2</sup>
- 2 On this occasion I have been asked to address you from an Australian perspective on the global trend in mediation; confidentiality in mediations; and the use of mediations in complex commercial disputes.

**A THE GLOBAL TREND IN MEDIATION**

- 3 It is appropriate first to address the trend in litigation because mediations are intrinsically intertwined with that process. Certainly governments

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<sup>1</sup> I am grateful to Jack Orford, the Researcher (2014) to the Judges of the Equity Division of the Supreme Court of New South Wales for his assistance with the preparation of this paper.

<sup>2</sup> Mediation Ordinance 2012 (Cap 620).

throughout Australia have taken steps to ensure that small claims (and even larger ones) are mediated in an informal environment with the aim of reducing the cost to the parties. The statistics demonstrate that over the last decade (with few exceptions) there has been a decline in the number of cases commenced in the courts.<sup>3</sup> The reason for the 'trend' of declining numbers is sometimes linked anecdotally to the state of the economy. In difficult fiscal times where commercial confidence is vulnerable, corporations are less willing to expend time and money in uncertain environments. It is said that as the state of the economy improves and commercial confidence is boosted, corporations are more willing to expend both time and money in the litigious environment.

- 4 These theories are not based on empirical data linked to the process of litigation. Rather they are general observations from statistics plotted over the years in which the global financial crisis occurred, many corporations perceived to be successful and profitable collapsed, and major international banks became the subject of various inquiries, including for the fixing of foreign exchange rates and the manipulation of the Libor.<sup>4</sup>
- 5 A factor impacting upon the reduction in the number of cases filed in the courts is the introduction of regimes for the resolution of disputes in Tribunals. The NSW Civil and Administrative Tribunal (NCAT), established under the *Civil and Administrative Tribunals Act 2013* (NSW), commenced operating on 1 January 2014. NCAT and other similar tribunals throughout the country have been referred to as "super tribunals".<sup>5</sup> NCAT replaced 23 tribunals, many of which had their own processes for encouraging parties to mediate, with parties paying their own costs unless there are "special circumstances".<sup>6</sup>

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<sup>3</sup> Attached Graph: Civil Filings 2003 to 2012

<sup>4</sup> Louise Armistead, 'Mark Carney: FX allegations more serious than Libor scandal'. The Telegraph (UK) (11 March 2014).

<sup>5</sup> Early Dispute Resolution, Discussion Paper, Reference Group of NCAT.

<sup>6</sup> *Civil and Administrative Tribunals Act 2013* (NSW) s 60.

- 6 Another factor is the appointment in 2013 of a Small Business Commissioner in New South Wales pursuant to the *Small Business Commissioner Act 2013 (NSW)*.<sup>7</sup> The objectives of this appointment include: to provide a central point of contact for small businesses to make complaints about their commercial dealings with other businesses and about their dealings with government agencies; and to facilitate the resolution of disputes involving small businesses through mediation and other appropriate forms of alternative dispute resolution.<sup>8</sup> The Commissioner's general functions include the provision of "low-cost alternative dispute resolution services for small businesses".<sup>9</sup> However the Commissioner is only able to deal with a complaint made by a small business if satisfied that the subject-matter relates to the unfair treatment of a small business, or an unfair practice involving a small business, or the subject-matter relates to an unfair contract to which the small business is a party, or if it is in the public interest to deal with the complaint.<sup>10</sup>
- 7 Another factor is the introduction of legislative mechanisms to prevent proceedings from being commenced in any court unless mediation has occurred and failed to resolve the dispute or the matter.<sup>11</sup> Governments throughout the nation are clearly committed to the process of mediation and other alternative dispute resolution mechanisms. For instance, in 2013 the NSW Attorney General requested the NSW Law Reform Commission to review the statutory provisions that provide for mediation and other forms of alternative dispute resolution, with a view to updating those provisions and, where appropriate, recommending a consistent model or models for dispute resolution in statutory contexts, including court-ordered mediation and alternative dispute resolution. That inquiry continues with the Law Reform Commission reviewing matters including referral powers, confidentiality, status of agreements reached and proper protection

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<sup>7</sup> Small Business Commissioners were appointed in Victoria in 2003, in Western Australia in 2011 and in South Australia in 2012. A national Small Business Commission was also appointed in 2013.

<sup>8</sup> *Small Business Commissioner Act 2013 (NSW)*, s 13.

<sup>9</sup> *Ibid*, s 14(1)(c).

<sup>10</sup> *Ibid*, s 15(1).

required for the parties, mediators and others involved in dispute resolution. It is also reviewing the proper role for legislation, contracts and other legal frameworks for dispute resolution.

- 8 All of these factors have impacted upon the Australian litigious environment and thus the use of mediation as an additional mechanism for the resolution of disputes.
- 9 Another factor of some importance in New South Wales is the commencement on 26 March 2012 of Practice Note SC Eq 11 *Disclosure in the Equity Division*. This has introduced a "new regime" with a far more disciplined analysis of the need for disclosure of documents by reference to the real issues identified in the pleadings and the evidence.<sup>12</sup> Its relevant terms are:

**Purpose**

3. This Practice Note is for the guidance of practitioners in preparing cases for hearing in the Equity Division with the aim of achieving the just, quick and cheap resolution of the real issues in dispute in the proceedings.

**Disclosure**

4. The Court will not make an order for disclosure of documents (disclosure) until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure.
5. There will be no order for disclosure in any proceedings in the Equity Division unless it is necessary for the resolution of the real issues in dispute in the proceedings.
6. Any application for an order for disclosure, consensual or otherwise, must be supported by an affidavit setting out;
- the reason why disclosure is necessary for the resolution of the real issues in dispute in the proceedings;
  - the classes of documents in respect of which disclosure is sought; and
  - the likely cost of such disclosure.

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<sup>11</sup> The Hon Justice P A Bergin, '*The objectives, scope and focus of mediation legislation in Australia*' (Mediate First Conference, Hong Kong, 11 May 2012).

