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Evaluating Mediation – New South Wales Settlement Scheme 2002

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Overview

The New South Wales Settlement Scheme 2002 was an initiative of the New South Wales Law Society (Dispute Resolution Committee), New South Wales Courts and the Motor Accidents Authority (MAA) of New South Wales. The Scheme was conducted from May 2002 to the beginning of 2003 and was intended to:

- refer litigated and unlitigated matters to mediation and assist courts, insurers and parties to reach a resolution of their dispute
- assess the benefits of that referral through evaluation by reference to a group of disputes that was mediated and a 'control group' that was not included in the Scheme
- publicise the availability of mediation to parties and solicitors within NSW
- explore issues involved in the referral of matters to mediation.

This report evaluates the Scheme by reference to a number of indicators. The evaluation has involved surveying parties and mediators involved in the Scheme. In addition, parties in a 'control group' of 150 cases in the District Court of New South Wales were surveyed and data was collected from the relevant Court files (and mediated matter court files) in the District Court. This data was used to compare costs, perceptions, outcomes, demographics and other information between four groups of cases: mediated cases, cases that settled 'between the parties', cases that were arbitrated and cases that were finalised after trial.

The indicative material collected through this evaluation and used in this report related to:

- satisfaction
- processes (and understanding of process)
- complexity
- costs
- delay
- fairness
- participation
- outcomes.

The evaluation was conducted by Professor Tania Sourdin, La Trobe University (formerly at the University of Western Sydney) and a small team of researchers, including Tania Matruglio (a PhD student at La Trobe University) who assisted in designing the project (see Appendix A).

The Scheme was funded by the Motor Accidents Authority (MAA) and the evaluation was funded jointly by the NSW Attorney General's Department and the MAA. To that end, $6,000 was provided from MAA funds and a grant of $20,000 was provided by the NSW Attorney General's Department

to La Trobe University to evaluate the Scheme. La Trobe University and the University of Western Sydney supported the Scheme and the academic costs of Professor Sourdin were not charged.

The researchers wish to acknowledge and thank members of the NSW Law Society Dispute Resolution Committee and staff of the District Court of New South Wales and the New South Wales Law Society who contributed to the research design and also assisted with information relating to file collation.

This report comprises nine chapters:

Chapter One provides information about the background to the Scheme and the evaluation process. It also contains information about the definitions used by researchers in respect of the processes used in the Scheme and the 'control group' of cases that were finalised following arbitration, trial or 'between parties agreement'.

Chapter Two details the methodology used by the research team.

Chapter Three reports on the outcomes of Scheme mediation cases, many of which were older matters that could be defined as complex. Findings included the following:

- The Scheme was successful in resolving approximately 69% of cases that proceeded through the Scheme. In addition, a number of disputes that were not mediated were settled after letters were sent to invite parties to be included in the Scheme.
- The average resolution rate was 69% and was higher in District Court mediated matters (78%) than in Supreme Court mediated matters (64%). A key indicator in respect of resolution was the age of the case. The Supreme Court cases tended to be more than three years old and in these cases resolution was less likely. This finding has implications for the earlier referral of matters to mediation.
- In mediated matters, parties reported a high degree of satisfaction with outcomes.
- Parties generally agreed that the level of formality was appropriate.
- 93% of parties considered that all parties in the mediation process were treated equally.
- Almost all parties in the mediation process considered that:
  - they could participate during the process
  - the process was fair
  - they had control over the mediation process
  - they had control over the mediation outcome
  - there was enough time during the process to present information
  - they felt comfortable during the process.
- It was difficult to statistically correlate and explore relationships between some variables due to the small number of people expressing dissatisfaction with the mediation process. 24% of survey respondents reported that they felt pressured to settle. It is not clear whether this 'pressure' was a result of mediator action or the actions of representatives and/or others.

Chapter Four explores the perceptions of the mediators involved in the Scheme. In addition it explores issues relating to what was done by mediators, for example, whether issues were listed on a whiteboard or butchers paper, and at what stage private sessions with the parties were used. The perceived cost savings in resolved matters are also explored as well as the reasons why mediators perceived that matters did not resolve.

Chapter Five provides information about the control group cases that were resolved following arbitration, hearing or 'between parties agreement' in the District Court of New South Wales. The control group was generally comprised of cases that were less complex and not as old as cases in the 'mediation' group.

Chapter Six compares perceptions held regarding the various processes in the District Court and the mediation group. On nearly every indicator the Scheme mediation cases, which included more complex and older cases, produced significantly more positive perceptions.

Chapter Seven provides details about the costs and outcomes reached in the different processes. It is noted in this chapter that earlier referral to mediation may reduce litigation costs.

Chapter Eight details the referral processes and options.

Chapter Nine details conclusions and future options.

A summary of key findings is contained in this section. Please refer to individual chapters for more detailed information.

Key findings

Mediation processes

The New South Wales Settlement Scheme 2002 was successful in resolving a high percentage (69%) of cases that were involved in the Scheme. Many of the matters referred to the Scheme were complex, difficult and 'old' cases that were often likely to take up a considerable number of hearing days. In addition, a number of matters settled after being referred to the Scheme, but without attendance at a mediation conference.

The settlement figure compares very favourably with other forms of Alternative Dispute Resolution, such as conciliation and case conference, where settlement rates are generally considerably lower (20–50%). Given the age and complexity of the cases referred to mediation, the settlement rate is high. The parties involved in the Scheme had very positive perceptions of the mediation process and outcomes.

The perceptions and outcomes of those involved in the mediation processes were contrasted with perceptions and outcomes experienced by parties in three other types of processes in the District Court of New South Wales: trial; 'between parties agreement' (where the parties, or more commonly their lawyers, negotiated directly to reach an agreement without the presence of a third party); and arbitration.

In relation to procedural satisfaction (see Table 6.11):

- 95.8% of parties responding to the mediation survey were satisfied with the way the process was handled (this compares with 60% satisfaction with arbitration, 62.5% satisfaction with hearing and 70% satisfaction with unassisted 'between parties' negotiation).
- 87.5% of parties responding to the mediation survey were satisfied with the way the dispute was dealt with (this compares with 50% satisfaction with arbitration, 62% satisfaction with hearing and 70% satisfaction with unassisted 'between parties' negotiation).
- 87% of parties responding to the mediation survey were satisfied with the outcome of the dispute (this compares with 70% satisfaction with arbitration, 50% satisfaction with hearing and 50% satisfaction with unassisted 'between parties' negotiation).
- 87.5% of parties 'felt comfortable' with the mediation process (this compares with a 50% comfort level with arbitration, 12.5% comfort with hearing and 42.9% comfort with unassisted 'between parties' negotiation).
- 91.7% of parties thought the mediation process was fair (this compares with 60% who considered the arbitration process to be fair, 57.1% who considered the hearing process to be fair and 71.4% who considered the unassisted 'between parties' negotiation process to be fair).

Case selection

As previously noted, many matters that were referred to mediation were 'old' cases that involved complex features (a lower proportion of matters referred to the Scheme involved personal injury cases). The research suggests that mediation is beneficial not only in simpler cases, but in more complex matters that may have been in the court system for some time.

The research on reasons why parties declined mediation suggests that many lawyers are unwilling to consider mediation if they perceive that the case is too complex or is 'unsuitable'. The research on cases that proceeded through the Scheme suggests that in these cases, mediation may offer considerable benefits and that lawyers should consider mediation more favourably, even in complex and 'difficult' cases.

Chapter

1

Background to the evaluation of the New South Wales Settlement Scheme 2002

Introduction

The NSW Settlement Scheme 2002 was an initiative of the Law Society of New South Wales ('the Law Society') and was supported by the New South Wales District and Supreme Courts and some insurers. The Law Society successfully gained funding from the Motor Accidents Authority (MAA) to develop and implement a scheme based on other Settlement Week initiatives previously established by the Society in the early 1990s. The evaluation of the Scheme and this report were funded by the NSW Attorney General's Department and the MAA.

The Law Society has previously conducted settlement 'weeks' and has found that a focussed scheme highlights the benefits of Alternative Dispute Resolution (ADR) to practitioners, insurers, business, courts and tribunals, and the general community. The first Settlement Week was conducted from 14–18 October 1991. The second Settlement Week took place between 22 June 1992 and 15 September 1993. This latest Scheme commenced in May 2002 and continued until January 2003.

The schemes conducted by the New South Wales Law Society have all been designed to refer to mediation disputes that may otherwise have been the subject of fully litigated proceedings. The rationale behind this approach is that by offering and supporting a range of options to resolve disputes, solicitors in New South Wales are responding better to client and legal system needs.

All schemes have been supported by a range of courts and tribunals, as well as insurers and litigants. Each scheme has been supported by an educational program.

