

**MEDIATION IN HONG KONG: THE WAY FORWARD**  
**PERSPECTIVES FROM AUSTRALIA**

**HONG KONG INTERNATIONAL ARBITRATION CENTRE**  
**HONG KONG**  
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**The Honourable Justice P A Bergin<sup>1</sup>**

**Introduction**

1. From humble beginnings in the late 1970s and early 1980s, alternative dispute resolution (ADR) in Australia has developed into a highly respected and sought after mechanism for resolving disputes. Courts now have annexed mediation schemes, the use of which is incorporated into their general case management procedures. Over the last 25 years there has been a cultural shift within the legal profession and the community with lawyers now promoting the use of ADR and academics and practitioners writing prolifically on the subject. As former Chief Justice of the Supreme Court of New South Wales, Sir Laurence Street AC, KCMG, QC said quite some time ago:

It [ADR] is not in truth '*Alternative*'. It is not in competition with the established judicial system. It is an *Additional* range of mechanisms within the overall aggregated mechanisms for the resolution of disputes. Nothing can be alternative to the sovereign authority of the court system. We cannot tolerate any thought of

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<sup>1</sup> The Hon Justice PA Bergin is the List Judge of the Commercial List and the Technology & Construction List of the Supreme Court of New South Wales and the Chairperson of the Alternative Dispute Resolution Steering Committee of the Court.

an alternative to the judicial arm of the sovereign in the discharge of the responsibility of resolving disputes between state and citizen or between citizen and citizen. We can, however, accommodate mechanisms which operate as *Additional* or subsidiary processes in the discharge of the sovereign's responsibility. These enable the court system to devote its precious time and resources to the more solemn task of administering justice in the name of the sovereign."<sup>2</sup>

2. Over the years various ADR organisations have been established including: the Institute of Arbitrators & Mediators Australia (IAMA) in 1975;<sup>3</sup> the Association of Dispute Resolvers (LEADR; formerly known as "Lawyers Engaged in Alternative Dispute Resolution") in 1989;<sup>4</sup> and the National Alternative Dispute Resolution Advisory Council (NADRAC) in 1995, a body created to provide policy advice to the Commonwealth government and to promote ADR.<sup>5</sup> These organisations have played an important role in overcoming lingering opposition to the integration of ADR services into the Australian legal system. As well as promoting ADR, they provide various services including training and accreditation programmes, publications and sponsorship and facilities for clients to locate mediators. Many of the professional associations are now also active in ADR, such as through the Law Society of New South Wales' Mediation Program<sup>6</sup> and the Victorian Bar's Mediation Centre.<sup>7</sup> The peak body representing the legal profession in

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<sup>2</sup> The Hon Sir L Street AC, KCMG, QC, "The Language of Alternative Dispute Resolution" (1992) 66 *Australian Law Journal* 194, 194.

<sup>3</sup> The Institute of Arbitrators & Mediators Australia, <http://www.iama.org.au/>.

<sup>4</sup> Association of Dispute Resolvers, <http://www.leadr.com.au/>.

<sup>5</sup> National Dispute Resolution Advisory Council, <http://www.nadrac.gov.au/>.

<sup>6</sup> Law Society of New South Wales, *The Law Society Mediation Program*, <http://www.lawsociety.com.au/page.asp?partID=3779>.

<sup>7</sup> The Victorian Bar, *The Victorian Bar Mediation Centre*, <http://www.vicbar.com.au/b.8.4.asp>.

Australia, the Law Council of Australia also has a very active ADR committee.<sup>8</sup>

3. I intend to focus on mediation and the Courts, limiting myself to the jurisdictions of the Supreme Court of New South Wales established in 1823 and the Supreme Court of Victoria established in 1852 and touching upon the Land and Environment Court of New South Wales which commenced operation in 1980<sup>9</sup> and the Federal Court of Australia which commenced operation in 1977.<sup>10</sup>
  
4. In the 1980s the “global public management revolution”<sup>11</sup> increased the expectation of Courts to achieve greater efficiencies and this resulted in the introduction of extensive case management procedures in a number of Australian Courts. The freedom that parties previously had to decide on how to conduct their litigation was curtailed by judges becoming managerial activists,<sup>12</sup> setting timetables for the parties and making orders that would prepare matters for hearing at the earliest possible date. This process included the encouragement of parties to settle the proceedings to avoid the cost and possible uncertainties of continuing with the litigation. That encouragement was at first rather reserved with judges suggesting that the parties should try

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<sup>8</sup> Law Council of Australia, <http://www.lawcouncil.asn.au/>.

<sup>9</sup> The Land and Environment Court of New South Wales was established by the *Land and Environment Court Act 1979* (NSW).

<sup>10</sup> The Federal Court of Australia was established by the *Federal Court of Australia Act 1976* (Cth).

<sup>11</sup> The Hon Chief Justice JJ Spigelman, “The ‘New Public Management’ and the Courts” (Speech delivered at the Family Courts of Australia 25<sup>th</sup> Anniversary Conference, Sydney, 27 July 2001, available at

[http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speeches](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches)).

<sup>12</sup> RF Peckham, “A judicial response to the cost of litigation: Case management, two-stage discovery planning and alternative dispute resolution” (1984) 37 *Rutgers Law Review* 253, 254.

to negotiate their differences with the assistance of their respective legal representatives. That encouragement moved slowly towards the “additional” mechanism of mediation.

5. In *The Friends of the Glenreagh Dorrigo Line Incorporated v Jones*, Mahoney JA observed:

The tracks along which litigation proceeds are public tracks. The timetables are those fixed by the Court rules. The days when a proceeding was to be allowed to progress at the speed dictated by the parties have passed. If the metaphor may be continued, there are other proceedings upon the tracks and, if the parties do not ensure that the vehicle for the determination of their dispute proceeds timeously, the public interest requires – at least, it may warrant – that it be removed from the track so that others more diligent in their interests may proceed.<sup>13</sup>

6. During the late 1970s and early 1980s ADR was successfully utilised in a number of Community Justice Centres where mediations of neighbourhood and family disputes were provided free of charge. This experiment was extended to the Court system when new trial Courts were created in areas of family<sup>14</sup> and environmental and planning law.<sup>15</sup> Family law in particular was perceived to be suitable for trialling ADR because of the confidentiality of the mediation process with its emphasis on preserving future relationships.

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<sup>13</sup> (Unreported, NSWCA, 30 March 1994).

<sup>14</sup> The Family Court of Australia was created by the Commonwealth government in 1975 as the Court with jurisdiction to hear cases under the *Family Law Act 1975* (Cth).

<sup>15</sup> Land and Environment Court of New South Wales was created by the New South Wales government as the Court of first instance to hear cases under legislation including the *Environmental Planning and Assessment Act 1979* (NSW) and the *Local Government Act 1919* (NSW).

## Land and Environment Court of New South Wales

7. Section 34 of the *Land and Environment Court Act 1979* (NSW) provides that, unless otherwise ordered by the Chief Judge, parties in particular cases<sup>16</sup> must attend a preliminary conference that is presided over by a Commissioner of the Court for the purpose of exploring whether the parties are able to agree on the disposition of the case. Justice Brian Preston, the current Chief Judge of the Land and Environment Court, has described the process as follows:

The legislature, in giving conciliation a primary role in the Court, expressly denounced the prevalent legal cultural view that alternative dispute resolution mechanisms are the poor cousins of litigation. In requiring conciliation of matters in Classes 1 and 2, the Court is not “diverting” cases from the formal justice system. Court annexed conciliation is **part** of the formal justice system. It is an equally legitimate and appropriate mechanism of dispute resolution. [emphasis in original]<sup>17</sup>

8. In the first five years of the operation of the Land and Environment Court from 1980 to 1985, results at the preliminary conferences were favourable. In 1983 there were 308 (20.9%) matters and in 1984 there were 281 (17.7%) matters disposed of at s 34 conferences. Unfortunately the success of these conferences has declined to only 1.5% in 2005 and 2.4% in 2006. The Court has moved towards other methods of dispute resolution including, mediation and neutral evaluation. Chief Judge Preston regards the operation of the

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<sup>16</sup> Those cases are Class 1 and Class 2 as defined in the *Land and Environment Court Act 1979* (NSW). Class 1 cases are environmental planning and protection appeals (s 17) and Class 2 cases are local government and miscellaneous appeals and applications (s 18).

<sup>17</sup> The Hon Justice BJ Preston, “Conciliation in the Land and Environment Court of NSW: History, Nature and Benefits” (Speech delivered at the ACDC Training Program for Members of the Land and Environment Court of New South Wales on s 34 Conferences in the Land and Environment Court, Sydney, 3 August 2007, available [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_lect.nsf/pages/LEC\\_speeches\\_and\\_papers](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lect.nsf/pages/LEC_speeches_and_papers)), 3.