<sup>12</sup> *Armstrong Strategic Management and Marketing Pty Ltd & Ors v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393.

### **Costs**

7. The Court may impose a limit on the amount of recoverable costs in respect of disclosure.
  
- 10 It has enabled parties to reach more promptly the understanding of the case that is made against them for the purpose, amongst others, of deciding whether and when to mediate their differences. It is expected that it will assist in the reduction of the overall cost of litigation. I understand that the introduction of this regime is being considered in other international jurisdictions.
  
- 11 The combination of this new regime with the centralised form of case management now enables parties to estimate more accurately the amount of time that will be required to bring the case to a conclusion, with a more accurate estimate of costs. The Courts have made it very clear that the days of trial by ambush are over and all parties are required to put their cards on the table.<sup>13</sup> Cases must be managed efficiently and effectively with trials confined to the real issues in dispute.<sup>14</sup> This removes at least one aspect of the so-called unpredictability of litigation. However experience shows that there will always be some aspects of litigation that are unpredictable. It is apparent that many mediators refer to the unpredictability of litigation to highlight the attractiveness of reaching the commercial resolution of a dispute at mediation. It would appear that this device (albeit now somewhat diluted in respect of matters in the Equity Division) will remain available to mediators.
  
- 12 One of the proposals that has been the subject of comment over the years is Harvard Professor Frank Sander's concept of the "multi-door courthouse" in which the doors represent various dispute resolution options that may be chosen by the litigant.<sup>15</sup> Although such a concept has not been adopted as defined by Professor Sander, Australian

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<sup>13</sup> *Nowlan v Marson Transport Pty Ltd* (2001) 53 NSWLR 116; *Glover v Australian Ultra Concrete Floors Pty Ltd* [2003] NSWCA 80.

<sup>14</sup> *Aon Risk Services Limited v Australian National University* [2009] HCA 27.

<sup>15</sup> Nadja Alexander, *Global Trends in Mediation* (2<sup>nd</sup> ed, 2006, Kluwer Law International).

environments are moving closer to it with the establishment of court-annexed mediation services. A recent suggestion has been made that "State-resourced mediation services independent of the court system at a modest fee" should be considered.<sup>16</sup> Certainly the mediation services that are already in place, independent of the courts, such as the regime referred to earlier in respect of small businesses, seem to work well. The establishment of a separate and general state-based mediation service may have an adverse impact on the resources that are available to fund those mediation services provided within the court system. However it can be seen that the trend is to consider cheaper and quicker options for dispute resolution to avoid litigation.

- 13 I understand that there is some movement towards the use of the apology as a fundamental means for resolving disputes and addressing the anger or hurt feelings that sometimes accompany broken contracts and/or promises.<sup>17</sup> Indeed I see that it is the subject of one of the sessions at this Conference. The apology is not presently a pivotal aspect of the mediation landscape in Australia. However there is provision for an apology in the area of defamation actions.<sup>18</sup> The utility of an apology will very much depend upon the culture of the parties, the nature of the dispute, the perceptions of the parties about the strength of their relevant positions and entitlement to be vindicated. However if a willingness to give an apology (even one limited to the fact that the parties find themselves in dispute) were a pre-requisite to participation in the mediation it may very well soften the resolve of the hardy litigant or make the mediation environment more amenable for the achievement of a settlement.
- 14 The Graphs attached to this paper include one that charts the number of cases filed in the Supreme Court of New South Wales, the number of mediations and the number of mediations that have been referred non-

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<sup>16</sup> The Hon Wayne Martin AC, Chief Justice of Western Australia, *Access to Justice*, Notre Dame University Freemantle Campus, 24 February 2014.

<sup>17</sup> Robyn Carroll, *Apologies as a Legal Remedy* (2013) 35 *Sydney Law Review* 317; Deborah L Levi, 'The Role of Apology in Mediation' (1997) 72 *NYUL Rev* 1165.

<sup>18</sup> *Defamation Act 2005* (NSW) s 20.

consensually during the period 2007 to 2013.<sup>19</sup> Notwithstanding the importance of recognising the limited use to which raw statistics can be put, the trend is a reduction in the number of cases filed, with no reduction in the number of cases mediated. An important aspect of these figures is the acceptance of the process of mediation in the litigious environment. Opposition to mediation is now negligible.

- 15 As the litigious environment has contracted, the legal profession has changed its work practices to spend a great deal more time adopting strategies to settle cases at mediation rather than to run cases at trial. There will always be cases that will not settle and require judicial determination. The acceptance of mediation as part of the litigious process has resulted in the more complex and difficult cases that are not amenable to settlement being run at trial.
- 16 There is no doubt that the trend in Australia is a nationwide recognition and acceptance that alternative dispute resolution mechanisms have a pivotal role to play in the process of settling disputes. However it is access to the courts that determine and protect the rights and interests of the citizens that remains of paramount importance in the maintenance of the civility and stability of our Australian society.

## **B CONFIDENTIALITY IN MEDIATIONS**

- 17 There is no single or uniform source of law governing the confidentiality of mediation in Australia. Some of the relevant principles were originally creatures of the common law, but have now been modified and codified by statute. Others in the statutory regime in the *Civil Procedure Act 2005* (NSW) are aimed at encouraging pre-trial mediation of disputes. Some are rules of evidence, while others confer substantive protection against any

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<sup>19</sup> Excluding mediations in the Family Provision List that are the subject of a separate regime. The Hon Justice P A Bergin *Executors/trustees and Mandatory mediations*, Sydney, 25 November 2009.

form of public disclosure. The law in this area is a rather unruly patchwork. As has been said:

In the more nuanced situations legislation, court orders, dispute resolution clauses, Agreements to Mediate, codes of conduct and case law provide some guidance and direction. However, these sources and resources do not always deal with mediation confidentiality and its exceptions in comprehensive, consistent and complementary ways.<sup>20</sup>

- 18 One of the most attractive aspects of mediation to the parties is the secret or confidential environment in which the discussions take place. Naturally parties wish to avoid the publication of deeply personal, or commercially sensitive, or sometimes embarrassing information. Confidentiality balances the encouragement of settlements — and, in particular, the full and frank disclosure which facilitates them — against the desire to have all relevant evidence available in the event that judicial determination is necessary.<sup>21</sup> Speaking of legal professional privilege, Gleeson CJ has noted that:<sup>22</sup>

The rule that prevents an unauthorised disclosure of confidential communications ... constitutes a restriction on the capacity of courts to ascertain the truth in certain circumstances. That restriction, however, is regarded as acceptable on the ground that it promotes the public interest, and assists the administration of justice ...