NSW Settlement Scheme 2002

The NSW Settlement Scheme 2002 had the following features:

- It targeted disputes (litigated and unlitigated) that could be referred to mediation through the Law Society of New South Wales. This was accomplished by promoting the Scheme by writing to parties involved in court cases (as well as some parties in unlitigated cases that were identified by insurers). Approximately 1600 disputed cases were targeted in the Scheme. In some cases, this targeting promoted the settlement of a dispute (without a mediation taking place). A full-time administrative staff member was employed by the Law Society for a six-month period to assist with the 'targeting' and the tasks identified below.
- After the matters were identified, facilitators contacted all parties to the dispute or their representatives and explained the mediation process and the Scheme. This facilitation process prompted some settlements without the need for a full mediation. The facilitators were employed by the Law Society.
- The Law Society also ran an educational campaign and a seminar program that was directed at mediators, insurers, the banking and financial sector and other interested parties involved in the Scheme.
- The Scheme was managed by a voluntary and unpaid steering committee.

An important aspect of the Scheme related to this evaluation. The evaluation is comparative in nature – that is, the evaluation involves comparing matters that have mediated outcomes and processes (89 matters) with those that proceeded through the District Court of NSW and were finalised by arbitration (50 matters), trial (50 matters) and 'between parties agreement' (50 matters).

Definitions of processes

An important issue in the evaluation of this Scheme relates to the definitions of processes used to finalise disputes. Dispute resolution processes that are 'alternative' to traditional court proceedings are often referred to as Alternative Dispute Resolution (ADR).

The Australian Standard *Guide to the prevention, handling and resolution of disputes* (AS 4608:1999) provides guidance in respect of definitions of ADR. In addition, the range of processes used in court-connected ADR programs that can be described in terms of definitions have been formulated by the National Alternative Dispute Resolution Advisory Council (NADRAC).

NADRAC has noted that dispute resolution processes may be classified as facilitative, advisory or determinative[1]:

- Facilitative processes involve a third party, often with no advisory or determinative role, who provides assistance in managing the process of dispute resolution. These processes include mediation, conciliation and facilitation.
- Advisory processes involve a third party who investigates the dispute and provides advice on the facts and possible outcomes. These procedures include investigation, case appraisal and dispute counselling.
- Determinative processes involve a third party who investigates the dispute, which may include a formal hearing, and makes a determination that is potentially enforceable. These processes include adjudication and arbitration.[2]

This evaluation report deals with processes described in a range of ways. The primary processes were categorised as mediation, arbitration, trial and 'between parties agreement'. The Scheme only referred matters to mediation. However, in the control group matters were finalised by trial, arbitration and 'between parties agreement'.

Mediation sample group matters

Mediation – a definition

The Australian Standard *Guide to the prevention, handling and resolution of disputes* (AS 4608:1999) defines mediation by reference to the NADRAC definition as follows:

> A process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identifies the disputed issues, develops options, considers alternatives and endeavours to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

Mediation can take a number of different approaches, which have been categorised as process-oriented (facilitative), or substance-oriented (evaluative), mediation.[3] In the process-oriented approach, the parties rather than the mediator, are said to provide the solution to their dispute and the mediator is the facilitator of the process rather than an authority figure providing substantive advice or pressure to settle. In the process model, a mediator does not require knowledge of the subject matter of the dispute.

Substance-oriented mediation is at the other end of the scale and the mediator is often an authority figure who evaluates the case based upon his or her experience and offers recommendations on how the case should be

[1] Adopting the terminology used in National Alternative Dispute Resolution Advisory Council (NADRAC) ADR definitions (AGPS Canberra March 1997). See also Australian Standard (4608:1999).
[2] Adopting the terminology used in National Alternative Dispute Resolution Advisory Council (NADRAC) *Alternative dispute resolution definitions (*AGPS Canberra March 1997).
[3] R Amadei et al 'The world of mediation - a spectrum of styles' (1996) 5 *Dispute Resolution Journal* 62.

resolved.[4] Some practitioners consider that the basic philosophy of mediation requires recognition that the process be empowering and therefore that substance-oriented mediation cannot be defined as mediation. Substance-oriented 'mediation' where a neutral provides a view as to the outcome is also known in the United States as 'muscle', 'rhino' or 'rambo' mediation.[5]

'Shuttle' mediation is another process that can be used where the mediator shuttles between parties conveying options and ideas. In this model the mediator acts as a 'go-between' for the parties.

In the Scheme which is the subject of this report, a facilitative form of 'mediation' was to be used and this process model was explored in educational seminars.

Control group sample

Three processes were used to finalise cases in the 'control group' of District Court cases – trial, arbitration and 'between parties agreement'. The 'between parties agreement' process is essentially a negotiation process where the parties (or more commonly their lawyers) negotiate directly to settle the dispute. In this process, negotiation may involve a face-to-face meeting between the parties and/or their representatives, or more commonly will be conducted by correspondence and telephone.

Arbitration also takes place pursuant to a number of legislative instruments within Australian courts[6] and tribunals. The process used may closely resemble traditional litigation and is sometimes not regarded as an ADR process. The major variables in arbitration are the degree of formality in the proceedings and the extent of appeal rights. Where arbitration proceedings operate within courts and tribunal structures, referral to arbitration is directed by a court official or judicial officer. In such models, arbitration may be conducted by appointed expert lawyers who may conduct the arbitration on court premises.[7] Matters finalised by arbitration in the control group were finalised pursuant to the NSW *Arbitration (Civil Actions) Act 1983*. This arbitration process has led to the resolution of thousands of common law Supreme, District and Local Court actions in New South Wales over the past 15 years.

The arbitration process involves an expert lawyer who presides over the arbitration. Rules of evidence do not apply and often witnesses are not called. Arbitrators will commonly have a number of matters listed before

[4] This model does not comply with the accepted NADRAC definition.

[5] This model has been described as operating in the Victorian workers' compensation scheme (Workcover) - See D Bryson '"And the leopard shall lie down with the kid": A conciliation model for workplace disputes' (1997) 8(4) *Australian Dispute Resolution Journal* 245.

[6] For example, provision exists under Order 72 of the Federal Court Rules.

[7]. Examples of that process may operate pursuant to legislation such as the NSW *Arbitration (Civil Actions) Act 1983* — for example, personal injury arbitrations in the Supreme Court and District Court of New South Wales.

them in any one day. No transcript is taken and appeals can take place under certain circumstances.

The trial or hearing process involves a judge determining the dispute after hearing evidence and argument from all parties. The researchers accept that, as with arbitration, the personal qualities of the decision maker can impact upon the length of the process as well as party perceptions of the process.

Research and evaluation process

The steps in the research and evaluation process, as well as relevant dates, are as follows:

- Consultations relating to survey design and approach (January/February 2002).
- Survey instruments drafted (February 2002).
- Preparation of survey tools and explanatory letters (March/April 2002). Printing and contact information.
- Ethics approval application, University of Western Sydney (April 2002).
- Survey package sent to all Law Society mediators and training program for Law Society mediations. This program was undertaken as voluntary pro bono training provided by the NSW Law Society Dispute Resolution Committee (April 2002).
- Survey of all participants in the NSW Settlement Scheme 2002 (May /January 2003). Each party in a mediation was given a questionnaire. An interim report on the response rate to the Scheme was prepared (August 2002). Each mediator in the Scheme was provided with surveys for each party (and for the mediator) to complete, together with reply-paid envelopes.
- Survey of all mediators in the Scheme (May/January 2003).
- Law Society survey of participation levels in the Scheme, summary report (August 2002).
- Creation of four separate databases – confidential names and addresses (for mail-out survey), court file database, survey questionnaire database, mediator survey database.
- Meetings, progress report and finalisation of District Court file data collection sheet and process (October 2002).
- Finalisation of confidentiality undertakings and collection protocols (District Court files).
- Collection of data from District Court control group files (150 files, not including mediation scheme files – 150 matters that had been finalised as a result of: a hearing (n=50), an arbitration (n=50), or a 'between parties agreement' (n=50) were selected as a 'control group'. A team of three researchers led by Tania Matruglio completed this task over one week in October 2002.
- Entry of information onto databases to enable mail merge to take place (October/November 2002).

- Survey letters sent to participants in District Court control group (November and December 2002) (600 letters with reply-paid envelopes).
- Receipt and coding of survey responses.
- Follow-up survey letters sent to participants in District Court control group (January 2003). (Approximately 400 letters to control group participants with reply-paid envelopes.)
- Collection of additional data from District Court files that were dealt with as part of the Scheme (35 files) (February 2003).
- Data cleaning (February 2003).
- Data analysis (March/April 2003).
- Report writing and consultation regarding drafts (April/May 2003).
- Final Report (September 2003 – consultations July and August).

More than 600 data sheets were entered into the databases to enable a triangulated research study. Cases finalised in the District Court between 30 September and 11 October 2002 were selected for the control group.

Identical information was collected from each District Court case file and included in the research sample using a standardised data collection form. The names and addresses of plaintiffs and defendants were also collected but kept separate from case file information. A survey was sent out to the District Court case participants during November/December 2002 and January 2003, which sought information about the process that finalised the case. The survey sent to this control group was identical to the survey sent to those who were involved in mediations conducted as part of the Scheme.

The file based information and the survey information were linked by a randomly allocated identification number and used for administrative and matching purposes during data analysis.