Court as a “de facto form of multi-door court house” that has the ability to “fit the forum to the fuss”.<sup>18</sup>

### The Federal Court of Australia

9. The Federal Court of Australia introduced a pilot programme in ADR in the New South Wales District Registry of the Court in 1987. The programme was subsequently expanded and many of the Court’s Registrars and several of its Judges undertook specialist training in mediation.<sup>19</sup> By 1996, 1,109 matters had been referred to mediation, 938 (85%) had been completed and 171 (15%) were still current. Of the matters completed, 736 (78%) settled at mediation conferences, 168 (18%) proceeded to trial, and 34 (4%) were transferred to State Courts. Twenty-seven (27) of the matters referred to mediation were mediated by Judges of the Federal Court and 17 (63%) of those matters settled at mediation.<sup>20</sup>
  
10. These figures justified the conclusion that Court-annexed mediation schemes could be effective in promoting high rates of settlement and reducing delay. On the other hand, there was a reluctance amongst Federal Court Judges to act as mediators. In an anonymous survey of the Judges conducted in 1994 a number of judges expressed opposition to the extension of their role. One Judge said:

I think a judge’s role is to judge. I have no problem philosophically with a judge giving some tentative and provisional indication of his view of the factual and

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<sup>18</sup> Ibid 24.

<sup>19</sup> The Hon Chief Justice M Black, “The Courts, Tribunals and ADR: Assisted Dispute Resolution in Australia” (1996) 7 *Australian Dispute Resolution Journal* 138, 138-9.

<sup>20</sup> Ibid 142, 151-2.

legal issues which might assist the litigants in assessing the probabilities and arriving at a settlement. But this has to be done very carefully. The judge has to retain a genuinely open mind, and be seen to do so. Anything that smacks of bullying (however suavely and politely done) in the course of a settlement (however reasonable) is inconsistent with the judicial function.<sup>21</sup>

11. Another Judge observed:

I think that all Australian judges, certainly all members of this Court, are very much aware of the desirability of parties achieving settlements. The policy which I adopt is to foster the idea of settlement discussions as and when this seems appropriate. In some cases it will be entirely pointless; it may be obvious that there is a substantial issue which has to be resolved by a court determination. In other cases the parties may be sophisticated and well represented; an enquiry or hint from time to time may be useful, but anything more may be counter productive. In other cases, it may be obvious that the parties have not addressed the matter of settlement, have overlooked important problems or are not being competently advised. In those cases more direct intervention may be justified. I am not adverse to saying quite bluntly that I think parties ought to become more involved in negotiations. However, I would never get involved in the detail of those negotiations except with the consent of the parties and having first informed them that I would be disqualified from hearing the case if it in fact proceeds....There is a major difference between judicial activism in pretrial preparation, so as to ensure that the issues are clear and that the evidence is all on the table (a situation which is most conducive to meaningful negotiation) and activism which has the judge expressing opinions about the merit of the case, whether of fact or law, before those merits have been adequately canvassed. To take the latter course, will likely lead to the feeling by the litigant disadvantaged by the expressions of opinion that the matter has been prejudged.<sup>22</sup>

12. On 21 May 1990 the *Federal Court Rules* were amended pursuant to s 59(1) of the *Federal Court of Australia Act 1976* (Cth) to insert Order 10 r 1(2)(g), which read:

The Court may:

...

(g) order that the parties attend before a Registrar or a Judge in confidential conference with a view to reaching a mediated resolution of the proceedings or an issue therein or otherwise clarifying the real issues in the dispute so that appropriate directions may be made for the disposition of the matter or otherwise to shorten the time taken in preparation of the trial.

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<sup>21</sup> A DeGaris, "The role of Federal Court Judges in the Settlement of Disputes" (1994) 13 *University of Tasmania Law Review* 217, 228.

<sup>22</sup> *Ibid* 228-9.

13. In June 1991 the *Federal Court Act 1976* (Cth) was amended by the *Courts (Mediation and Arbitration) Act 1991* (Cth). Section 53A was inserted as follows:

53A. Subject to the Rules of Court, the Court may, with the consent of the parties to proceedings in the Court, by order refer the proceedings, or any part of them or any matter arising out of them, to a mediator or an arbitrator for mediation or arbitration as the case may be, in accordance with the Rules of Court.
14. In December 1991 the *Federal Court Rules* were amended to introduce Order 72 entitled “Mediation and Arbitration”, which permits consensual referral to mediation and also allows a Judge to act as a mediator. In December 1992 the *Federal Court Rules* were amended to remove Order 10 r 1(2)(g) and Order 72 was left to govern mediation in the Court. In 1997 s 53A of the Act was amended to allow matters to be referred to mediation with or without the consent of the parties, however referrals to arbitration still required the consent of the parties.
15. Although the provision for judicial mediation remains in force, it is utilised extremely rarely. The Registrars of the Court conduct the mediations and I understand that the very rare use of judicial mediation has been in Native Title cases.<sup>23</sup>
16. There are differing views on the propriety of judicial mediation. It would be of interest to analyse the results of the system introduced recently in the Technology and Construction Court in London. That Court’s Settlement Process, approved by the Lord Chief Justice and the Master of the Rolls allows judges to provide a “service, akin to a mediation, at the request of the

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<sup>23</sup> *Native Title Act 1993* (Cth).



parties".<sup>24</sup> If the judge attempts to assist the parties as a mediator of their dispute and the matter does not settle then the judge is prohibited from having anything further to do with that case. The prohibition on a judge having anything further to do with a case in which settlement is not reached seems to me to be a clear recognition of the principle that justice should not only be done but must also appear to be done. The fact that a judge has met in secret or private with parties and their legal representatives during the mediation process is the reason for the prohibition. Once a judge has private or secret communications with not only the parties but also the practitioners and is precluded from disclosing the content of those secret communications to any other person, it seems to me that the perception of impartiality is compromised.

17. The perception of impartiality in the judiciary stems in part from the fact that judges administer justice in open court. Members of the public are able to see judges performing judicial duties, hear the judges' communications with representatives of the respective parties and read the reasons for the judge's decision. There is a real question whether the system of open justice is able to accommodate judges brokering deals in private.<sup>25</sup> This is an interesting area and will no doubt be the subject of further discourse.

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<sup>24</sup> His Honour Judge Peter Coulson QC, *The Technology and Construction Court* (2006) Sweet & Maxwell, 72-73.

<sup>25</sup> The Hon Sir L Street AC, KCMG, QC, "Mediation and the Judicial Institution" (1997) 71 *Australian Law Journal* 794.

## Victoria

18. In 1992 Chief Justice Phillips of the Supreme Court of Victoria introduced what was colloquially referred to as the “Spring Offensive”. A panel of Judges was appointed to review 762 matters awaiting trial, of which 280 cases were referred to mediation, 104 of which settled at mediation (37%).<sup>26</sup> In the “Autumn Offensive” in 1994, approximately 150 long-running cases were referred to mediation 79.35% of which settled.<sup>27</sup> Short-term initiatives like these “Offensives” and the “settlement weeks” in New South Wales and Queensland in the early 1990s provided the profession and the Courts valuable exposure to and experience with mediation.<sup>28</sup>
  
19. Participation in Court ordered mediation has since become a common feature of litigious procedure in the Victorian Supreme Court. Some years ago when the present Chief Justice of the Supreme Court of Victoria, Chief Justice Marilyn Warren, was hearing commercial cases as a puisne judge, her Honour said:

Mediation is almost always ordered whether the parties desire it or not. I have been told so many times by parties that “the case is not one suitable for mediation”, nevertheless I have referred it and lo and behold it has settled. I have to say there is a very high success rate with court ordered mediations in the Commercial List. My experience informs me that this is largely due to the skill of senior mediators, particularly those retained from the senior Bar.<sup>29</sup>

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<sup>26</sup> J North, “Court Annexed Mediation in Australia – an Overview” (Speech delivered to the Malaysian Law Conference, Kuala Lumpur, 17 November 2005), 2.

<sup>27</sup> GH Golvan QC, “A decade of mediation – the promise fulfilled?” (2000) 18(3) *The Arbitrator* 136, 140.

<sup>28</sup> H Astor and C Chinkin, *Dispute Resolution in Australia* (2002) 254-6.

<sup>29</sup> The Hon Justice M Warren, “Commercial Litigation and the Commercial List in the Supreme Court of Victoria” (Speech delivered at the Law Institute of Victoria, 23 July 2001, available <http://www.supremecourt.vic.gov.au/CA256CC60028922C/page/Publications-Speeches?OpenDocument&1=70-Publications~&2=20-Speeches~&3=~>), 7.

20. The current mediation policy of the Victorian Supreme Court is reflected in Chief Justice Warren's following statement:

It should be stressed that mediation is not an inferior type of justice. It is a different type of justice. All studies of dispute resolution show that people greatly value quick resolution of disputes and the opportunity to put their case in the presence of a neutral person. Mediation satisfies both these requirements.<sup>30</sup>

### New South Wales

21. In 1985, the Honourable Sir Laurence Street AC, KCMG, QC, then Chief Justice of the Supreme Court of New South Wales established an informal ADR planning committee which included the then Chief Judge of the Commercial Division of the Supreme Court the Honourable Justice A Rogers, representatives from a number of the leading law firms and the New South Wales Attorney General's Department. This committee established the framework for what became the Australian Commercial Disputes Centre (ACDC), an independent, not-for-profit organisation promoting non-adversarial dispute resolution processes in Australia.<sup>31</sup>
22. In 1994, the New South Wales Parliament enacted the *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW) which introduced identical amendments into the governing statutes of the Supreme Court, the Industrial Relations Commission, the Land and Environment Court, the

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<sup>30</sup> The Hon Justice M Warren, *Mediation in the Supreme Court*, Supreme Court of Victoria, <http://www.supremecourt.vic.gov.au/CA256CC60028922C/page/Support+Services-Mediation?OpenDocument&1=80-Support+Services~&2=10-Mediation~&3=~>.