- 19 The protections afforded in New South Wales in respect of matters referred to mediation by the court include the following:
- Immunity of the mediator and the parties from a defamation suit in respect of oral statements in a mediation session or documents or

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<sup>20</sup> Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2011) 672.

<sup>21</sup> Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2011) 670.

<sup>22</sup> *Benecke v National Australia Bank* (1993) 35 NSWLR 110, 111 (Gleeson CJ).



other material sent or produced to a mediator or to the court for the purpose of a mediation session;<sup>23</sup>

- For the mediator in relation to the referred proceedings, the same immunity as a judicial officer of the court;<sup>24</sup>
- The prohibition on the mediator disclosing information obtained as a result of the mediation except in certain circumstances;<sup>25</sup>
- Privileges protecting communications made, and documents prepared: in the course of a mediation session;<sup>26</sup> or for the dominant purpose of providing legal advice;<sup>27</sup> or in the genuine pursuit of a negotiated settlement of all or part of the dispute. These may be identified as the statutory mediation privilege in s 30(4) of the *Civil Procedure Act*, legal advice and/or litigation privilege, and the so-called 'without prejudice' communications privilege;
- Contractual obligations of confidence voluntarily assumed by parties to mediation, their representatives, and the mediator, under the usual terms of a mediation agreement; and
- The equitable remedies relating to the protection of confidential information.

#### Statutory protections

- 20 The statutory protections from suit for the mediator and to a limited extent for the parties, are an important factor in the creation of an environment in which the parties feel free to disclose matters in an attempt to reach a mediated settlement that they may otherwise not disclose (and not be required to disclose) in a court. It is that flow of easier communication that will provide some guidance to the mediator in identifying opportunities for the parties to reach a settlement with which they are willing to live.

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<sup>23</sup> *Civil Procedure Act 2005 (NSW)* s 30(2)

<sup>24</sup> *Civil Procedure Act 2005 (NSW)* s 33.

<sup>25</sup> *Civil Procedure Act 2005 (NSW)* s 31.

<sup>26</sup> *Ibid* s 30(4).

<sup>27</sup> *Evidence Act 1995 (NSW)* s 118.

21 The statutory protection for the mediator (and for the parties) is limited to a court-referred mediation. Accordingly when parties proceed to private mediation without the court referring it, the only protection available to a mediator is a contractual protection, which may prove to be of limited utility. Those practitioners who are alert to the statutory provisions protecting the mediator (and the parties) sensibly seek an order referring the matter to mediation to enliven the protections.

22 Section 31 of the *Civil Procedure Act* provides that a *mediator* 'may disclose information obtained in connection with the administration or execution of this Part<sup>28</sup> *only* in the following circumstances:

- Where the person from whom the information was obtained consents;<sup>29</sup>
- Where the mediator is called to give *limited evidence* as to the fact that an agreement has been reached and as to the substance of it;<sup>30</sup>
- Information disclosed in connection with the administration or execution of the Part of the *Civil Procedure Act* dealing with mediation<sup>31</sup> — which has been held to allow the mediator to express a view on the utility of continuing mediation;<sup>32</sup> or
- Where there are reasonable grounds to believe the disclosure is necessary to minimise or prevent the danger of injury to any person or damage to any property.<sup>33</sup>

#### Mediation 'privilege'

23 Section 30(4) of the *Civil Procedure Act* prohibits admission of evidence of the course of mediation, including documents prepared for, or as a result of, the mediation. Once again this only applies to court-referred mediation. It extends to the entire 'mediation session', defined to include steps taken

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<sup>28</sup> Dealing with court referrals to mediation.

<sup>29</sup> *Civil Procedure Act 2005* (NSW) s 31(a).

<sup>30</sup> *Ibid* ss 31(b), 29(2).

<sup>31</sup> *Ibid* s 31(b).

<sup>32</sup> *Rajski v Tectran Corporation Pty Ltd* [2003] NSWSC 477, [11] (Palmer J).

<sup>33</sup> *Civil Procedure Act 2005* (NSW) s 31(d).

in the course of arranging the session or in a follow-up session.<sup>34</sup> For example, a compromise offer sent by email subsequent to a mediation session that was not declared to be over (and where the court was not notified as required by the Rules) was held to be ‘in the course of’ or ‘as a result of’ the mediation session and so protected.<sup>35</sup> The prohibition has been held to exclude evidence relating to the conduct of the parties at mediation (eg, to explain why mediation was terminated);<sup>36</sup> and evidence of a settlement offer made contemporaneously with, but not during, formal mediation.<sup>37</sup>

#### ‘Without prejudice’ privilege

- 24 Communications ‘made between persons in dispute’ (whether or not also including a third party) ‘*in connection with* an attempt to negotiate a settlement of the dispute’, or documents so connected, are not permitted to be admitted as evidence.<sup>38</sup> This embraces evidence of negotiations aimed at narrowing the scope of the dispute rather than settling the whole dispute.<sup>39</sup> Exceptions include where the communication is relevant to liability for costs.<sup>40</sup>

#### Legal Advice privilege/Litigation privilege<sup>41</sup>

- 25 Clients have a well-known privilege protecting communications with lawyers made for the dominant purpose of obtaining legal advice. Legal advice includes any advice as to ‘what a party should prudently or sensibly do’ in a legal context,<sup>42</sup> and many of the documents used or prepared for mediation may well be protected. It has also been suggested that with the

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<sup>34</sup> *Civil Procedure Act 2005* (NSW), s 30(1).