The researchers provided the District Court with confidentiality undertakings and collected the information from court files whilst on the District Court premises.

Overview of literature research

The researchers relied upon a number of significant inquiries and reports that touch upon issues relevant to the operation of the Scheme. These include previous Settlement Week Evaluations, evaluations of other ADR schemes (within Australia and overseas), as well as material from courts and tribunals.

NSW Law Society mediation guidelines

The NSW Law Society has published guidelines relating to mediation. The guidelines provide a background to the Scheme and set out the rights and responsibilities of those involved in mediation. (See Appendix F for a copy of the NSW Law Society Guidelines.)

Specific Scheme guidelines

Documentation was also prepared specifically for the Scheme that detailed the evaluation and data collection processes.

NSW Law Society website

The NSW Law Society website contains information relating to panel mediators and the operation of the NSW Settlement Scheme.

Other reports

The researchers considered reforms in the civil justice area and issues relating to ADR, case management and administration. For example, the Australian Institute of Judicial Administration (AIJA) conducts research into various aspects of judicial administration and many of its reports[8] are relevant to this report. AIJA monitors the development of case management systems in Australia and holds annual conferences on case management and delay reduction (including reference to ADR schemes).[9] Material prepared by the Justice Research Centre, a project of the Law and Justice Foundation of New South Wales, is another source of research relevant to this report.[10] The Commonwealth Productivity Commission also provides information used for benchmarking government services such as courts and tribunals.

Overseas research and inquiries

Throughout the world suggestions have been made about how dispute systems can operate more effectively and various reports from Canada, the United Kingdom and the United States are relevant to this report. In addition, there is an increasing focus on problems within the litigation system and how the perceived inadequacies of civil litigation systems – such as cost and delay – can be addressed. Various inquiries have addressed these issues.[11] Other overseas studies show significant benefits in using ADR. One

[8] For example R Cranston et al *Delays and Efficiency in Civil Litigation* Australian Institute of Judicial Administration Melbourne 1985; H Powles et al *The Litigant in Person — A Discussion Paper* Australian Institute of Judicial Administration Melbourne 1993; P Williams et al *The Cost of Civil Litigation Before the Intermediate Courts of Australia* Australian Institute of Judicial Administration Melbourne 1992; T Church and P Sallman *Governing Australia's Courts* Australian Institute of Judicial Administration Melbourne 1991.

[9] Australian Institute of Judicial Administration *Case Management and Delay Reduction in the Higher Courts* Papers Second Annual AIJA Meeting of Australian Higher Courts on Case Management and Delay Reduction Melbourne 29–30 November 1992; Australian Institute of Judicial Administration *Case Management in the Higher Courts* Papers Fourth Annual AIJA Conference of Australian Higher Courts on Case Management in the Higher Courts Melbourne 2–3 December 1994.

[10] For example: T Matruglio and J Baker *An Implementation Evaluation of Differential Case Management:A Report on the DCM Program in the Common Law Division of the Supreme Court of New South Wales* Civil Justice Research Centre Sydney 1995; T Matruglio *Plaintiffs and the Process of Litigation: An Analysis of the Perceptions of Plaintiffs Following their Experience of Litigation* Civil Justice Research Centre Sydney 1994; J Baker *Who Settles and Why? A Study of the Factors Associated with the Stage of Case Disposition* Civil Justice Research Centre Sydney 1994; T Matruglio *So Who Does Use the Courts?* Civil Justice Research Centre Sydney 1993; D Worthington and J Baker *The Cost of Civil Litigation: Current Charging Practices in New South Wales and Victoria* Civil Justice Research Centre Sydney 1993.

[11] See for example Australian Law Reform Commission – Review of the Adversarial System – Issues Papers, Background Papers, Discussion paper and Final Report 1997–2001.

study that analysed more than 3000 cases in Ontario found there were positive impacts on the pace, costs and outcomes of litigation when ADR processes were used.[12] In the United States however, one study of mediation and neutral evaluation programs was unable to show any effect of these methods of dispute resolution on satisfaction or views of fairness.[13] However, that study referred to 'mediated' cases as those where the neutral often gave an opinion as to the likely outcome – a process that many mediators would not define as mediation.[14] Other studies have attempted to evaluate mediation and there is evidence that ADR processes may have different benefits in different types of disputes.[15]

[12] R Hann and C Baar *Evaluation of the Ontario Mandatory Mediation Program* (Queens printer, Ontario, March 2001), 3.

[13] J Kakalik et al *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (RAND, Santa Monica, California 1996), 53.

[14] See process definition issues in this Chapter.

[15] R Ingleby *In the Ball Park: Alternative Dispute Resolution and the Courts* (AIJA, Melbourne, 1991); Family Court of Australia *Evaluation of the Family Court Mediation Service* (1994); C Chinkin and M Dewdney, 'Settlement week in New South Wales; An Evaluation' (1992) 2 *Australian Dispute Resolution Journal* 93; M Dewdney et al *Contemporary Developments in Mediation within the Legal System and Evaluation of the 1992-93 Settlement Week Program* (Law Society of New South Wales, Sydney, 1994); Law Institute of Victoria *Mediation in the Spring Offensive 1992* (Melbourne 1993); B Sordo 'A Law Society Perspective of Law and Lawyers in Mediation' (1995) 2(2) *Commercial Dispute Resolution Journal* 77. See also T Sourdin *Alternative Dispute Resolution* (2002) Law Book Company.

Chapter

2

Methodology

Introduction

This chapter details the methodology used by the researchers in conducting this evaluation. The methodology has been developed by the researchers in a series of projects they have undertaken.[16]

Overview of empirical research

Research sample

The information for the empirical research conducted as part of this evaluation was collected from three sources: finalised District Court files; a self-administered questionnaire completed by mediators in the Scheme; and a self-administered questionnaire handed to parties in the mediation sample and mailed out to parties involved in the control group.

The research sample comprises all cases referred to mediation through the Scheme from May 2002 to January 2003 and a control group sample of 150 cases finalised in the NSW District Court in October 2002. The total number of cases mediated under the program where completed mediator surveys were received was 86. Of these, 54 involved Supreme Court matters and 32 District Court matters. Data was collected from a total of 189 files held by the District Court. To extract data from files, a research-coding sheet was created and data was manually extracted from each file.

In the 'mediation Scheme group' questionnaires were handed to parties upon completion of the mediation. The parties could either post their

[16] Questionnaires were developed by T Sourdin and T Matruglio based on research previously conducted and trialled by them in a range of areas including the Financial Industry Complaints Service (FICS), Supreme Court of New South Wales, the District Court of New South Wales, the Fair Trading Tribunal of New South Wales, the Federal Court of Australia, the Family Court of Australia, the Commonwealth Administrative Appeals Tribunal, Workcover and various other organisations. Questionnaires were developed with reference to tested methodologies (such as those developed by the reserachers and Rand and Institute of Civil Justice methodologies – see E Rolph, E Moller, *Evaluating Agency Alternative Dispute Resolution Programs*, Rand, United States).

questionnaire back to the researchers or return it to the mediator in a sealed envelope. Data was then collected (where applicable) from the NSW District Court files.

In the 'control group' data was initially collected from NSW District Court files. Following the file-based data collection, a questionnaire was mailed to all parties involved in the dispute.

In addition to the information collected from court files (189 files), a total of 153 'party' surveys were returned completed. The response to the mediation group questionnaire was particularly good (see Table 3.1). The control group responses were considerably lower (see Table 6.1). In many instances parties had changed address and surveys were returned marked 'not at this address'.

Mediators involved in the Scheme also completed a survey. A total of 86 mediator surveys were completed (see Chapter 4).

Data collection

File-based data collection

Data was collected from Court files using a standardised data collection form. The information recorded from the Court files included details about the dispute (including the nature of the complaint, case outcome, amount in issue); details about the claimant (gender, age, occupation, education, income); case processing details (including date of filing, dates of requests for and provision of information, use of experts); and case finalisation (including date resolved, method of resolution).

Two questionnaires were developed for distribution to mediators and parties (in the mediation and control group). The questionnaire format and content has been developed for and used by the researchers in a number of dispute resolution settings. Questions were included on the basis of previous research that has extensively examined the issue of user satisfaction and user perceptions following experience with a dispute resolution process. An extensive consultation process involving the NSW Law Society and the NSW District Court was also undertaken prior to finalisation of the questionnaires.

The content and format of these sorts of questionnaires has evolved and developed over time, and the bent is dependent upon the intricacies, and sometimes idiosyncrasies, of individual dispute resolution settings. The basic tenets rest however in surveys conducted by the Institute for Civil Justice[17] (part of the RAND Corporation) which has been researching the issues of satisfaction and perceptions for some decades.

The questionnaires included questions relating to details about perceptions of, and satisfaction with, the dispute resolution process used. Details were

[17] For examples, see EA Lind, R MacCoun, P Ebender, W Felstiner, D Hensler, J Resnik, & T Tyler, 1989, *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences,* The Institute for Civil Justice, The RAND Corporation, Santa Monica, R-3708-ICJ.

also sought about the demographics of the parties (gender, age, their first language, education, occupation and income).