<sup>31</sup> The Hon Sir L Street AC, KCMG, QC, "Evolution of Commercial ADR in Australia" (2005) 79 *Australian Law Journal* 765, 766-7; Australian Commercial Disputes Centre, *Our History*, <http://www.acdcld.com.au/4189,01,1-0-History.php>.

District Court, the Workers Compensation Court and the Local Court. The new Part 7B of the *Supreme Court Act 1970* (NSW) included:

#### **Referral by Court**

**110K (1)** The Court may, by order, refer a matter arising before it (other than criminal proceedings) for mediation or neutral evaluation if:

- (a) the Court considers the circumstances appropriate; and
- (b) the parties to the proceedings consent to the referral; and
- (c) the parties to the proceedings agree as to who is to be the mediator or evaluator for the matter.

**(2)** The mediator or evaluator may, but need not be, a person whose name is on a list compiled under this Part.

23. In 1999 the Council of Australian Chief Justices adopted a formal *Declaration of Principles on Court Annexed Mediation* which included the following:

- Mediation is an integral part of the Court's adjudicative processes and the "shadow of the court" promotes resolution.
- Mediation enables the parties to discuss their differences in a co-operative environment where they are encouraged but not pressured to settle so that cases that are likely to be resolved early in the process can be removed from that process as soon as possible.
- Consensual mediation is highly desirable but, in appropriate cases, parties can be referred where they do not consent, at the discretion of the Court.
- The parties should be free to choose, and should pay, their own mediator, provided that when an order is sought for such mediation the mediator is approved by the Court.
- Mediation ought to be available at any time in the litigation process but no referral should be made before litigation commences.
- In each case referral to mediation should depend on the nature of the case and be in the discretion of the Court.
- Mediators provided by the Court must be suitably qualified and experienced. They should possess a high level of skill which is regularly assessed and updated.
- Mediators must have appropriate statutory protection and immunity from prosecution.

- Appropriate legislative measures should be taken to protect the confidentiality of mediations. Every obligation of confidentiality should extend to mediators themselves.
- Mediators should normally be court officers, such as Registrars or Counsellors rather than Judges, but there may be some circumstances where it is appropriate for a Judge to mediate.
- The success of mediation cannot be measured merely by savings in money and time. The opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation.<sup>32</sup>

24. The *Supreme Court Amendment (Referral of Proceedings) Act 2000* (NSW) amended s 110K of the *Supreme Court Act 1970* (NSW) to provide for referral of matters to mediation without the consent of the parties. That amendment included the following:

**110K Referral by Court**

(1) If it considers the circumstances appropriate, the Court may, by order, refer any proceedings, or part of any proceedings, before it (other than any or part of any criminal proceedings) for mediation or neutral evaluation, and may do so either with or without the consent of the parties to the proceedings concerned.<sup>33</sup>

25. In 2000 the Chief Justice of the Supreme Court of New South Wales, the Honourable Chief Justice JJ Spigelman, speaking extra-curially, said that mediation was intended to “ensure the early resolution of disputes” and that the Court would “keep a watchful eye to ensure that references to mediation do not add to delays in finalising matters”. In the same address the Chief Justice also commented upon compulsory mediation as follows:

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<sup>32</sup> The Hon Chief Justice JJ Spigelman, “Address to the LEADR Dinner – University and Schools’ Club Sydney” (Speech delivered to the LEADR Dinner, Sydney, 9 November 2000, available [http://infolink/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speeches](http://infolink/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches)).

<sup>33</sup> This has been replicated in the *Civil Procedure Act 2005* (NSW) s 26.

In one sense, the idea of a compulsory mediation is a contradiction in terms. To be successful a mediation process requires consensus.

Notwithstanding the 'contradiction in terms', there are precedents for compulsion of mediation. Indeed any contractual arrangement which requires mediation, as is frequently the case, is in one sense a compulsion of this character, albeit one agreed consensually at a time when the possibility of dispute was far from the contracting parties' minds. Some legislative schemes have included provision for compulsion. I refer in particular to the *Farm Debt Mediation Act* and the *Retail Leases Act*. The Federal Court and the Supreme Courts of South Australia, Victoria and Western Australia have for some time had power to refer matters to mediation over the objection of one or both of the parties.

No doubt it is true to say that at least some people, perhaps many people, compelled to mediate will not approach the process in a frame of mind likely to lead to a successful mediation. There is, however, a substantial body of opinion - albeit not unanimous - that some persons who do not agree to mediate, or who express a reluctance to do so, nevertheless participate in the process often leading to a successful resolution of the dispute.

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. I formed the view that a power of the character now conferred on the court by Parliament was a useful addition to the armory of the court to achieve its objectives.<sup>34</sup>

26. The statutory power of referral to mediation without consent caused consternation in the profession. The change was referred to as "radical" and "most undesirable as a matter of principle".<sup>35</sup> It was argued that a "forced process of mediation" had the potential to erode respect for the rule of law especially if the power to order compulsory mediation was exercised frequently. There was a suspicion that judges would be tempted to exercise

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<sup>34</sup> Spigelman, above n 32.

<sup>35</sup> B Walker SC and AS Bell, "Justice According to Compulsory Mediation", *Bar News*, Spring 2000, 7.

the power frequently in times of pressure on the courts to “up their productivity”.<sup>36</sup> The Productivity Commission in Australia interests itself in Court administration and applies jargonistic epithets such as “key performance indicators”, “outputs” and “backlog indicators” to the work of the Courts. It refers to mediation as a “diversion program” and in its most recent report reached the exquisitely obvious conclusion that a successful mediation “generally finalises cases earlier than if finalised by trial and judgment”. However it was unable to describe the effect of unsuccessful mediations on “timeliness” other than to say it was “highly variable”.<sup>37</sup>

27. The profession’s concern in relation to non-consensual mediation has proved to be without foundation. Seven years later the evidence establishes that few matters are referred to mediation without the consent of all parties. Judges exercising the power under s 110K and its later equivalent<sup>38</sup> to refer matters to mediation without the consent of the parties have to consider all the circumstances of the case.
28. The case of *Yoseph v Mammo*<sup>39</sup> involved a dispute about a family home in which the mother (the plaintiff) and three children (the three defendants) had been registered as joint tenants. The mother claimed that she alone was beneficially entitled to the property. On the first morning of the trial, the third defendant made an application under s 110K to have the matter referred

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<sup>36</sup> Ibid 8.

<sup>37</sup> Productivity Commission, *Report on Government Services 2007*, <http://www.pc.gov.au/publications>, 6.28.

<sup>38</sup> *Civil Procedure Act 2005* (NSW) s 26.

<sup>39</sup> [2002] NSWSC 585.

to mediation. The application was opposed by the plaintiff and the first and second defendants on the grounds that they were ready for the matter to proceed to hearing and feared that the delay caused by a futile mediation would only prolong and increase the stress on the elderly fragile plaintiff. Barrett J referred the matter to mediation and made the following observations:

9 My view is that this is the very kind of case for which s.110K is designed. The parties to this litigation are members of a family, a mother and three of her children. They are apparently all still on speaking terms and possess a proper concern for one another's welfare. This is not, as I perceive it at this point, the unfortunate kind of case which often comes before the court where family members no longer have respect for one another and are at loggerheads in an unseemly way. This family, as I see it, maintains its dignity and mutual respect.

10 Persons in that situation are, I think, best able to benefit from the opportunities that mediation presents. The flexibility of the process and its capacity to get around entrenched legal position taking is its beauty and a feature which can, I think, be particularly beneficial in a context such as the present.....

11 When the totality of the circumstances of this case is examined, it becomes clear, in my view, that the parties are likely to be assisted by a compulsion upon them to engage in mediation. The compulsion will break the ice which may well have caused them to desist from mediation to this point, even though its possibility was referred to in directions made by the registrar in October last year. Once that ice is broken, the relationships between the parties and the natural affection that they bear to one another may well take over in a beneficial way that causes a productive solution to emerge. It is always better for parties - particularly those closely related to one another - to live with a solution that they themselves have found, with or without outside assistance, than it is for them to come away from court with some having won and others having lost. The mediation opportunity is therefore one which should be grasped and in which the parties should make up their minds to engage constructively, now that the court has decided that that is where they should go."<sup>40</sup>

29. That same judge said in an earlier case, *Morrow v chinadotcom*:

[44] The clearly stated preference of one party to continue with the litigation which that party sees as the most appropriate means of dispute resolution must cause a Court to think very carefully before compelling what, on the face of things, may well turn out to be an exercise in futility attended by delay and expense. There will no doubt be some cases where such a course will be justified:

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<sup>40</sup> [2002] NSWSC 585 at [9] - [11].



where for example, the Court perceives the emotional or other non-rational forces (including unreasonable intransigence) are at work and a proper sense of proportion may be introduced into the picture by the efforts of a third party skilled in conciliation.