<sup>35</sup> *Sharjade Pty Ltd v RAAF (Landings) Ex-Servicemen Charitable Fund Pty Ltd* [2008] NSWSC 1347, [39] (Bergin J).

<sup>36</sup> *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 252 (Gleeson CJ, Cole JA and Sheppard AJA), in relation to the very similar s 15(1) of the *Farm Debt Mediation Act 1994* (NSW); but cf *Al Mousawy bht Khamis v JA Byatt Pty Ltd* [2008] NSWSC 264 (Hoeben J) (evidence of cancellation or refusal to attend considered in ‘belated request for adjournment’), noted *Ritchie’s Uniform Civil Procedure New South Wales*, above n 1, *Civil Procedure Act Commentary* [30.10].

<sup>37</sup> *Jireh International Pty Ltd v Western Export Services Inc (No 2)* [2011] NSWCA 294.

<sup>38</sup> *Evidence Act 1995* (NSW) s 131. (emphasis added)

<sup>39</sup> *Lukies v Ripley (No 2)* (1994) 35 NSWLR 283, 292B (Young J).

<sup>40</sup> *Evidence Act 1995* (NSW) s 131(2)(h).

<sup>41</sup> *Evidence Act 1995* (NSW) s 118 and s 119.

increasing integration of ADR into pre-trial procedures (including the process of court referral, and of court-annexed mediation), that such mediations may be subsumed beneath the umbrella of litigation and thus attract the litigation privilege.<sup>43</sup>

### Limitations

- 26 One important limitation on these privileges relates to communications during mediation that put a party on notice of the existence or possible existence of objectively provable facts. If party A makes party B aware, during mediation, that a document X exists and relates to some fact in issue, then on one view there is nothing to prevent later attempts to discover or have that document produced. This view was taken by Rolfe J in *AWA Ltd v Daniels*,<sup>44</sup> relying on the following passage from *Field v Commissioner of Railways*:<sup>45</sup>

This form of privilege [without prejudice privilege] ... is directed against the admission in evidence of express or implied admissions. ... It is not concerned with objective facts which may be ascertained during the course of negotiations. These may be proved by direct evidence.

- 27 In other words there is a difference between evidence of a mediation communication referring to an objective fact (and perhaps explicitly to direct evidence of it), and that other direct evidence itself. The latter is not necessarily privileged.
- 28 If it were otherwise (ie the direct evidence of the fact was treated as poisoned fruit) it would open the possibility of a party sterilising evidence against them by disclosing it during mediation.<sup>46</sup> On the other hand, finding separate direct evidence of facts disclosed during mediation admissible might allow 'unscrupulous parties [to] use and abuse the

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<sup>42</sup> *AWB Ltd v Cole* (2006) 155 FCR 30, [44] (Young J).

<sup>43</sup> Boule, above n 20, 679.

<sup>44</sup> *AWA Ltd v Daniels* (Unreported, Supreme Court of NSW (Commercial Division), 18 March 1992).

<sup>45</sup> *Field v Commissioner of Railways for New South Wales* (1957) 99 CLR 285, 291.

<sup>46</sup> Boule, above n 20, 676.

mediation process by treating it as a gigantic, penalty free discovery process'.<sup>47</sup> Rogers CJ Comm D declined to adopt the apparent breadth of the passage from *Field*, contenting himself that: (1) the solicitor for the party put on notice was already alive to the possibility of the document's existence; and (2) in all but the most exceptional case such a relevant document would be discovered.<sup>48</sup> These decisions illustrate that privileges in respect of mediation communications do not entirely obviate the need for a party to preserve tactical advantages in anticipation of later litigation.

### Mediation agreements

- 29 The New South Wales Bar Association's standard form mediation agreement provides that the parties and the mediator together agree not to disclose 'any information or documents provided to them in the course of or for the purposes of the mediation to anyone not involved in the mediation' unless authorised by the disclosing party.<sup>49</sup> It requires parties to procure a signed confidentiality agreement in prescribed form from anyone attending the mediation (for example, as a party's representative) which contains an undertaking not to use information for any purpose other than the mediation, and not to disclose it without written permission from *all* parties. Most mediation agreements will probably have clauses to similar effect.<sup>50</sup>
- 30 These clauses are probably the most important in protecting mediating parties from unauthorised disclosure to third parties. They complement the rules governing admission of evidence to the extent that a contractual confidentiality clause will not itself prevent mediation communications from being discovered or subpoenaed.

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<sup>47</sup> *AWA Ltd v Daniels* (1992) 7 ACSR 463, 468 (Rogers CJ in Comm D).

<sup>48</sup> Rogers CJ Comm D at 469.

<sup>49</sup> NSW Bar Association, *Mediation Agreement*, 3 Nov 2012, cl 19.

<sup>50</sup> See, for example, the clauses extracted in *Sharjade Pty Ltd v RAAF (Landings) Ex-Servicemen Charitable Fund Pty Ltd* [2008] NSWSC 1347, [24]–[25] (Bergin J), and as summarised in *Silver Fox Company Pty Ltd v Lenard's Pty Ltd* [2004] FCA 1570, [30] (Mansfield J).

### Confidential information in equity

- 31 The ingredients of an action for misuse of confidential information are: (1) information with a quality of confidence; (2) imparted in circumstances importing an obligation of confidence; and (3) unauthorised use.<sup>51</sup> So long as the information has the ‘necessary quality’ of confidence to begin with — which is to say that the information must actually be secret — the ordinary course of most mediations will supply elements (2) and (3).
- 32 Third party recipients of confidential information who can be fixed with knowledge — actual or constructive — of its nature will be restrained by injunction from making unauthorised use of it.<sup>52</sup> Parties who receive such information innocently may still be restrained from unauthorised use once they are on notice of its confidential origin.<sup>53</sup> It is more difficult where, by that stage, the information is in the public domain.<sup>54</sup>
- 33 Where there is a pre-existing contractual nexus (as between mediating parties and the mediator), the scope of the obligation of confidence will be evidenced by the mediation agreement.