The mediator questionnaire included questions about how mediators perceived the mediation process; perceptions of the skills and knowledge of mediators (including micro skill issues such as whether a whiteboard was used); and perceptions of the process. Questions specific to the case were also included as were some background demographic details.

The questionnaires included both fixed choice and open-ended questions. The fixed choice questions were multiple response item scales.

Questionnaire mail-out and delivery

In the mediation Scheme group coded questionnaires were handed to the parties. In the control group the names and addresses of the case participants were recorded during the file-based data collection. In November 2002, a questionnaire was sent to all case participants in the control group. Included was a letter explaining the purpose of the research and a reply-paid envelope. A follow-up letter was sent in December 2002 and January 2003 to those who had not responded earlier. No further contact was attempted with the case participants after distribution of the follow-up letter.

The researchers wish to thank all those who responded to surveys.

Chapter

3

Mediation – fairness and satisfaction

Introduction

As part of the evaluation of the NSW Settlement Scheme 2002, all parties involved in mediated matters (that were part of the Scheme) were surveyed. Amongst other issues, the survey sought information about the perceptions the parties held of the mediation process, and the satisfaction they felt following the process. This chapter details the results of the full mediation participant survey. Comparative information relating to the NSW District Court 'control group' is contained in later chapters.

The New South Wales Supreme and District Courts selected the cases for inclusion in the NSW Settlement Scheme 2002. A letter was sent by the Courts to the representatives of the parties, inviting them to participate in the Scheme.

Mediation survey distribution and response

Survey distribution

Following the mediation, the mediator explained the purpose of the survey and distributed a survey form to each of the mediation participants. Completion of the survey was voluntary and those choosing to respond were given the option of completing the survey and returning it to the mediator, or returning it to the researchers in a reply-paid envelope.

Survey response

The total number of survey responses received was 87. This figure is comprised of 55 Supreme Court matters (63.2%) and 32 District Court matters (36.8%).

The following table provides information about the total number of surveys received from plaintiffs and defendants in each of the jurisdictions. In some

cases surveys were provided by multiple parties to a dispute. On this basis, the table also includes the total number of mediated disputes about which we have survey information (that is, the sum includes only 1 plaintiff and 1 defendant per case).

Table 3.1 Number of surveys received

	Supreme Court		District Court	
	n	%	n	%
Number of surveys received[18]	55	63.2	32	36.8
Plaintiff	31	56.4	19	59.4
Defendant	24	43.6	13	40.6
Number of mediations about which survey information was received (excludes responses from multiple parties)	51		29	
Plaintiff	29/55	52.7	17/32	53.1
Defendant	22/55	40.0	12/32	37.5

Based on the number of mediator surveys received, these figures equate to a response rate of 53% from Supreme Court plaintiffs and 40% from Supreme Court defendants, and 53% from District Court plaintiffs and 38% from District Court defendants.

The response rates are relatively high, which can be attributed to the survey distribution method employed. That is, the parties were handed a survey form by the mediator/s following the mediation of their dispute.

The total number of surveys received does not, in some circumstances, allow for statistical tests to be undertaken. It is possible that this factor may mask what would be statistically significant differences if there were a larger number of cases in the sample group.

Case details

Descriptive information was collected to provide some understanding of the types of cases that went to mediation, the age of the dispute at the time of the mediation and whether the dispute was resolved at the mediation.

Case types

While the small number of cases in some of the categories precludes statistical analysis, there are considerable differences between the Supreme and District Court jurisdictions with regard to the type of cases dealt with under the NSW Settlement Scheme 2002. Nonetheless, from Table 3.2 it is

[18] Party by jurisdiction: χ^2=.075, df=1, p=.784, n=87. There is no difference in the rate of response by plaintiffs and defendants on a jurisdictional basis.

clear that the mediators dealt with a larger variety of Supreme Court disputes than the range of matters emanating from the District Court.

Most Supreme Court matters were from 1 of 3 case types: 27.8% personal injury[19]; 25.9% family matters; and 24.1% equity matters. The remaining 22.2% was made up of a variety of case types. In contrast to this, 83.9% of the District Court matters were for claims for personal injury, most of which resulted from a motor vehicle accident (58.1%).[20]

Table 3.2
Type of dispute

Case type	Supreme Court		District Court	
	n	%	n	%
Motor vehicle accident	6	11.1	18	58.1
Medical negligence	2	3.7		
Work related injury	3	5.6	4	12.9
Occupier/public liability	4	7.4	4	12.9
Commercial	8	14.8	4	12.9
Family	14	25.9		
Equity	13	24.1		
Other[21]	4	7.4	1	3.2
Total	**54**	**100.0**	**31**	**100.0**

In recognition of these differences, the information that follows is also presented on a jurisdictional basis. Where numbers allow, statistical comparisons have been conducted. Also, where appropriate, the information is presented on a 'by party' basis.

Dispute age at mediation

In both jurisdictions, the median duration between the year that the dispute arose and the year of the mediation was three years (n=84). Thus, it follows that for those cases resolved at mediation, the duration between the origin of the dispute and its finalisation was also three years.

[19] This figure is comprised of 11.1% motor vehicle accident claims and 3.7% medical negligence claims, 5.6% as the result of a work related injury and 7.4% related to occupier/public liability.

[20] The remaining personal injury matters were comprised of 12.9% workplace injury claims and 12.9% occupier/public liability claims.

[21] The 'other' cases from the Supreme Court group were reported by the survey respondents as being: for false imprisonment; professional negligence; insurance (no further details provided); and action against a bank (no further details provided).

[22] The 'other' cases from the Supreme Court group were reported by the survey respondents as being: for false imprisonment; professional negligence; insurance (no further details provided); and action against a bank (no further details provided).

Was the dispute resolved?

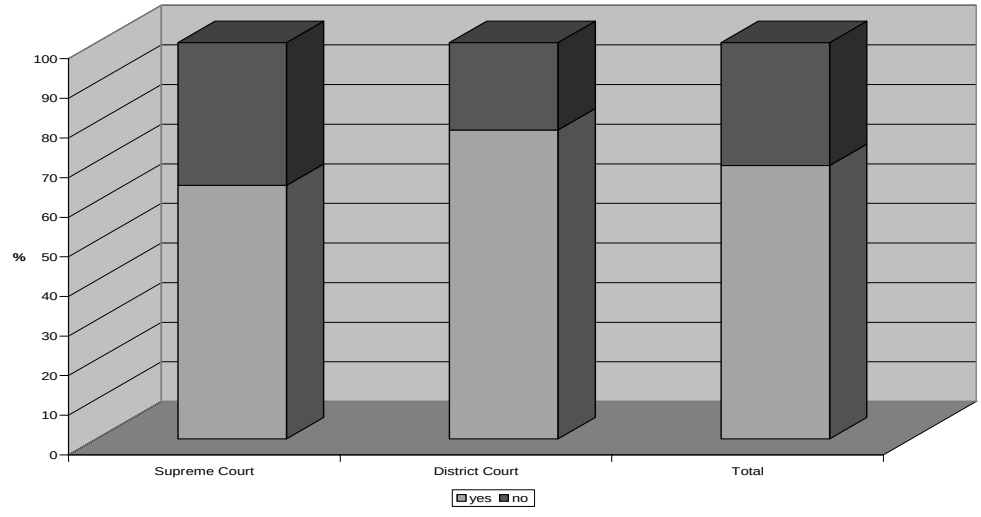
Just over two thirds of all cases mediated under the Scheme were resolved at the mediation, or 69%. Table 3.3 sets out the differences between the jurisdictions with regard to the proportion of disputes resolved at mediation, with 78% of the mediated District Court matters finalised at the mediation compared with 64% of the Supreme Court matters. The difference was not however found to be statistically significant.[23] These figures do not report on cases that settled prior to the mediation or following the mediation.

Table 3.3
Has the dispute been resolved?

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
Yes	35	63.6	25	78.1	60	69.0
No	20	36.4	7	21.9	27	31.0
Total	**55**	**100.0**	**32**	**100.0**	**87**	**100.0**

Given that the same pool of mediators dealt with both the Supreme and District Court matters, some understanding of the difference in resolution rates was sought. Clearly, the jurisdictions exhibit differences with regard to the type of cases dealt with in the Scheme. However, in addition, whilst the median age of the disputes was the same at the time of the mediation in both jurisdictions (3 years), significantly more Supreme Court matters than District Court matters were over 3 years old at the time the mediation took place.[24] This finding is important as in the following section it becomes apparent that dispute age can impact upon whether matters are more likely to be resolved at mediation.

Figure 3.1
Resolution at mediation by jurisdiction



[23] Finalisation by jurisdiction: χ^2=1.984, df=1, p=.159, n=87. Note however that the relatively small numbers in the sample may mask statistical significance.
[24] Jurisdiction by dispute (case) age: χ^2=8.125, df=1, p=.004, n=84.

What case characteristics are related to dispute resolution at mediation?