[45] The present proceedings involve commercial parties engaged in a commercial transaction. They may be taken to possess a reasonable degree of business sophistication and acumen. Presumably they (and certainly their respective solicitors) are well aware of the potential benefits, in many cases, of mediation and other non-curial resolution processes. If, with the benefit of that knowledge and advice of their solicitors, they do not all see sufficient value in resort to some alternative procedure of their own choosing there is, it seems to me, very little, if anything, that is likely to be gained by the Court compelling them to pay lip service to it.

[46] While the abstract pros and cons of compulsory mediation have been discussed elsewhere...the Court's task in a particular case is to assess the situation before it. My assessment in this case is that mediation forced upon one of the parties, rather than voluntarily embraced by all of them, would be unlikely to achieve anything useful.<sup>41</sup>

30. I respectfully agree with Barrett J's observations in relation to commercial parties having business sophistication, acumen and understanding of the benefits of ADR. Notwithstanding those attributes I have referred commercial parties in two matters to mediation over the objection of one party.
31. The first was a case brought by an Owners Corporation which managed a building that included a hotel.<sup>42</sup> The Corporation sought strata levies from the owner/lessor of the Lot in which the hotel was located. The owner/lessor cross-claimed against the hotelier/lessee for indemnity for the levies under the terms of the lease. The hotelier/lessee cross-claimed against the owner/lessor seeking damages for business interruption allegedly caused by defective building works. There was also a cross-claim by a former director

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<sup>41</sup> *Morrow v chinadotcom* [2001] NSWSC 209, [44]-[46].

<sup>42</sup> *Baker v McGlynn* (Unreported, Supreme Court of New South Wales, Bergin J, 20 October 2006).

of the owner/lessor against the managing director of the lessor in relation to liability under the lease.

32. This matter commenced in the District Court and was ultimately transferred to the Commercial List in the Supreme Court. There had been numerous interlocutory skirmishes with freezing orders in place. The litigation was vigorously fought by all parties and it appeared that personal acrimony had developed. The parties even disagreed about the extent of the order for mediation and returned to Court for further debate. On that occasion I expressed the view that the parties had a better chance to reduce their costs by going to mediation.<sup>43</sup> It is always difficult to refer matters to mediation when parties are less than wedded to the idea, but experience shows that when at least one of the parties is keen to try and settle, sometimes, notwithstanding the lack of consensus, matters settle. I ordered the whole of the proceedings be referred to mediation. In this case the mediator was a retired judge with judicial experience in commercial matters and on the Court of Appeal after a distinguished career at the Bar. The matter settled in its entirety.

33. The other case was a complex matter in relation to a major construction project.<sup>44</sup> The plaintiff/owner commenced proceedings against the defendant/builder who cross claimed against a number of sub-contractors and architects. The claims related to contractual variations and cost overruns

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<sup>43</sup> *Baker v McGlynn* (Unreported, Supreme Court of New South Wales, Bergin J, 2 November 2006).

<sup>44</sup> *Estate Property Holdings v Barclay Mowlem Constructions* (Unreported, Supreme Court of New South Wales, Bergin J, 9 June 2006).

arising from allegedly defective works and included allegations of misleading or deceptive conduct. The matter was plagued by interlocutory motions in relation to discovery. The plaintiff resisted an order for mediation on the ground that its presence would not assist the mediation. Notwithstanding the plaintiff's resistance the matter was referred to mediation and all matters between all parties settled at that mediation. Both of these cases referred to mediation non-consensually were well advanced towards a trial or final hearing. The parties had a very good idea of their opponents' cases and were in a position to make judgments in relation to the relative strengths and weaknesses of their respective cases.

34. The power to order non-consensual mediation has been exercised sparingly, mainly because it is now rare that parties resist referral to mediation. May I suggest that jurisdictions that are considering the introduction of such a power may find that the Australian experience will assist their resolve to introduce it.

### **Online Mediation**

35. The Law Council of Australia is presently conducting a trial of an online chatroom-style mediation facility. Their "Online Mediation Platform"<sup>45</sup> provides secure access to different 'rooms' for different lines of communication: a 'room' for private communications with a mediator, a 'room' for communications with the mediator and the other parties and a

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<sup>45</sup> This is a repackaged version of "The Mediation Room" system developed by a UK company: *The Mediation Room*, <http://www.themediationroom.com/>.

'room' for communications just between the parties and their legal representatives. Some practitioners have been trained in online dispute resolution (ODR) and it has recently been introduced as a teaching tool at the College of Law, a college at which law graduates complete a practical legal training course prior to admission as legal practitioners.<sup>46</sup> This facility and ODR are promoted as "cutting edge" and it is hoped that the system will not be restricted simply to mediation but will also be used in long distance arbitrations and for exchange of information in all ADR procedures.<sup>47</sup>

36. The Law Council of Australia's trial will conclude in February 2008, but as yet it has not identified the demographic that would benefit most from ODR. It is probable that many of the Tribunals that have been established for the resolution of disputes between consumers, traders and landlords and tenants may well be suited to the use of such technology.

### **Nomenclature**

37. As the ADR industry develops and reaches into cyberspace, ADR practitioners are offering a broader range of services. One area that has developed is that of "facilitation". Facilitation has been used in the commercial world for many years with corporations and their boards using facilitators to assist them with strategic planning and other aspects of their daily commercial lives. The facilitator guides the commercial entity through

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<sup>46</sup> The College of Law programme is analogous to Hong Kong's Postgraduate Certificate in Laws.

<sup>47</sup> Law Council of Australia, *Online Mediation Platform*, <http://www.lawcouncil.asn.au/>.

discussion to achieve a consensus and/or majority view as to how best to approach aspects of commercial life and/or deals.

38. In the ADR world facilitation has been described as a process embarked upon to choose a process for the resolution of a dispute.<sup>48</sup> The facilitator meets with the parties for the purpose of assisting them to reach a consensus as to the most appropriate process to try to resolve their dispute. It seems to be a precursor to mediation and/or arbitration and/or further negotiations and the facilitator may then move into different roles including as mediator or arbitrator or neutral evaluator, should the parties wish that to occur. Caution should be exercised in the adoption of additional labels and the definition of those labels to ensure that ADR is not plunged into the “fog” that threatened to engulf it in the early 1990s.<sup>49</sup> However, having said that, there have been cases in the Supreme Court of New South Wales which were so complex that “facilitators” have been utilised by the parties for the purpose of narrowing the issues in dispute and producing an agenda for resolution by the parties in negotiation without the intervention of a mediator. This has occurred in very large and complex multi-party litigation involving numerous and complex causes of action.

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<sup>48</sup> See, eg, Strategic Action, *Strategic Resolution – Dispute Resolution – Facilitation*, <http://www.strategic-resolution.com/facilitation1.html>.

<sup>49</sup> The Hon Sir L Street AC, KCMG, QC, “The Language of Alternative Dispute Resolution” (1992) 66 *Australian Law Journal* 194.

## Regulation

39. The Law Council of Australia has developed ethical guidelines for both mediators and legal practitioners at mediations.<sup>50</sup> Presently there is no compulsory national system for the accreditation of mediators in Australia,<sup>51</sup> although there is work in progress developing such a regime.
40. In March 2004 NADRAC suggested that any national accreditation system of mediators should be guided by four major policy objectives: (1) enhancement of the quality and ethics of mediation; (2) protection of consumers; (3) development of consumer confidence in mediation; and (4) building of capacity and coherence in the field.<sup>52</sup> A Commonwealth Government Grant administered by the National Mediation Conference Limited (the Conference) was provided to facilitate discussion on appropriate national accreditation standards for mediators in Australia. The Conference is presently implementing a scheme, approved in 2006, for national accreditation of mediators. The scheme includes uniform requirements for training and education as a prerequisite to national accreditation; continuing education, training and practice for the maintenance of that accreditation; and the development of national standards. The implementation phase will include

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<sup>50</sup> Law Council of Australia, *Ethical Guidelines for Mediators* (2006) <http://www.lawcouncil.asn.au/policy/1957353025.html>.

<sup>51</sup> However organisations such as the Institute of Arbitrators and Mediators Australia (IAMA) and the Association of Dispute Resolvers (LEADR) and professional bodies such as the Law Society of New South Wales and the Victorian Bar provide their own accreditation schemes. In the Australian Capital Territory the relevant Minister may declare standards of competency required for the registration of mediators: *Mediation Act 1997* (ACT).