### Consent and waiver

- 34 Parties may of course waive privileges (the client, in the case of legal professional privilege; and the originator of ‘without prejudice’ communications). The NSW Bar Association’s standard form mediation agreement between *parties* requires the consent of the ‘disclosing Party’ only; but the confidentiality agreement signed by all *participants* requires signatories to obtain the written consent of *all* parties before disclosure. The exception to s 30(4) of the *Civil Procedure Act* requires *all persons*

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<sup>51</sup> *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47–8.

<sup>52</sup> GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5<sup>th</sup> ed, 2011) 194; Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies*, 4<sup>th</sup> ed, 1132.

<sup>53</sup> *Wheatley v Bell* (1982) 2 NSWLR 544.

<sup>54</sup> Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies*, 4<sup>th</sup> ed, 1124.

*present* at mediation (thus including the mediator), or all persons specified in any document, to consent to its disclosure.<sup>55</sup>

#### Proof of compromise

35 Mediated settlement agreements are admitted into evidence for the purpose of enforcing a compromise.<sup>56</sup> This is a long-held exception to the without prejudice privilege, and is supplemented by s 29(2) of the *Civil Procedure Act* allowing the mediator to give related evidence. This exception extends to applications to have such an agreement rectified.<sup>57</sup>

36 It is important to avoid satellite litigation about the conduct of mediations. Such litigation is antithetical to the process. However it occurs. It is necessary for those involved in the process to not only obtain contractual rights and protections in the relevant mediation agreement but also to seek the protection of the statutory protections that may be available in the relevant jurisdiction. This requires the focus of the mediator and the parties ensuring that such protections are in place before embarking upon the process. Another mechanism that has been used is to embody the agreement in a form of consent order that is made by the court at the conclusion of the mediation. Although cases have been brought for the setting aside of such orders (for duress and the like), in the main, such orders afford additional protection to the parties and the mediator.

### **C. MEDIATION IN COMPLEX COMMERCIAL/FINANCIAL DISPUTES**

37 Complexity, for the purpose of this discussion, may involve cases in which there are:

- Multiple parties with complicated and diverse interests;

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<sup>55</sup> *Civil Procedure Act 2005* (NSW) s 30(5).

<sup>56</sup> See generally Boule, 693.

- Operating in elaborate or labyrinthine contractual settings;
- In competitive relationships that have spanned many transactions (the understanding of the detail of which may require specialised knowledge) sometimes over years;
- In which there are allegations of serious commercial or financial misconduct;
- With multiple forms of relief or remedies being sought;
- In the pursuit of high stakes outcomes (financial as well as commercial).

38 Some parties may still be in a commercial relationship. Other cases may involve a combination of parties continuing in a relationship while others have terminated their relationship. Other cases may involve parties who are no longer in a commercial relationship.

39 From a case management point of view commercial/financial disputes in which the parties remain in a commercial relationship require prompt resolution. The parties embrace this promptitude because they wish to resolve the dispute that is presently affecting their commercial dealings. Others who have terminated their relationships are not as interested in such promptitude. This attitude flows through to the mediation setting. Experience in Australia is that parties in complex commercial disputes who are still in a relationship are more amenable to urgent mediation than those who have terminated their relationship. It would seem that the leverage available in the former setting may not be available where parties have gone their own ways.

40 In complex commercial/financial disputes it is necessary to have a more sophisticated approach to alternative dispute resolution mechanisms. The Court takes more of an interest in the pre-mediation steps to ensure that the real issues that are impeding the parties from a commercial settlement

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<sup>57</sup> See generally Boule, 694.



are identified so that the mediator is not met with a chaotic environment that may or may not be to the advantage of one or more of the parties.

- 41 In cases that involve complicated specialised knowledge, the Court may appoint a single expert to provide the parties with a premise from which a mediation might go forward. As the determination of the expert question is usually necessary for the ultimate decision, should the mediation be unsuccessful, it presents as an efficient and effective method of "settling" an issue that may divide the parties. The Court controls this process prior to any referral to mediation.
- 42 Another mechanism that is used in complex commercial/financial disputes is the appointment of a facilitator to meet with the parties to identify those real issues (both expert and lay) that each of the multiple parties contends requires resolution or determination. This mechanism has worked well in cases in which there are very complicated technological and/or mathematical issues that require precision in identification, agreed protocols for resolution, and competing theories in respect of the identified issues. Once the facilitator has assisted the parties in identifying the issues on which they disagree, a better judgment can be made about the nature and/or timing of any proposed mediation. In the cases in which this mechanism has been used, the facilitator plays no further part in the alternative dispute resolution mechanisms.
- 43 The Australian experience includes the appointment of multiple mediators with different tasks in respect of different aspects of the complex dispute. The parties usually identify a mediator with commercial experience combined with the relevant necessary legal experience and on occasions will appoint a person with particular scientific or financial expertise (depending upon the complexity of the issues to be mediated) as a co-mediator.
- 44 The involvement of a lawyer with experience in managing large disputes has proved to be pivotal in marshalling the parties' energies towards a

commercial settlement rather than a dry run of the issues that will ultimately be determined in the court if the mediation is unsuccessful. In some instances the mediations have not concluded within the agreed timeframe and much work has been done to convince parties to continue their negotiations at another time. However the Court's experience is that multi-party complex disputes, if not settled at mediation, are usually less complicated at the trial because the parties have narrowed their real issues in dispute during the course of the mediation. This process is advantageous both to the parties and ultimately to the courts.