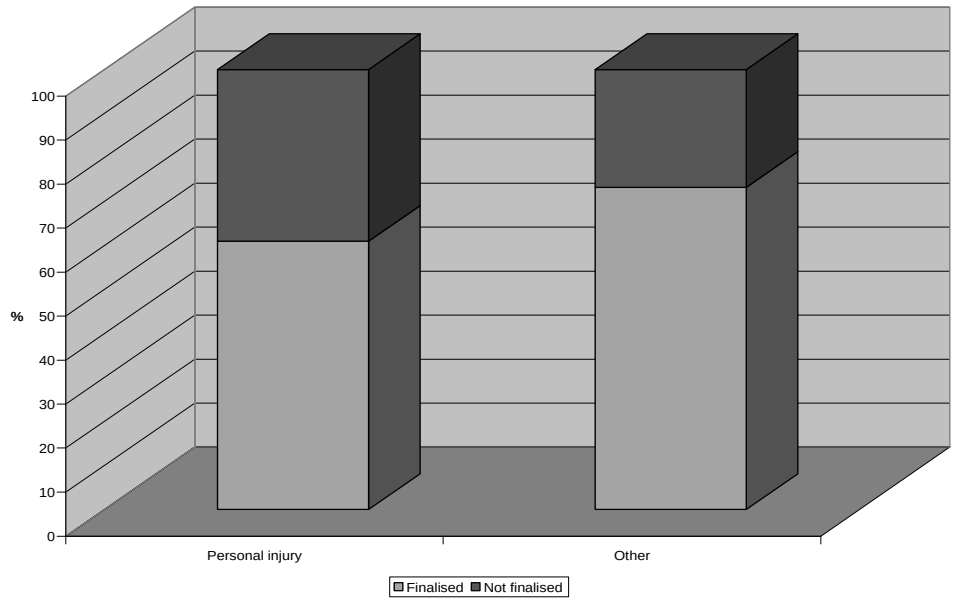
To determine what case characteristics might be related to dispute resolution at mediation, the relationship between resolution and case type, and the age of the dispute (measured by the year the matter was filed in court) was examined.

Type of dispute

In view of the sample size, the dispute types were reduced to two categories: personal injury and other.[25]

Figure 3.2 shows there is a difference between the resolution rates of personal injury and 'other' case types, with a smaller proportion of personal injury cases resolving at mediation than the 'other' case types (61% compared with 73%). This difference was not however found to be statistically significant.[26]

Figure 3.2 Resolution at mediation by case type



Age of dispute

Table 3.4 indicates that there is a relationship between the age of the dispute[27] at the time of mediation and whether the dispute was resolved at mediation.[28] Just over three quarters (77%) of the disputes that were of three years or less duration at the time the mediation took place, were resolved at mediation. This compares with 57% of the disputes of more than three years duration.

[25] The personal injury category includes motor vehicle accident; medical negligence; work related injury; and public liability. The 'other' category includes the remaining case types: commercial; family; and equity.

[26] Case type by finalisation: χ^2=1.380, df=1, p=.240, n=82. (Note the sample size has the potential to mask statistically significant differences. On this basis, any difference found is worth considering as an issue for further research/investigation).

[27] 'Case age' = date of filing to disposition

[28] Dispute age x finalised at mediation: χ^2=3.736, df=1, p=.05, n=84.

Table 3.4 Case age at mediation by finalisation

Age of case at mediation	Finalised at mediation		Not finalised at mediation		Total	
	n	%	n	%	n	%
<= 3 years	36	76.6	21	56.8	47	100.0
> 3 years	11	23.4	16	43.2	37	100.0

Is dispute age related to case type?

To ensure that the relationship found between dispute age and finalisation at mediation was not related to case type, a test was undertaken to determine whether a relationship exists between the age of the dispute and dispute type. No such relationship was found.[29] Therefore on this basis, it appears that the statistically significant relationship between dispute age and resolution at mediation is valid.

On the basis of these findings, the type and age of the dispute are issues that need to be investigated further and perhaps considered when selecting cases for mediation.

Expected dispute duration and satisfaction with duration

In most cases the duration of the dispute was in accord with the survey respondent's expectation (63%). However, in around one quarter of cases (27%), the dispute took longer than was expected. Despite this, a large majority of survey respondents reported being satisfied with the length of time it took to resolve their dispute (88%) (see Table 3.6).

Table 3.5 Expectation of case duration by jurisdiction

The finalisation of the dispute took…	Supreme Court		District Court		Total	
	n	%	n	%	n	%
More time than expected	9	26.5	7	28.0	16	27.1
Less time than expected	4	11.8	2	8.0	6	10.2
About the same time as expected	21	61.8	16	64.0	37	62.7
Total	**34**	**100.0**	**25**	**100.0**	**59**	**100.0**

[29] Dispute age x case type: χ^2=1.181, df=1, p=.178, n=80.

Table 3.6 Satisfaction with dispute duration

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
Satisfied	29	85.3	23	92.0	52	88.1
Dissatisfied	5	14.7	2	8.0	7	11.9
Total	**34**	**100.0**	**25**	**100.0**	**59**	**100.0**

Relationship between expectations of case duration and satisfaction with case duration

Previous research has found that a relationship exists between expectation and satisfaction.[30] That is, the closer the match between expectation and reality, the greater the likelihood of satisfaction – regardless of, for example, the actual duration. Previous research has also identified the legal profession as being paramount with regard to the importance in establishing the expectations of parties in litigated matters.

On this basis, the relationship between the expectations held by the survey respondents with regard to dispute duration, and their satisfaction with the actual duration was explored. While the numbers are not sufficiently large to enable a statistical test of the data, the outcome presented in Table 3.7 supports the findings of previous research. That is, a greater proportion of people whose expectations regarding duration were met (by reality) expressed their satisfaction with duration than did those whose expectations were not met.

Table 3.7 Duration expectation by duration satisfaction

Dispute took…	Satisfied		Dissatisfied	
	n	%	n	%
More time than expected to be resolved	11	68.8	5	31.3
Less time than expected to be resolved	6	100.0	0	0.0
About the same amount of time as expected to be resolved	34	94.4	2	5.6

[30] T. Matruglio, 1994 *Plaintiffs and the Process of Litigation*, Civil Justice Research Centre, Law Foundation of New South Wales, Sydney. EA Lind, RJ MacCoun, PA Ebener, WL Felstiner, DR Hensler, J Resnik and TR Tyler, *The Perception of Justice: Tort Litigant's Views of Trial*, *Court-Annexed Arbitration and Judicial Settlement Conferences*, Institute for Civil Justice, The RAND Corporation, Santa Monica, R-3708-ICJ; T. Sourdin, *Commercial Dispute Resolution*, PhD Thesis, 1996, UTS, Sydney.

Issues surrounding 'success' and case outcome

The survey queried the perceptions held by the disputants with regard to their prospects of success. This variable was examined separately for plaintiffs and defendants. Most plaintiffs (40%) reported they thought there was a possible range of outcomes, 29% that they had a fair chance of success, 14% that they had a small chance and only 6% reported a belief that a win was a near certainty. Four percent reported that they did not know what their chance of success was.

By comparison, most defendants reported the belief that they had a fair chance of success (52%) and 24% that they had a small chance. Sixteen percent reported the belief in a possibility of a range of outcomes and 8% that there was a near certainty of a win.

Table 3.8 Perceived chances of success: prior to mediation

	Plaintiffs		Defendants	
	n	%	n	%
A small chance	5	14.3	6	24.0
A fair chance	10	28.6	13	52.0
Near certainty of a win	2	5.7	2	8.0
Possible range of outcomes	14	40.0	4	16.0
Did not know	4	11.4		
Total	**35**	**100.0**	**25**	**100.0**

Perception of case outcome

For half the plaintiffs, the outcome of their case was reported as being the same as they had expected (51.4%). In almost one third (31%), the outcome was worse than they had expected and in 17% the outcome was better than they had expected. Over half the defendants reported the outcome being as they had expected (58%); one quarter reported the outcome as being better than expected and 17% reported worse than expected.

Table 3.9 Perception of dispute outcome

The outcome was…	Plaintiffs		Defendants	
	n	%	n	%
Better than expected	6	17.1	6	25.0
Worse than expected	11	31.4	4	16.7
Same as expected	18	51.4	14	58.3
Total	**35**	**100.0**	**24**	**100.0**

Satisfaction with outcome

Measured by satisfaction with amount of money received, almost three quarters of plaintiffs reported being satisfied with the monetary outcomes of the mediation process.

Table 3.10 Satisfaction with money received

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
Satisfied	17	77.2	6	60.0	23	71.9
Dissatisfied	5	22.7	4	40.0	9	28.1
Total	**22**	**100.0**	**10**	**100.0**	**32**	**100.0**

How did the outcome compare with the expectations?

The relationship between expectation and plaintiff satisfaction was explored by reference to the amount of money received and the perceptions held about the outcome. While the numbers are not sufficiently large to enable a statistical comparison to be undertaken, there is a clear relationship between these two variables.