<sup>52</sup> National Alternative Dispute Resolution Centre, *Who says you're a mediator?: Towards a national system for accrediting mediators* (2004) [http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Who\\_says\\_you&apos](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Who_says_you&apos).

the auditing of all mediation organisations and the establishment of a national register of accredited mediators. The scheme also includes the introduction of a system to deal with complaints against mediators.<sup>53</sup>

### **Pitfalls**

41. One of the pitfalls for Court-referred mediation is the referral of the matter to mediation when the parties, although consenting to the referral, are not really minded to settle their differences. It seems to me that the way to avoid this pitfall is to constantly monitor the cases that are referred to mediation with reference to the stage at which they are referred, to enable a judgment to be made as to the most appropriate time in the litigious process to refer a matter to mediation. Another mechanism of avoiding this pitfall would be to follow the lead of the King's College London<sup>54</sup> and conduct a survey of the users of both the court annexed mediation system and those that utilise the private mediation system. In the Supreme Court of New South Wales there is presently no "customer survey" after completion of the mediation but this matter is presently under consideration in the ADR Steering Committee.

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<sup>53</sup> L Boule et al, 'Mediator Accrediation in Australia' (Report to the 8th National Mediation Conference, Hobart, Australia, 3-5 May 2006, available at <http://www.mediationconference.com.au/html/Accreditation%20Report%20and%20Proposal.doc>) 10.

<sup>54</sup> King's College London is conducting research including an evidence-based survey with the support and assistance of the Technology and Construction Court. It is hoped that the research will: reveal the circumstances in which mediation is "a real alternative to litigation"; assist the Court to determine whether, and at what stage to mediate; and identify particularly successful mediation techniques. In its Interim Report, the College has concluded that mediation is being used successfully in construction disputes; mediations are being undertaken on the parties' own initiative; and that mediations are occurring at several distinct points of the litigious process. The final report will be available towards the end of 2008: N Gould, *Mediation in Construction Disputes: An Interim Report* (2007), <http://www.ciob.org.uk/filegrab/FenwickElliott-MediationinConstructionDisputes-AnInterimReport.pdf?ref=500>.

## **Confidentiality**

The parties to private mediations sign mediation agreements prepared by the mediators in which they agree to the confidentiality of the mediation process. When a matter is referred to a mediator by the Court, the mediator has the same immunity as a judicial officer<sup>55</sup>. A mediator may disclose information in circumstances which include: with the consent of the person from whom the information was obtained; and if it is reasonably required for the purpose of aiding in the resolution of the dispute between the parties<sup>56</sup>. A mediator may be called to give evidence limited “as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement” that was reached at the mediation<sup>57</sup>. However anything said or any admission made in a mediation is not admissible in any proceedings before any court or other body. Any document prepared for the purpose of, or in the course of, or as a result of the mediation (or any copy thereof) is not admissible in any such proceedings<sup>58</sup>. However such prohibition does not apply if there is consent to the tender of such material<sup>59</sup>.

## **Cost**

42. Complex commercial and construction litigation has borne the brunt of criticism that it is too costly. When he was Chief Judge of the Commercial Division of the Supreme Court of New South Wales, Justice Rogers made the following observation:

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<sup>55</sup> *Civil Procedure Act 2005* (NSW) s 33.

<sup>56</sup> *Civil Procedure Act 2005* (NSW) s 31.

<sup>57</sup> *Civil Procedure Act 2005* (NSW) s 29.

<sup>58</sup> *Civil Procedure Act 2005* (NSW) s 30(4).

<sup>59</sup> *Civil Procedure Act 2005* (NSW) s 30(5)(a).



Complex commercial cases were assuming the proportions of medieval battle trains. The trolleys of photocopied documents in arch levers, the battery of partners, employed solicitors and paralegals with their portable telephones to call for reinforcements, the lap top computers to spew out even more information, were not only stretching court accommodation to the point where a usually spacious courtroom was insufficient to provide the necessary elbow room but where both cost and character were transforming a complex commercial case into a major Hollywood production. I may remark, in parenthesis, that it is somewhat ironic that at the end of the day, the presentation of the case having called for this battery of talent, one person, the judge, is required to produce an answer, which will then be subjected to searching analysis by the same battery of lawyers and their associates for flaws and blemishes. To adapt the cry from the witness to the charge of the Light Brigade: "It is magnificent but is it justice?"<sup>60</sup>

43. Fourteen years later Chief Justice Spigelman was critical of the cost of discovery in commercial litigation.<sup>61</sup> This criticism needs to be viewed in the light of the amounts at stake and the complexity and importance of the litigation, however the judiciary and the profession need to develop mechanisms for making the cost of commercial litigation proportionate to the importance of the subject matter in dispute.<sup>62</sup>
44. It is important that the Courts, in particular, and the profession generally, utilize the mediation process cost-effectively. The Courts and the profession should strive to avoid increasing costs by referring matters to mediation before the optimum or *ripe* time. One of the problems for the judiciary and the profession is the dearth of empirical data as to the *ripe* time to refer a matter to mediation. There are so many factors that might affect the outcome of a mediation including the type of case; the relationship between the parties; the

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<sup>60</sup> The Hon Justice A Rogers, "The Managerial or Interventionist Judge" (1993) 3 *Journal of Judicial Administration* 97, 101.

<sup>61</sup> The Hon Chief Justice JJ Spigelman, "Access to Justice and Access to Lawyers" (Speech delivered at the 35<sup>th</sup> Australian Legal Convention, Sydney, 24 March 2007, available at [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speeches](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches)).

<sup>62</sup> The Hon Justice PA Bergin, "Litigation and Globalisation" (Speech delivered at the Young Lawyers Litigation Seminar, Sydney, 24 March 2007, available at [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speeches](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches)).

history between the parties; the amounts in dispute; the relative financial position of the parties; and, of course, the will to settle.

45. There has been some reticence in relying upon settlement rates as an indicator of the effectiveness of an ADR program and the suggestion has been made that the cases that settle at mediation “might well have settled anyway, as most do”. This suggestion stems from the fact that the vast majority of cases that are commenced do not go to trial.<sup>63</sup>
46. The Supreme Court of Victoria’s seasonal “Offensive” approach targeted the oldest cases and achieved high rates of settlements, however nothing further than longevity is known about the attributes of each of those cases. The early conciliations in the Land and Environment Court of New South Wales in the early 1980s and the early mediations in the Federal Court of Australia in the late 1980s and early 1990s achieved high settlement rates, but once again little is known about the cases that settled.<sup>64</sup>
47. Identification of the *ripe* or optimum time for settlement is a complex process because it may be different in different types of matters, for example, a case involving a small amount of money and a family dispute may well be able to be settled earlier than multi-issue complex litigation between corporate leviathans. The reason for attempting to identify the optimum or *ripe* time for referral to mediation is so that costs expended in unsuccessful mediations can

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<sup>63</sup> K Mack, *Court Referral to ADR: Criteria and Research* (2003) National Alternative Dispute Resolution Advisory Council/Australian Institute of Judicial Administration, available <http://www.nadrac.gov.au/agd/WWW/disputeresolutionhome.nsf/Page/Publications>, 19.

<sup>64</sup> See Part I of this Paper.

be avoided. Having said that, it is not a precise science, and it would not be sensible to declare hard and fast rules because there are so many factors that will affect the outcome of a mediation. The research available in Australia to date does not assist in identifying the *ripe* time at which a dispute should be mediated. Notwithstanding the reticence that exists in relation to reliance on settlement rates, I intend now to analyse some empirical data from the Supreme Court of New South Wales to explore the topic of the *ripe* time for mediation.

### **A recent Snapshot - the *Ripe* time for mediation**

48. There are two Trial Divisions in the Supreme Court of New South Wales – the Common Law Division and the Equity Division.<sup>65</sup> In each Division cases are managed in various Lists. The judge in charge of each of the Lists, known as the List Judge, case manages the matters in the List. I will concentrate on the Lists of which I am the List Judge, the Commercial List and the Technology & Construction List (the Lists).<sup>66</sup>
49. The cases in the Lists include claims in contract and/or tort, claims for equitable relief and/or damages, allegations of misleading or deceptive conduct under relevant Commonwealth and State statutes, and claims for specific performance and/or final injunctions. The disputes usually involve

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<sup>65</sup> Prior to 1998 there were numerous Trial Divisions to which cases were allocated. In 1998 the structure of the Divisions was changed to abolish all but two Trial Divisions with cases allocated to specialist Lists within those Divisions.

<sup>66</sup> The Chief Justice issues Practice Notes from time to time, including Practice Notes that govern the operation of the various Lists. Practice Note SC Eq 3 governs the Lists: Supreme Court of New South Wales, *Practice Note SC Eq 3 – Supreme Court Equity Division – Commercial List and Technology and Construction List*, [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_procedures](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_procedures).

very large amounts of money and most involve numerous parties with numerous and complex issues for determination. Mediation is encouraged and parties are required to advise the Court at the commencement of proceedings whether they have mediated prior to the litigation, and irrespective of whether they have already mediated, whether they are willing to consent to the matter being referred to mediation at a suitable time.