- 45 Although promptitude is an aspect of the case management of these difficult disputes, caution is necessary to ensure that matters are not prematurely referred to mediation. Parties in Australia are required to attend mediations in good faith. At least to some extent there is an expectation that settlement may be possible. However sometimes there are unexpected outcomes. Two examples come to mind.
- 46 As to the first, I would like to remind us of a mediation in a complex commercial dispute, not in Australia, but in United States of America - the Microsoft anti-trust dispute. You will recall that in 1998 the Department of Justice of the USA and more than 20 States sued Microsoft over alleged anti-trust violations under the *Sherman Act* and State anti-trust laws, relating to various tying relationships between its software products and alleged exclusive dealing arrangements.
- 47 Microsoft was accused of unlawfully maintaining market power through exclusive dealing and various other anti-competitive practices. It was also alleged that it leveraged market power to control related markets and crush competitors. It had bundled its own browser, Internet Explorer with its dominant Windows operating system, exhausting much of the consumer demand for an Internet browser and thus making it very difficult for competitors to enter and grow their market share.

- 48 The court ordered mediation that took place over a period of four months was ultimately unsuccessful. The mediator reportedly described the parties' differences as "too deep-seated to be bridged".<sup>58</sup>
- 49 The judgment at first instance found against Microsoft and would have forced its break up into smaller companies, one selling operating systems, another selling software for operating systems with other onerous restrictions. Microsoft appealed. While on appeal Microsoft's liability for unlawfully sustaining its operating system monopoly was affirmed, the finding of liability for monopolising the Internet browser market was reversed and the matter was remitted for re-hearing of the claim of unlawful tying of Internet Explorer to Windows. On remitter the new trial judge strongly urged the parties to settle.
- 50 Two mediators were appointed and allotted three weeks to attempt to settle the case. The mediation was relevantly described as follows:<sup>59</sup>

Slow progress was made until a crucial compromise was reached on a critical issue over which the parties had been at impasse. Ironically, this key issue was not even in the original case that had been brought by the government, tried, and appealed. It emerged much later in the case, because the ways in which people used computers and software changed over the course of the litigation.

The mediation problem was that Microsoft's actions with respect to these key issues were not in the case that had been filed. Microsoft, not unsurprisingly, took the position that any settlement should not concern itself with issues that were not formally in the case. However as a very practical matter, considering how technology had evolved, this issue had become an important interest for the governmental parties to address in any settlement. Some of the governmental parties viewed failure to obtain any relief on this issue as a major stumbling block. Finally, two days before the court-imposed deadline for mediation to conclude, the parties agreed that the settlement would address this issue. Some of the governmental parties saw Microsoft's concession on this issue as a major achievement. ... Settlement became imminent: each side now felt that it had achieved more than it might possibly obtain if the case went to judgment

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<sup>58</sup> Andrew Marshall, *Microsoft Faces Prospect of Death by Lawyer* Independent (London) (3 April 2000), 15

<sup>59</sup> Eric D Green *Re-Examining Mediator and Judicial Roles in large, complex litigation: Lessons from Microsoft and other Megacases* (2006) 86 Boston University Law Review 1171.

- 51 Notwithstanding the very complex issues involving many parties, it was the serendipitous introduction of a non-issue that grew out of real-time experience overtaking the issues with which the mediation was involved that ultimately facilitated the settlement. I have said elsewhere that mediators use the unpredictability of litigation to promote the attractiveness of the certainty of a mediated settlement. This is an exquisite example of the unpredictability of mediation. However in this instance it was a very advantageous one for the parties.
- 52 Australian experience is not dissimilar; mediation may lead to quite unexpected results.<sup>60</sup>
- 53 An Australian example with an unexpected outcome involved circumstances arising out of the collapse of a company known as Storm Financial Limited (Storm), a publicly listed company in Australia in respect of which investors lost approximately \$830 million.
- 54 Mrs Richards, as the representative of a group of 1050 members, sued the Macquarie Bank (the Bank) and Storm (then in liquidation). It was claimed that on the advice from Storm they borrowed money in the form of margin loans from the Bank and then used it to invest in one or more of nine managed investment schemes over a period of three years from 2005 to 2008. The allegations against the Bank included: breaches of the *Corporations Act 2001* (Cth) relating to an alleged unlawful operation of the managed investment scheme; breaches of contract and alleged unconscionable conduct by the Bank towards its margin borrowers; and being a linked credit provider of Storm and thereby vicariously liable for Storm's breaches of contract and misrepresentations under what was then known as the *Trade Practices Act 1974* (Cth).

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<sup>60</sup> *Daya v CAN Reinsurance Co Ltd* [2004] NSWSC 795

- 55 The parties took part in two mediations that were unsuccessful. The trial proceeded to finality and judgment was reserved. At that time the parties proceeded to a further mediation.
- 56 Some members of the group in the action were represented by the law firm, Levitt Robinson. Others (some hundreds of investors) were members of an action group, known as the Storm Investors Consumer Action Group and were not represented by Levitt Robinson.
- 57 Mrs Richards and the group members who retained Levitt Robinson entered into retainer agreements with that firm. Those agreements addressed the question of funding the litigation and provided that those persons (referred to as the Funding Group Members) would be subject to a levy to cover legal costs. The scale of levies in the retainer agreement was not calculated mathematically and the amounts of the proposed levies were not proportional to the losses suffered by the investors. There was nothing in the retainer agreement of any possible "uplift" payable to those investors who had paid the levy.
- 58 The law firm communicated not only with its clients, but also with those members of the action group. It warned them that any settlement that might be reached would be structured to provide that those who made a financial contribution to the litigation would gain "the major share of any settlement monies, in recognition of the financial strain and risk of even further erosion of their financial position which they have endured".<sup>61</sup> This so-called "warning" was communicated in February 2013.
- 59 The proceedings settled at mediation and the fact of the settlement was announced on 15 March 2013.
- 60 There were some clients of Levitt Robinson who had not made any contribution to the costs of the proceedings and had apparently been

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<sup>61</sup> *ASIC v Richards* [2013] FCAFC 89 at [22].

excused from doing so on the grounds of hardship. They were given an opportunity to make a minimum contribution of \$500 between 15 March 2013 and the date on which the approval application (referred to below) was due to come before the Court.