Table 3.11 Satisfaction with outcome and perception of outcome: plaintiffs only

The outcome was…	Satisfied		Dissatisfied	
	n	%	n	%
Better than expected	3	13.0	0	0.0
Worse than expected	2	8.7	7	77.8
Same as expected	18	78.3	2	22.2
Total	**23**	**100.0**	**9**	**100.0**

This information suggests that perceptions regarding 'success', measured by satisfaction with the dispute resolution process rather than the dispute outcomes per se, are dependent on realistic and achievable party expectations with regard to what is involved in the resolution process as well as the duration, possible outcomes and costs of that process.

Who was perceived to be successful?

It is interesting to examine the issue of who the survey respondents perceived as being successful with regard to dispute outcome.

Table 3.12 shows who the survey respondents perceived as being successful on a by party basis. Half of the plaintiffs saw both sides to the dispute as being successful following the mediation, 29% saw the defendant as being successful and only 14% reported that they were successful. By comparison, 84% of the defendants saw both sides to the dispute as being successful, 12% saw the plaintiff as being successful and 4% saw themselves as being

successful. In two cases, the plaintiff reported the belief that neither party was successful following the mediation. All respondents to this question were involved in matters that were finalised at mediation.

Table 3.12 Perception of success

Who was successful?	Plaintiffs		Defendants		Total	
	n	%	n	%	n	%
The survey respondent	5	14.3	1	4.0	6	10.0
The other side	10	28.6	3	12.0	13	21.7
Both sides	18	51.4	21	84.0	39	65.0
No-one	2	5.7			2	3.3
Total	**35**	**100.0**	**25**	**100.0**	**60**	**100.0**

Does the high proportion of people who perceived both sides to have been successful reflect the characteristics of the mediation process (where tangible and non-tangible outcomes may be achieved)? Do disputants involved in other resolution processes have similar perceptions? These questions are further explored in Chapter 6.

Table 3.13 Perception of dispute outcome

The outcome was…	Plaintiffs		Defendants	
	n	%	n	%
Better than expected	6	17.1	6	25.0
Worse than expected	11	31.4	4	16.7
Same as expected	18	51.4	14	58.3
Total	**35**	**100.0**	**24**	**100.0**

Examining these perceptions on a by party basis, it is clear that considerably more defendants considered that both sides were successful compared to plaintiffs (84% versus 51%). Exploring this feature in relation to the perception of outcome, it is not a surprising result as one third of plaintiffs had an outcome worse than they had expected. This may reflect the more realistic perceptions of 'repeat' player defendants.

The mediation process

Getting to the mediation

The mediations held as part of the Scheme mostly proceeded as scheduled. Therefore the perceptions held by the survey respondents regarding the process of the mediation were not influenced by them having to wait for

their mediation to take place. This feature was a relevant consideration in the control group where 'waiting' is a feature of dispute resolution processes such as trial and arbitration.

Time spent waiting on the day?

Survey respondents were asked whether they had to spend time waiting for their dispute to be dealt with on the day. A small number of those with a Supreme Court matter, 4/36 (11.1%), or a District Court matter, 2/25 (8%), reported having to wait.

How long did they have to wait?

The duration of the wait was reported by five survey respondents. Two reported having to wait three hours for their mediation, and the remaining three reported having to wait 10, 15 and 30 minutes. It is not clear why waiting time occurred in this small number of cases. It may be that waiting time included time spent waiting for a person with authority to attend the mediation or even time spent waiting while the other party was in private session – rather than time spent waiting for the mediation to commence.

How formal was the mediation process and were parties comfortable with the level of formality?

Almost three quarters of the survey respondents viewed the mediation process as being informal (74%). However, one quarter viewed the process as formal.

Table 3.14 Perception of procedural formality

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
Formal	9	28.1	6	24.0	15	26.3
Informal	23	71.9	19	76.0	42	73.7
Total	**32**	**100.0**	**25**	**100.0**	**57**	**100.0**

Formality preference

Almost all the survey respondents viewed the level of formality of their mediation as being 'right'. Formality may vary as a result of mediator style differences. Only two survey respondents reported a preference for the mediation to have been more formal, and three for the mediation to have been less formal. Only one of the survey respondents who perceived the mediation process as being formal reported a preference for it to have been less formal. The remaining 14 respondents who perceived the mediation process as having been formal reported the level of formality as 'right'.

Table 3.15 Formality preference

Preference	Supreme Court		District Court		Total	
	n	%	n	%	n	%
More formal			2	8.0	2	3.3
Less formal			3	12.0	3	4.9
Formality was right	36	100.0	20	80.0	56	91.8
Total	**36**	**100.0**	**25**	**100.0**	**61**	**100.0**

How well did the parties understand the mediation process?

The mediation process was understood by all but one of the survey respondents. In fact most reported understanding what was going on 'very well'. These results will be compared with the process understanding reported by people involved in other dispute resolution processes, in Chapter 6. There, the issues relating to the level of understanding reported by people involved in traditionally more formal dispute resolution processes such as arbitration and hearing are explored further.

Table 3.16 Process understanding

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
Very well	26	72.2	18	72.0	44	72.1
Quite well	10	27.8	6	24.0	16	26.2
Not at all			1	4.0	1	1.6
Total	**36**	**100.0**	**25**	**100.0**	**61**	**100.0**

Was the treatment of each party perceived to be equal during the mediation?

Importantly, 93% of the survey respondents believed both sides to the dispute were treated equally during the mediation process. However 7% believed that one side had been favoured.

Table 3.17 Equality of treatment during the mediation

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
Both sides treated equally	34	97.1	22	88.0	56	93.3
My side favoured	1	2.9			1	1.7
Other side favoured			3	12.0	3	5.0
Total	**35**	**100.0**	**25**	**100.0**	**60**	**100.0**

What do people want from a dispute resolution process?

The importance of procedural perceptions in determining satisfaction has been demonstrated in previous research.[31] It has been found that levels of participation, perceptions of fairness, costs, delay and control are important factors in determining levels of satisfaction with, and positive perceptions about dispute processes and dispute outcomes. For example, participants who 'lose' in a process may still have positive perceptions depending upon the perceptions they hold about the process.

The survey included questions aimed at measuring the perceptions of the survey respondents with regard to participation, fairness, control and comfort.

Process perceptions

The mediation participants overwhelmingly held positive perceptions of the mediation process. That is, virtually all survey respondents felt that they were able to participate during the process; that the process was fair; that they had control during the mediation process; that they had control over the outcome of the dispute; that there was enough time during the process to present their information; and that they were comfortable during the process. However, almost one quarter of survey respondents reported feeling pressured to settle (24%). It is not clear whether this pressure came from the mediator, representatives or the parties themselves.

While all but two people agreed they were able to participate during the process, 10 mediation participants indicated that they would have liked to participate more. This may have implications for mediators who use a shuttle negotiation process (particularly in the final stages of the mediation).

[31] See for example: EA Lind, RJ MacCoun, PA Ebener, WL Felstiner, DR Hensler, J Resnik and TR Tyler, 1989, *The Perception of Justice: Tort Litigants Views of Trial*, *Court-Annexed Arbitration and Judicial Settlement Conferences*, Institute for Civil Justice, The RAND Corporation, Santa Monica, R-3708-ICJ; T Matruglio, 1994, *Plaintiffs and the Process of Litigation*, 1994, Civil Justice Research Centre, Law Foundation of New South Wales, Sydney; M Delany & T Wright, 1997, *Plaintiff's Satisfaction with Dispute Resolution Processes*, Justice Research Centre, Law Foundation of New South Wales, Sydney; Australian Law Reform Commission *Review of the Adversarial System of Litigation, Background and Issues Papers* 1997–2001; Ontario Law Reform Commission *Rethinking Civil Justice: Research Studies for the Civil Justice Review Toronto 1996* vol 1, 5; M Winfield *Far from Wanting their Day in Court: Civil Disputants in England and Wales Research Paper* National Consumer Council United Kingdom 1996; T Sourdin, *Pilot Study*, *NSW Fair Trading Tribunal*, University of Western Sydney, NSW 2002; T Sourdin *Alternative Dispute Resolution*, 2002, Law Book Company, Sydney.

Table 3.18 Perceptions of the mediation process

Agree/disagree with:	Agree		Disagree	
	n	%	n	%
I was able to participate during the process	59	96.7	2	3.3
The process was fair	59	96.7	2	3.3
I felt I had control during the process	55	90.2	6	9.8
I would have liked to participate more	10	16.7	50	83.3
I had control over the outcome	54	90.0	6	10.0
I felt pressured to settle	14	23.7	45	76.3
There was enough time during the process	55	91.7	5	8.3
I felt comfortable during the process	53	88.3	7	11.7

Participant satisfaction

In this evaluation, participant satisfaction was measured by reference to the following variables: the handling of the mediation process; the way the dispute was dealt with; the length of time it took to resolve the dispute; the outcome of the dispute; and overall satisfaction with the operation of the system in their case.