50. The Court provides a mediation service in which the Registrars, who are trained mediators, mediate disputes referred to them by the Court. It is extremely rare for any parties in the Lists to request a referral to the Court-annexed mediation service because they usually prefer to utilise the services of private mediators of their own choice at their own cost. These mediators include retired judges, legal practitioners and various other experts.
51. The phenomenon of the *ripe* time – the optimum time at which the case is more likely to settle at or by reason of the mediation – is rather elusive. Some suggest an early referral to mediation prior to costs being expended in the litigious process when parties can feel they will save money by reaching a commercial outcome; others suggest a later referral, after parties have seen the strengths and weaknesses of the respective cases and feel more comfortable about reaching a commercial outcome. These suggestions have been made anecdotally without the benefit of empirical data to support either position. For instance it was suggested recently that parties should mediate “as early as possible” because:

Any advantage in waiting until a dispute has proceeded to the point at which lawyers can advise fully (and disagree) on prospects is outweighed by other considerations; for example, the outcome will still be unpredictable, the costs incurred will have made settlement more difficult and the contentious exchanges in the course of the litigation will quite often have created ill-will between the parties and their lawyers.<sup>67</sup>

52. This seems to be a rather powerful suggestion from the perspective of common sense and logic, however this Conference has presented an opportunity to provide empirical data to test whether the *ripe* time to refer a matter to mediation is earlier rather than later.<sup>68</sup> Some have suggested that ADR processes should not be compartmentalised into specific stages of the litigious process.<sup>69</sup>
53. The cases in the Lists that have been referred to mediation have been analysed, focussing on the stage of the litigious process at which the case was referred to mediation and whether the case settled at mediation or soon thereafter. The conclusions to be drawn from these raw figures, without consideration of other aspects and input from the parties, of course, have limitations. However with this caveat in mind I intend to analyse the matters in the Lists that were referred to mediation in the period 1 January 2006 to 1 June 2007 (the Period). I will also refer to the outcomes of mediations in the Court-annexed mediation system in non-commercial/construction matters during the Period.

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<sup>67</sup> The Hon T Fitzgerald AC, QC, "Mediation: Why, When & How" (Address delivered at the New South Wales Committee of the Australian Insurance Law Association seminar, Sydney, 22 November 2007).

<sup>68</sup> With the assistance of the Commercial List Researcher, David Greenberg, and my Tipstaff, Adrian Bright.

<sup>69</sup> Australian Law Reform Commission, *Managing Justice: A review of the Federal Civil Justice System*, Report No 89 (2000) [6.62].

54. During the Period there were 98 matters referred to mediation; 65 matters in the Commercial List and 33 matters in the Technology & Construction List. Only 2 of those matters were referred without the consent of both parties.<sup>70</sup> Only 37 of the matters referred settled at mediation, which equates to a settlement rate of approximately 38%.<sup>71</sup>
55. In the analysis of the cases referred to mediation from the Lists, the stages of the litigious process at which the cases were referred to mediation have been categorised as:
- the *preliminary* stage – in which the parties are finalising their pleadings;
  - the *intermediate* stage – during which discovery/disclosure and other interlocutory steps occur; and
  - the *advanced* stage – during which the parties are preparing evidence and the trial date has been set.<sup>72</sup>
56. Of the 37 matters that settled at mediation:
- 8 (22%) matters were referred to mediation at a preliminary stage;
  - 11 (30%) matters were referred to mediation at an intermediate stage; and

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<sup>70</sup> These matters are discussed in detail in Part I of this Paper.

<sup>71</sup> See Appendices 1 and 2.

<sup>72</sup> These stages are similar to the “pinch points” identified in the King’s College London research: see N Gould, *Mediation in Construction Disputes: An Interim Report* (2007), <http://www.ciob.org.uk/filegrab/FenwickElliott-MediationinConstructionDisputes-AnInterimReport.pdf?ref=500>. There are cases in the Lists in which a trial date is set quite early in the proceedings.

- 18 (48%) matters were referred to mediation at an advanced stage.<sup>73</sup>
57. An analysis of the total cases that were referred to mediation (98) at each of the stages is also instructive:
- 30 matters were referred at a *preliminary* stage and 8 (27%) settled;
  - 38 matters were referred at an *intermediate* stage and 11 (29%) settled; and
  - 30 matters were referred at an *advanced* stage and 18 (60%) settled.<sup>74</sup>
58. In respect of the cases that did not settle at mediation (61):
- 22 (36%) had been referred to mediation at a *preliminary* stage;
  - 27 (44%) had been referred to mediation at an *intermediate* stage; and
  - 12 (20%) had been referred to mediation at an *advanced* stage<sup>75</sup>.
59. An analysis of the progression of the cases that did not settle at mediation suggests that the vast majority (72%) go to trial with only 15% settling within 6 months of the mediation and the balance (13%) settling more than 6 months after mediation.<sup>76</sup>
60. As I have already said the drawing of inferences and conclusions from raw statistics is never satisfactory and in an area such as this, where mediations

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<sup>73</sup> See Appendices 3 and 4.

<sup>74</sup> See Appendices 5 and 6.

<sup>75</sup> See Appendices 7 and 8.

<sup>76</sup> See Appendices 9 and 10.

are conducted in private with confidentiality regimes, the conclusions and inferences are bedevilled by even more uncertainty.

61. An analysis of the figures from the Court-annexed mediation system for the Period demonstrates that the settlement rate is 21% higher than the settlement rate of mediations of cases referred to private mediators from the Lists.<sup>77</sup> The nature of the cases that are mediated within the Court-annexed system are quite different from those that are referred to mediation from the Lists. In the former, the cases usually involve claims for financial and other provision for members of a family out of a deceased estate and/or adjustment of property rights in respect of de facto relationships in which the parties are individuals and in the main are not experienced negotiators.<sup>78</sup> In the latter the cases are complex multi-party, multi-issue disputes involving very large amounts of money in which the parties are usually very experienced commercial operators with well-honed negotiation skills. There is the added factor in these cases that those who make the decision to settle at mediation may have to explain their decision to others, for instance, board members or shareholders.
62. These comparative figures provide some support for the proposition that certain types of disputes are more amenable to mediation than others. There will of course be other factors affecting the outcome of mediations; for instance, the Commercial List is known as the “fast track” of litigation and the

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<sup>77</sup> See Appendix 11.

<sup>78</sup> *Family Provision Act 1982 (NSW); Property (Relationships) Act 1984 (NSW)*.



parties who are referred to mediation know very well that even if they are unable to settle their differences at mediation they will obtain a speedy resolution of their dispute by the Court. There is also the prospect that these commercial parties may wish to pursue the strategy of litigation for competitive or commercial reasons whereas those parties in the General List involving family disputation may not see any strategic advantage in staying in the Court system in dispute with their siblings or parents. The area of law in those cases is also much narrower and more certain with the ambit of remedies set by statute.

63. The factors that may affect parties' decisions to reach a settlement at mediation may include: the cost of the litigation; the cost of the mediation; the nature of the relationship between the parties; the desire (or lack of it) to continue in a commercial relationship with the other party; the concern about possible publicity; the financial capacity to continue with the litigation; the existence of other projects on which the funding required for the litigation may be otherwise spent; the desire to avoid a public hearing; the presence of a trial date; the perceived strengths or weaknesses of the party's case and that of the opponent(s); and possibly the identity of the mediator.
64. The majority of these factors will be present at an early stage of the litigious process. The judgment about the strengths or weaknesses of the respective cases will be able to be made with far more precision at the advanced stage of the litigious process. Accordingly when matters are referred to mediation at an early stage of the litigious process it seems that commercial factors may

impact upon the decision to settle. The legal representatives of the parties are in a far better position than the Court to know whether there is enough impetus for their clients to settle at mediation and the Court depends upon practitioners to assist in identifying the *ripe* or *riper* time for referral to mediation.

65. Although this was a relatively small sample, these figures show an interesting trend. It appears that the later a case is referred to mediation the greater the chance of settlement. You may think that this is consistent with common sense. As cases progress towards final hearing, parties have access to more information and proposed evidence and are in a position to better appreciate the strengths and weaknesses of their own cases and those of their opponents. This may provide an impetus to settle, whereas parties attending mediation without knowing the evidentiary weaknesses of their cases may feel more constrained in their approaches to settlement. The setting of a trial date is also an important factor that seems to focus the parties' minds on the necessity to make firm decisions in respect of their disputes.
66. There are cases that settle when the true strengths and/or weaknesses of the respective cases are not known, however it appears that the majority of commercial litigants prefer to have the capacity to make the more precise judgment about the strengths and weaknesses of their cases before they settle at mediation. This is supported by the raw figures that show that 60% of the cases referred to mediation at an *advanced* stage of the litigious process settled

compared to less than 30% when referred earlier, either at the *preliminary* or *intermediate* stage.

## **Conclusion**

67. The conclusion, albeit qualified, to be drawn from the analysis of the matters in the Lists referred to mediation is that the *riper* time for referral to mediation of commercial and construction cases is towards the latter stage of the litigious process.