- 61 An application was made for the Federal Court to approve the settlement. This was necessary by reason of a statutory prohibition on settlement of representative proceedings (class actions) without the approval of the Court.<sup>62</sup> Such approval is necessary so the Court can be satisfied that any settlement has been undertaken in the interests of the group members as a whole, and not just in the interests of the applicant and the respondent.<sup>63</sup> The role of the Court in this regard is protective and akin to that of a guardian.<sup>64</sup> It is to decide whether the compromise is fair and reasonable, having regard to the claims made on behalf of the group members who will be bound by the settlement.<sup>65</sup>
- 62 The corporate regulator, the Australian Securities and Investments Commission (ASIC) intervened in the proceedings to oppose the approval of the settlement.
- 63 The "amount at stake" in that case was \$282 million. The overall settlement sum was \$82.5 million, about 30.57% of the total contributions of group members. The settlement represented a return of about 42% of the equity contributions to those who had funded the litigation and about 17.602% to those members who had not contributed.<sup>66</sup> A premium of 35% was fixed for those who had funded the litigation.<sup>67</sup>
- 64 The primary judge identified the two broad issues for determination on the application for approval. The first was whether the overall settlement could

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<sup>62</sup> *Federal Court of Australia Act (1976)* (Cth) s 33V

<sup>63</sup> *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 at 258.

<sup>64</sup> *ASIC v Richards* [2013] FCAFC 89 at [8].

<sup>65</sup> *Williams v FAI Home Security Pty Ltd* (No 4) (2000) 180 ALR 459 [19].

<sup>66</sup> *Richards v Macquarie Bank Limited* (No 4) [2013] FCA 438 [26].

<sup>67</sup> At [32].

be regarded as fair and reasonable. The second was whether, even if that were so, the internal distribution was fair and reasonable. The primary judge decided "quite firmly" that the overall settlement was fair and reasonable.<sup>68</sup>

65 ASIC raised for consideration whether or not it could be said that all of the group had notice or at least sufficient notice that there was a premium for those who had funded the litigation, or the prospect of some better return, if they had contributed towards the recovery proceedings.<sup>69</sup> However the primary judge was satisfied that the internal allocation as between funding and non-funding members of the group was fair and reasonable.<sup>70</sup> ASIC also raised for consideration the fact that the Bank had obtained an indemnity from the members of the representative group. The primary judge saw this indemnity as preventing double recovery and saw nothing unfair about it.<sup>71</sup> The settlement was approved.

66 ASIC appealed that decision. On appeal, the Full Federal Court reversed the decision approving the settlement, as not to do so would involve "substantial injustice". The Court found that there was inequality of opportunity afforded to group members to share in the Funders' Premium. In this regard the court held that:

- Not all group members had notice of the premium;
- Unlike a commercial litigation funder, the Funding Group Members made a decision to fund the litigation on terms and conditions that did not contemplate a premium;
- The financial effect of the payment of the premium to the Funding Group Members was disproportionate in that they received a 525% return on the total amount paid to fund the litigation;

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<sup>68</sup> At [29].

<sup>69</sup> At [39].

<sup>70</sup> At [41].

<sup>71</sup> At [44].

- The so-called return on "investment" was not consistent across the whole of the Funding Group Members because the premium was not paid in proportion to the funds advanced by each of them;
- Some group members were not provided with the opportunity to pay the minimum contribution, so as to qualify for a greater share of the settlement; and
- There was no rational explanation for rewarding the Funding Group Members by paying them a 35% premium (by reference to the premiums charged by commercial litigation funders) on an amount inclusive of interest and costs by a method that did not mathematically correlate with the amount they paid to fund the litigation.<sup>72</sup>

67 In overturning the approval of the settlement the Full Court was very conscious that its decision would "re-enliven an extraordinarily difficult class-action rather than give effect to a settlement reached after a mediation conducted by an eminent" person.<sup>73</sup>

68 This outcome demonstrates why the protections available to mediators and parties are so important. It is a salutary lesson for mediators and a reminder of the intricacies with which they must grapple in mediating multi-party complex commercial and/or financial litigation.

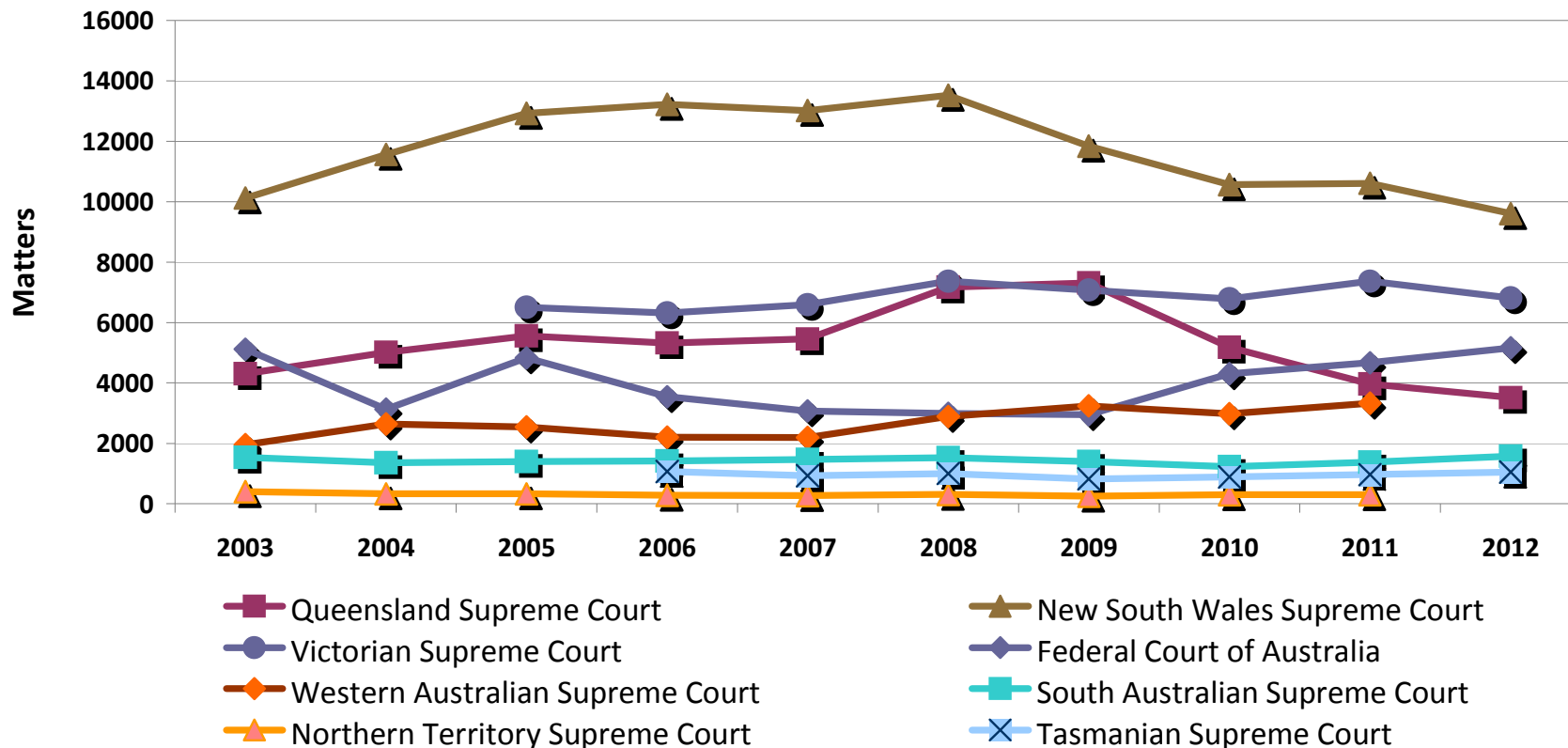
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<sup>72</sup> At [46]-[57]