Table 3.19 Participant satisfaction

Satisfied/dissatisfied with:	Satisfied		Dissatisfied	
	n	%	n	%
How the process was handled	58	96.7	2	3.3
The way the dispute was dealt with	57	95.0	3	5.0
The time taken to deal with the dispute	55	91.7	5	8.3
The outcome of dispute	53	89.8	6	10.2
The way the system operated	71	88.8	9	11.2

A very high proportion of participants were satisfied with how the mediation process was handled, the way the dispute was dealt with and the length of time taken to resolve the dispute. A lower proportion of people reported being satisfied with the dispute outcome and the operation of the system in their case.

Table 3.20 provides information on overall system satisfaction by jurisdiction.

Table 3.20 Overall system satisfaction by jurisdiction

	Supreme Court		District Court	
	n	%	n	%
Satisfied	42	85.7	29	93.5
Dissatisfied	7	14.3	2	6.5
Total	**49**	**100.0**	**31**	**100.0**

A higher proportion of disputants whose matter was filed in the District Court reported satisfaction with the system operation than participants in the Supreme Court.

Did plaintiffs and defendants respond differently to the process and satisfaction questions?

The responses provided by defendants and plaintiffs to the questions on the process and their satisfaction were remarkably similar. The variable with the greatest variance of responses was that relating to feeling pressured to settle, with almost 10% more defendants feeling such pressure (20% of plaintiffs compared with 30% of defendants). As noted previously, it is unclear whether this 'pressure' was applied by the mediator, representatives or another party.

Table 3.21 Perception variables: plaintiffs/defendants compared

Process perception variables	Plaintiffs				Defendants			
	Agree		Disagree		Agree		Disagree	
	n	%	n	%	n	%	n	%
I was able to participate during the process	34	97.1	1	2.9	25	96.2	1	3.8
The process was fair	34	97.1	1	2.9	25	96.2	1	3.8
I had control during the process	32	91.4	3	8.6	23	88.5	3	11.5
I had control over the outcome	32	91.4	3	8.6	22	88.0	3	12.0
I felt pressured to settle[32]	7	20.0	28	80.0	7	29.2	17	70.8
I felt comfortable during the process	32	91.4	3	8.6	21	84.0	4	16.0

[32] Felt pressured to settle by party: χ^2=.661, df=1, p=.416, n=59.

Table 3.22 Satisfaction variables: plaintiffs /defendants compared

Satisfaction variables	Plaintiffs				Defendants			
	Satisfied		Dissatisfied		Satisfied		Dissatisfied	
	n	%	n	%	n	%	n	%
How the process was handled	34	97.1	1	2.9	24	96.0	1	4.0
The way your dispute was dealt with	34	97.1	1	2.9	23	92.0	2	8.0
The time it took to deal with your dispute	33	94.3	2	5.7	22	88.0	3	12.0
The outcome of your dispute	30	88.2	4	11.8	23	92.0	2	8.0
Overall satisfaction with the way the system operated[33]	41	87.2	6	12.8	30	90.9	3	9.1

Relationship between process and satisfaction variables

To determine factors related to a reporting of overall satisfaction with the system, an attempt was made to explore the relationship between over-all satisfaction and the perception questions. However, too few people reported dissatisfaction with the operation of the system to enable any meaningful comparisons to be made. High levels of satisfaction were reported regardless of outcome.

Case processing

Seeking legal advice

At what stage of a dispute do disputants seek legal advice? Why do they seek it? Is it because negotiations with the other side break down, because the process becomes too difficult, because they are getting nowhere, or because they wish to apply pressure on another party?

Almost all survey respondents reported having seen a lawyer to help with the resolution of their dispute (91%, n=63). Of these, 43% (n=26) reported having tried to negotiate with the other side before seeing a lawyer. Fifty-seven percent of disputants sought legal advice to assist in resolving their dispute before attempting negotiations with the other side.

[33] Over-all system satisfaction by party: χ^2=.262, df=1, p=.609, n=80.

Table 3.23 Seeking legal advice

	Supreme Court		District Court		Plaintiff		Defendant	
	n	%	n	%	n	%	n	%
Did you see a lawyer?								
yes	43	91.5	20	90.9	37	94.9	26	86.7
no	4	8.5	2	9.1	2	5.1	4	13.3
Did you negotiate with the other side before seeing a lawyer?								
yes	13	23.6	10	58.8	13	39.4	10	41.7
no	27	67.5	7	41.2	20	60.6	14	58.3

Why did the survey participants see a lawyer?

Only a small number of defendants chose to answer this question. The most commonly reported reason for seeing a lawyer was to get expert advice. Following this, it was reported that the advice of a lawyer was sought due to having the claim or the liability for the claim denied, that an agreement could not be reached with the other side, or that the other side would not negotiate.

Table 3.24 Reasons reported for seeing a lawyer

	Plaintiffs	Defendants
Couldn't reach an agreement/other side wouldn't negotiate	10	8
Denial of claim and/or liability	11	2
Could not get the money amount sought	1	
Process was too difficult	4	
Wanted expert advice	19	6

Did your lawyer try to resolve the dispute before it was filed in Court?

Table 3.25 Did lawyer attempt settlement prior to litigation?

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
Yes	23	54.8	16	69.6	39	60.0
No	19	45.2	7	30.4	26	40.0
Total	**42**	**100.0**	**23**	**100.0**	**65**	**100.0**

In 60% of cases it was reported that the lawyer assisted in trying to resolve the dispute prior to filing a claim in Court. This is more evident in District Court than Supreme Court matters. The reasons why the cases were eventually filed were reported as being as follows.

Why was the dispute litigated?

The most commonly reported reason for commencing litigation was that the other side was not prepared to settle. The next most common reason was that the other side would not give the party what they 'wanted'. Some parties reported that the other side took 'too long' or there was more than one party on the other side.

Table 3.26
Why litigated?

	Supreme Court	District Court	Total
	n	n	n
My lawyer said I would get more	1		1
The other side wouldn't give me what I wanted	4	4	8
The other side was not prepared to settle	11	8	19
The other side was taking too long	2	1	3
There was more than one party on the other side	3		3
Limitation period	1	1	2
Did not know what would happen	1		1
Change in the case	1		1

Preferences for a public or private procedure?

All those who provided a response to this question reported that they liked the private nature of the mediation process (31 Supreme Court survey respondents answered this question, as did 20 District Court survey respondents). The most commonly reported reasons for this preference were that the private nature of the mediation process ensures the dispute is dealt with in a personal manner and that the private nature of the process reduces costs.

Table 3.27 Procedural preference

	Supreme Court	District Court	Total
	n	n	n
Why private?			
Ensures the case is personal	16	6	24
Saves embarrassment	5	3	8
Less intimidating	11	4	15
Is fairer	11	3	14
Is cheaper	19	4	23
Produces a better outcome	12	5	17
Why public?			
Keeps everybody honest	3	1	4
Publicises what the other side has done	2	1	3
Is fairer	3	1	4
Produces a better outcome	1		1

A small number of survey respondents also reported reasons why public procedures were preferable. These results are provided in Table 3.27.

A total of six Supreme Court survey respondents indicated a reason why a public procedure is preferable (five of these six disputes were not resolved at mediation). One survey respondent was a satisfied mediation participant who indicated that they thought a public procedure is preferable as it publicises what the other side has done.

Two District Court survey respondents indicated reasons why a public procedure was preferable – both were successfully mediated cases and the parties were satisfied with the private nature of the mediation process. These responses suggest that the survey respondents were reporting the perceived advantages of both procedural methods.

Case costs

Table 3.28 provides information relating to the costs associated with resolving disputes. A comparison of cost on the basis of dispute resolution process is provided in Chapter 6.

Table 3.28
Case cost

	Supreme Court		District Court	
	Plaintiff $	Defendant $	Plaintiff $	Defendant $
Professional fees				
median	19,500	20,000	17,500	14,000
mean	25,886	34,946	23,042	15,833
minimum	2,500	3,000	0	5,000
maximum	70,000	100,000	62,000	30,000
n	22	13	12	6
Disbursements				
median	2,000	1,500	3,000	3,500
mean	5,192	5,671	4,357	4,333
minimum	495	500	357	2,000
maximum	22,000	20,000	15,000	10,000
n	13	9	8	6
Other costs				
median	3,600	10,000	8,750	
mean	3,600	16,286	8,750	
minimum	2,000	1,000	500	
maximum	5,000	36,000	17,000	
n	5	7	2	0
Total costs				
median	21,000	29,000	20,000	19,500
mean	29,773	44,238	29,896	20,167
minimum	3,500	6,300	4,857	8,000
maximum	92,000	120,000	65,000	35,000
n	22	14	11	6

Total cost expenditure is often linked to case age. As the matters that were referred to the Scheme were older and more complex than the control group cases, significant costs had often already been incurred by the time the mediation took place.

Demographic information

The survey included questions that enabled the collection of demographic information about the survey respondents.

Previous involvement in legal action

The survey asked if the party had previous involvement in a legal action. A considerable proportion of people from both jurisdictions had such previous involvement. Considering this variable on a party basis, it is clear that while both the plaintiff and defendant groups had considerable proportions of people with previous legal action experience (51.2% and 33.3% respectively), the proportion of plaintiffs with previous legal action experience is

somewhat higher. It may be that those who choose to mediate are more likely to have had litigation and/or previous experience of mediation. Such parties may be more likely to agree to mediation rather than continuing through the litigation process.