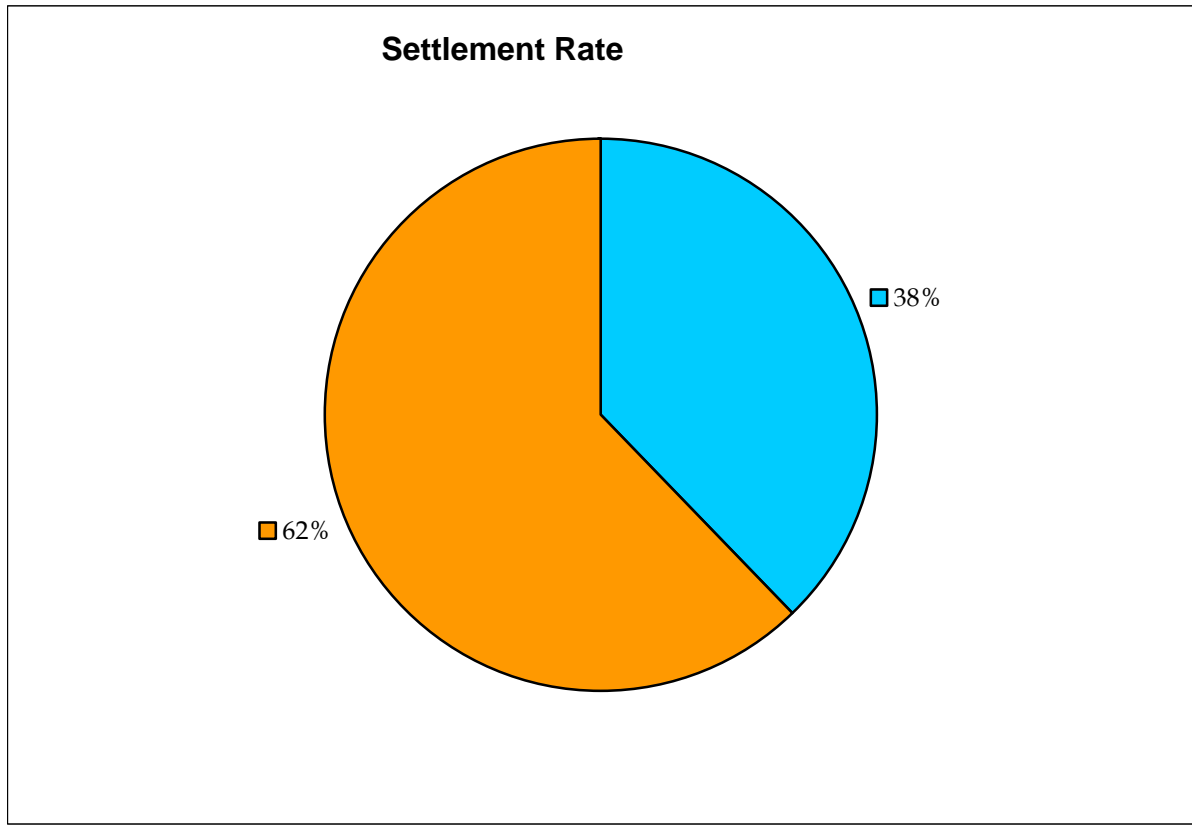
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## APPENDICES

### Appendix 1: Settlement Rate

<b>List</b>	<b>Matters Referred to Mediation</b>	<b>Settlements at Mediation</b>	<b>Settlement not reached at Mediation</b>
Commercial List 2006	47	20	27
Commercial List 2007 (to 30 May)	18	5	13
Technology and Construction List 2006	25	9	16
Technology and Construction List 2007 (to 30 May)	8	3	5
<b>Total</b>	<b>98</b>	<b>37</b>	<b>61</b>

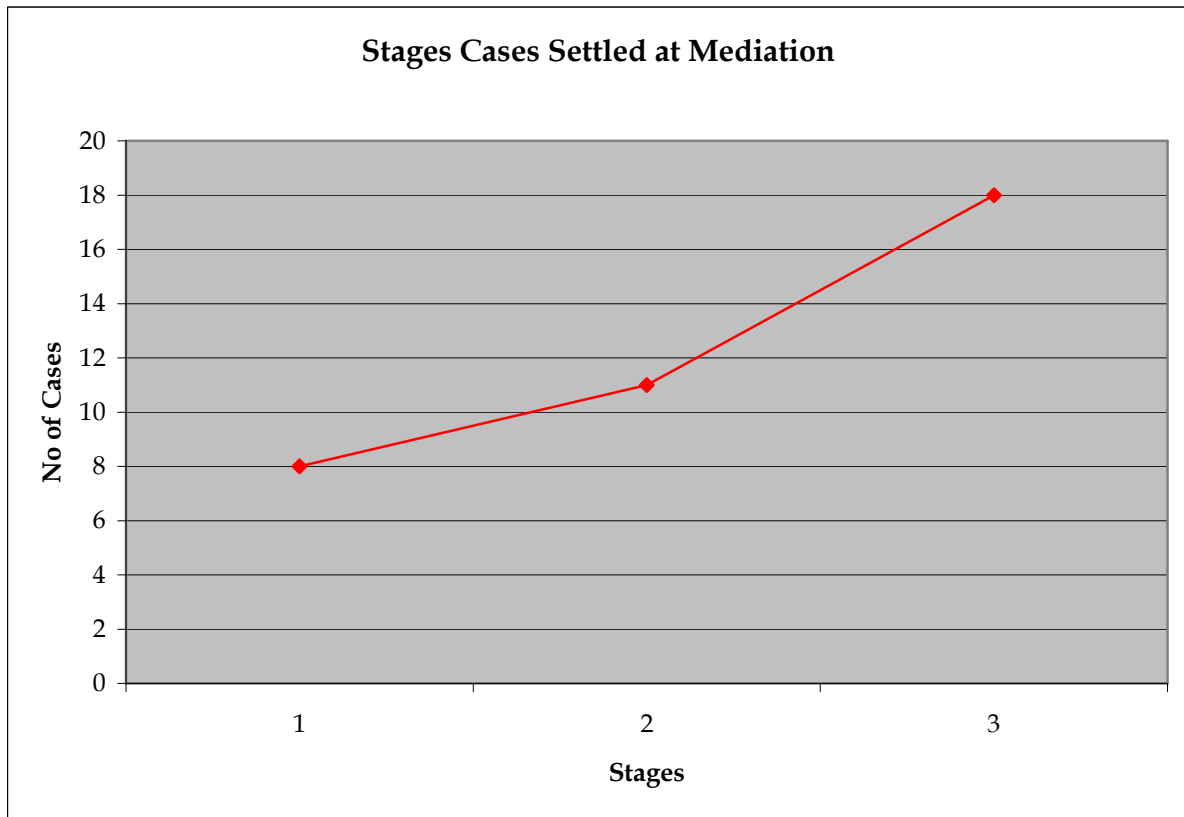
## Appendix 2



### Appendix 3: Stages at which cases settled at mediation

<b>List</b>	<b>Preliminary Stage</b>	<b>Intermediate Stage</b>	<b>Advanced Stage</b>
Commercial List 2006	5	8	7
Commercial List 2007 (30 May)	2	1	2
Technology and Construction List 2006	1	2	6
Technology and Construction List 2007 (to 30 May)	0	0	3
<b>Total</b>	<b>8 (22%)</b>	<b>11 (39%)</b>	<b>18 (49%)</b>

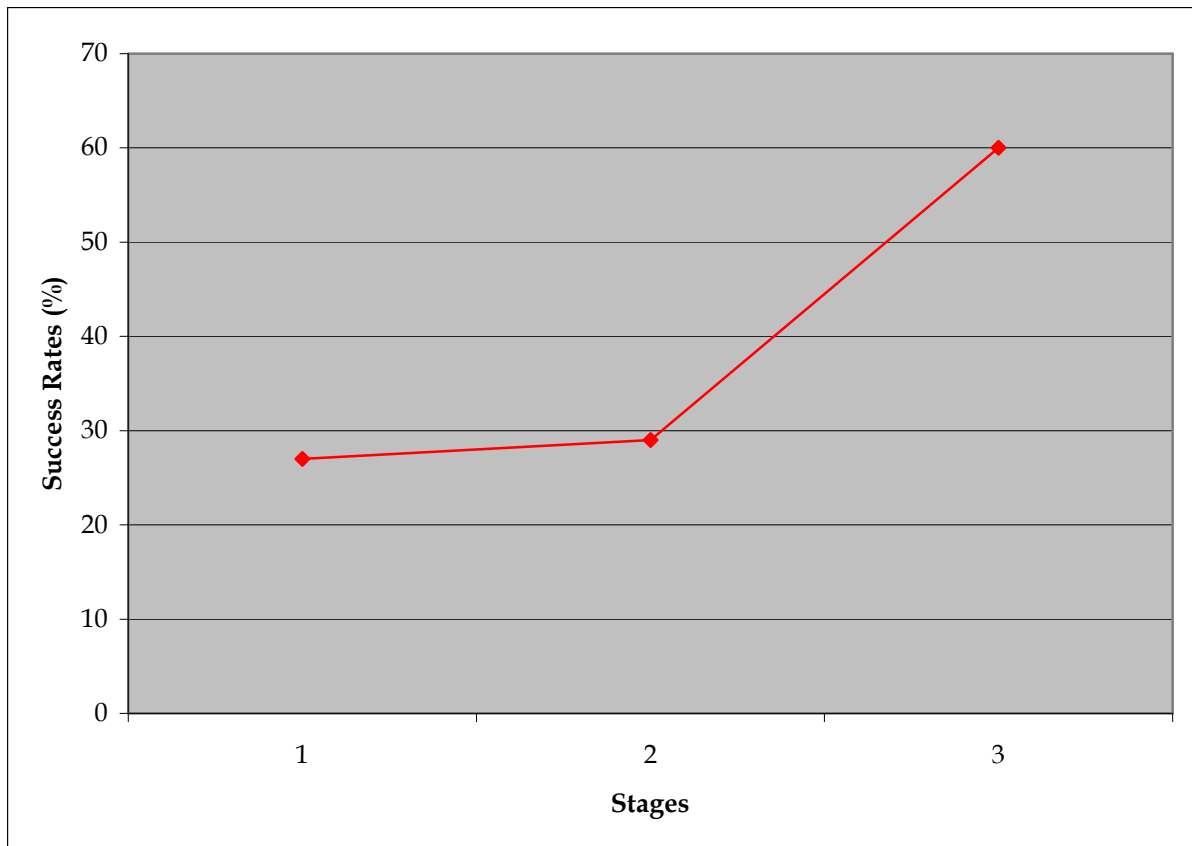
#### Appendix 4: Stages at which cases settled at mediation