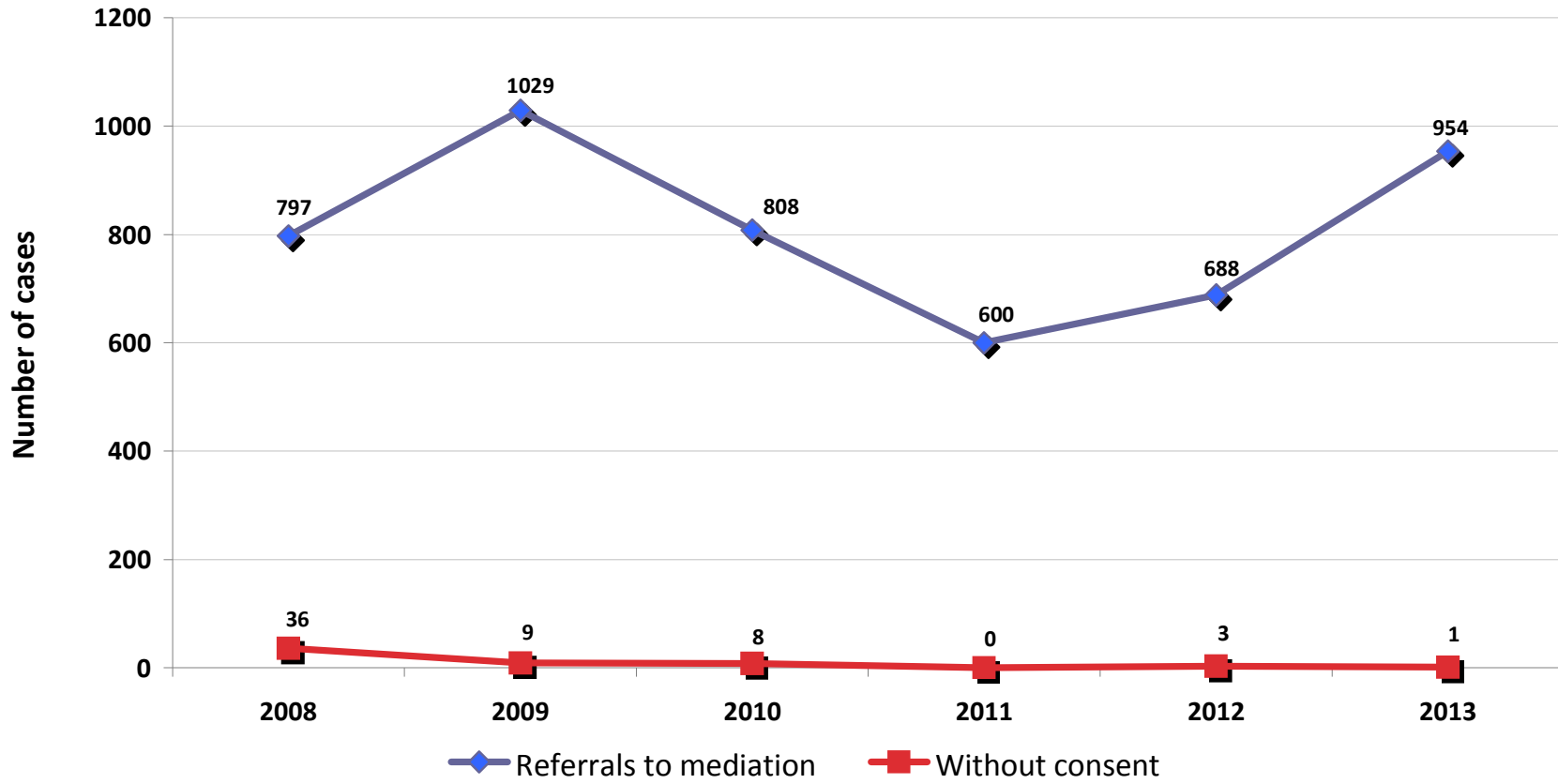
<sup>73</sup> At [59].



## TREND IN CIVIL FILINGS



### Referrals to mediation (without consent)



## Referrals to mediation (without consent) Commercial List