### Appendix 5: Settlements during stages

Stage	Matters referred to Mediation	Settled at Mediation	Success Rate
Preliminary	30	8	27%
Intermediate	38	11	29%
Advanced	30	18	60%

### Appendix 6: Settlements during stages

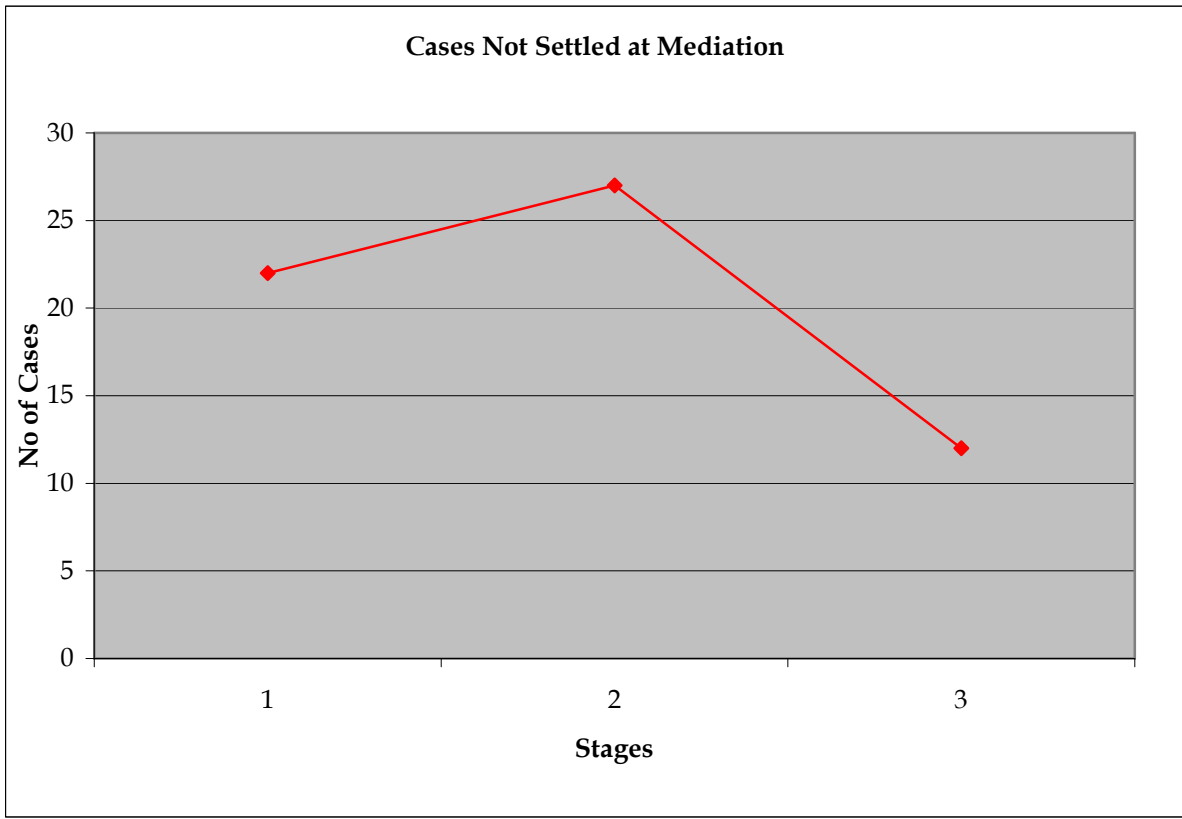




## Appendix 7: Cases that did not settle at mediation

<b>List</b>	<b>Preliminary Stage</b>	<b>Intermediate Stage</b>	<b>Advanced Stage</b>
Commercial List 2006	10	13	4
Commercial List 2007 (to 30 May)	4	4	5
Technology and Construction List 2006	6	8	2
Technology and Construction List 2007 (to 30 May)	2	2	1
<b>Total</b>	<b>22 (36%)</b>	<b>27 (44%)</b>	<b>12 (20%)</b>

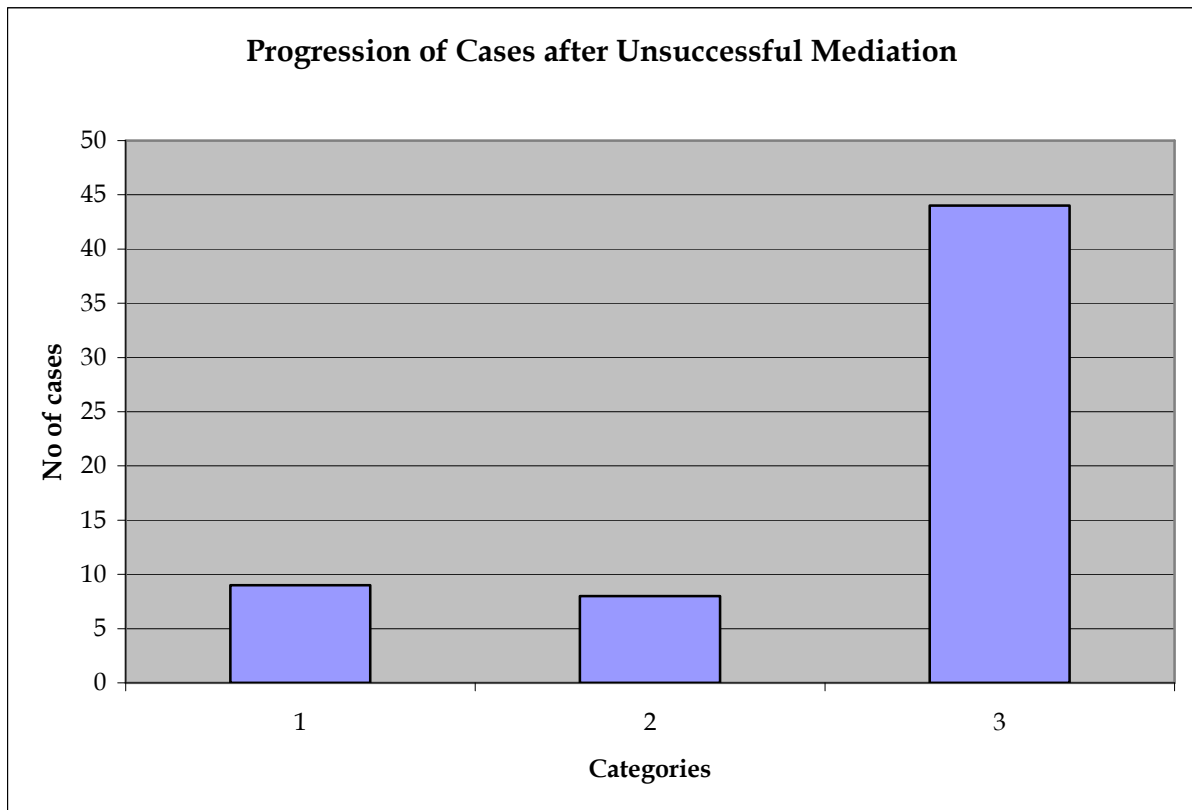
## Appendix 8: Cases that did not settle at Mediation



## Appendix 9: Progression of Cases after Unsuccessful Mediation

<b>List</b>	<b>Negotiated Settlement reached less than 6 months after mediation</b>	<b>Negotiated Settlement reached more than 6 months after mediation</b>	<b>Progressing to hearing or has been heard</b>
Commercial List 2006	6	6	15
Commercial List 2007 (to 30 May)	1	0	12
Technology and Construction List 2006	1	2	13
Technology and Construction List 2007 (to 30 May)	1	0	4
<b>Total</b>	<b>9 (15%)</b>	<b>8 (13%)</b>	<b>44 (72%)</b>

## Appendix 10: Progression of Cases after Unsuccessful Mediation



## Appendix 11: Court-Annexed Mediation

	Referred to Mediation 2006 - June 2007	Settled	%
<b>General Equity</b>	356	208	58%
<b>Probate</b>	11	8	73%
<b>Total</b>	367	216	59%