Table 3.29 Previous legal action?

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
Yes	22	40.0	9	36.0	31	44.3
No	23	51.1	16	64.0	39	55.7
Total	**45**	**100.0**	**25**	**100.0**	**70**	**100.0**

Who are the repeat players?

Table 3.30 Repeat players

	Plaintiff		Defendant	
	n	%	n	%
Yes	22	51.2	9	33.3
No	21	48.8	18	66.7
Total	**43**	**100.0**	**25**	**100.0**

Previous litigation experience was considered to have the potential to influence reported satisfaction as it may create a precedent against which any subsequent litigation or dispute resolution process experience is compared. On this basis, satisfaction was examined in relation to the variable of having had previous experience with a legal action. No difference was found between the groups with regard to their reported satisfaction with the overall operation of the system. Once again, statistical testing was difficult as a result of the small number of people reporting dissatisfaction with the mediation process.

Gender

Most survey respondents involved in the Supreme Court matters were male (60%). The male/female ratio for the District Court was the same.

Table 3.31 Gender of the survey respondents

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
Male	27	60.0	9	36.0	36	51.4
Female	12	26.7	9	36.0	21	30.0
Male & female survey respondents	1	2.2			1	1.4
Company/ organisation	3	6.7	3	12.0	6	8.6
Solicitor with organisation	2	4.4	4	16.0	6	8.6
Total	**45**	**100.0**	**25**	**100.0**	**70**	**100.0**

Was there a difference between men and women in relation to their perceptions of and satisfaction with the mediation process?

Unfortunately the numbers prevent full statistical analysis, however the results of the comparisons are provided in Tables 3.32 and 3.33.

Table 3.32 Perception variables: by gender

Process perception variables	Male				Female			
	Agree		Disagree		Agree		Disagree	
	n	%	n	%	n	%	n	%
I was able to participate during the process	24	100.0	0	0.0	16	94.1	1	5.9
The process was fair	24	100.0	0	0.0	16	94.1	1	5.9
I had control during the process	21	87.5	3	12.5	15	88.2	2	11.9
I had control over the outcome	22	95.7	1	4.3	14	82.4	3	17.6
I felt pressured to settle	5	21.7	18	78.3	2	11.8	15	88.2
I felt comfortable during the process	21	91.3	2	8.7	15	88.2	2	11.8

Table 3.33 Satisfaction variables: by gender

Satisfaction variables	Male				Female			
	Satisfied		Dissatisfied		Satisfied		Dissatisfied	
	n	%	n	%	n	%	n	%
How the process was handled	23	100.0	0	0	16	94.1	1	5.0
The way your dispute was dealt with	23	100.0	0	0	16	94.1	1	5.0
The time it took to deal with your dispute	21	91.3	2	8.7	17	100.0	0	0.0
The outcome of your dispute	21	91.3	2	8.7	16	94.1	1	5.9
Overall satisfaction with the way the system operated[34]	30	88.2	4	11.8	18	85.7	3	14.3

The responses of men and women are quite similar on all perception variables except for the perception relating to control over the outcome (men agreed 95.7% and women 82.4%) and with regard to feeling pressured to settle (men agreed 21.7% and women 11.8%). There were no apparent differences on the basis of gender with regard to the satisfaction variables.

Age

Age of the survey respondents

Most of the survey respondents were in the 51-65 years of age category. The lowest number of survey respondents were in the 18-30 years of age category.

Table 3.34 Survey respondent age

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
18–30	3	7.5	3	15.0	6	10.0
31–40	9	22.5	6	30.0	15	25.0
41–50	8	20.0	6	30.0	14	23.3
51–65	13	32.5	4	20.0	17	28.3
Over 65	7	17.5	1	5.0	8	13.3
Total	**40**	**100.0**	**20**	**100.0**	**60**	**100.0**

[34] Over-all system satisfaction by party: χ^2=.262, df=1, p=.609, n=80.

Is English the first language of parties?

In the majority of cases English was the first language of the survey respondent. This may reflect the mediation population, or it may be that those from a NESB (non-English speaking background) are less likely to respond to surveys.

Table 3.35 English as first language

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
Yes	38	92.7	20	100.0	58	95.1
No	3[35]	7.3			3	4.9
Total	**41**	**100.0**	**20**	**100.0**	**61**	**100.0**

Education

Half the survey respondents reported having a tertiary education. Again, this may reflect either the mediation population or the propensity of more highly educated people to respond to surveys.

Table 3.36 Education

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
School certificate	9	23.7	4	21.1	13	22.8
Higher school certificate	3	7.9	2	10.5	5	8.8
TAFE	7	18.4	3	15.8	10	17.5
College/University	19	50.0	10	52.6	29	50.9
Total	**38**	**100.0**	**19**	**100.0**	**57**	**100.0**

Occupation

Most survey respondents reported themselves to be managers/administrators, followed by the professional category. This is consistent with a highly educated survey population.

[35] One of the three Supreme Court respondents from a non-English speaking background indicated their first language as being Maltese.

Table 3.37
Occupation

	Supreme Court		District Court		Total	
	n	%	n	%	n	%
Manager/ administrator	13	35.1	2	14.3	15	29.4
Professional	9	24.3	6	42.9	15	29.4
Tradesperson	6	16.3			6	11.8
Clerk	1	2.7	2	14.3	3	5.9
Sales/personal service worker	2	5.4	1	7.1	3	5.9
Machine/plant operator						
Labourer or related	1	2.7			1	2.0
Home duties/retired	5	13.5	3	21.4	8	15.6
Total	**37**	**100.0**	**14**	**100.0**	**51**	**100.0**

Income

The survey asked parties to indicate the income band to which they belonged. The most commonly reported income bands were Nil-$20,000 and over $60,000.

Table 3.38
Income

$	Supreme Court		District Court		Total	
	n	%	n	%	n	%
Nil–20,000	13	38.3	1	6.3	14	28.0
20,000–40,000	6	17.6	5	31.3	11	22.0
40,000–60,000	8	23.5	3	18.7	11	22.0
More than 60,000	7	20.6	7	43.7	14	28.0
Total	**34**	**100.0**	**16**	**100.0**	**50**	**100.0**

Conclusions

The case details collected from the participant survey demonstrate that mediation, under the NSW Settlement Scheme 2002, was used to deal with a variety of case types that were often of at least 3 years duration.

Statistically significant relationships were found between dispute resolution at mediation and a number of significant case variables. A lower proportion

of personal injury matters were resolved at mediation than were other case types. Further, a relationship was found to exist between case age and resolution (independent of case type) with significantly fewer cases of more than three years duration resolving at mediation. These findings have implications for case selection for mediation. Is mediation less successful when the parties to the dispute have no prior relationship and/or no need of a continuing relationship (as is the case in the majority of personal injury matters)? Are disputes of 3 (or less) years old more amenable to resolution by mediation?

In accord with previous research, it was found that the disputants' satisfaction with case duration and case outcome was related to their prior expectations of duration and outcome. When expectations accord with reality, satisfaction will be expressed. Previous research has found that the advice given by lawyers (in respect of outcomes and process) is a key factor in the formation of expectations and perceptions.

The findings in relation to the mediation process were positive across a wide range of variables. Indeed, many statistical tests could not be performed because it was difficult to correlate and explore relationships between some variables as a result of the small numbers of people reporting dissatisfaction with the mediation process. Importantly, a high proportion of mediation participants expressed the belief that the mediation had resulted in both sides to the dispute being successful.

There was overwhelming agreement that the perceived level of procedural formality was 'right' and that both parties to the dispute had been treated equally during the mediation process. This reflects the participants' experiences regarding understanding of, control during and comfort with the mediation process, as well as participant satisfaction with the way the mediation was handled and the dispute dealt with. Importantly, the responses of plaintiffs and defendants with regard to process perceptions and reported satisfaction were remarkably similar.

Chapter 4

Mediation – mediator skills

Introduction

The mediators participating in the Scheme were requested to complete a survey form at the end of the mediation in which they were involved. In cases where the process involved a co-mediation, a survey form was completed by each mediator.

A total of 86 completed mediator surveys were received. Of these, 54 (62.8%) were Supreme Court matters and 32 (37.2%) were District Court matters.

The mediation process

The mediators were asked questions about the procedures they follow during the mediation process.

Pre-mediation sessions

Seventy-five mediators (87.2%) reported that they held a pre-mediation session. The most commonly reported reason for not holding a pre-mediation session, (given by the remaining 11 mediators), was the inability of one or both parties to attend such a session (see Table 4.1 overleaf).

The reasons why parties could not attend are provided in Table 4.1 and give some insight into the issues which arise in mediations.

In just over half of the cases (55%) the pre-mediation session was held face-to-face. In 40% of cases, the session was conducted over the telephone. In a small number (5%), the mediator conducted the session in a face-to face session and over the telephone.[36]

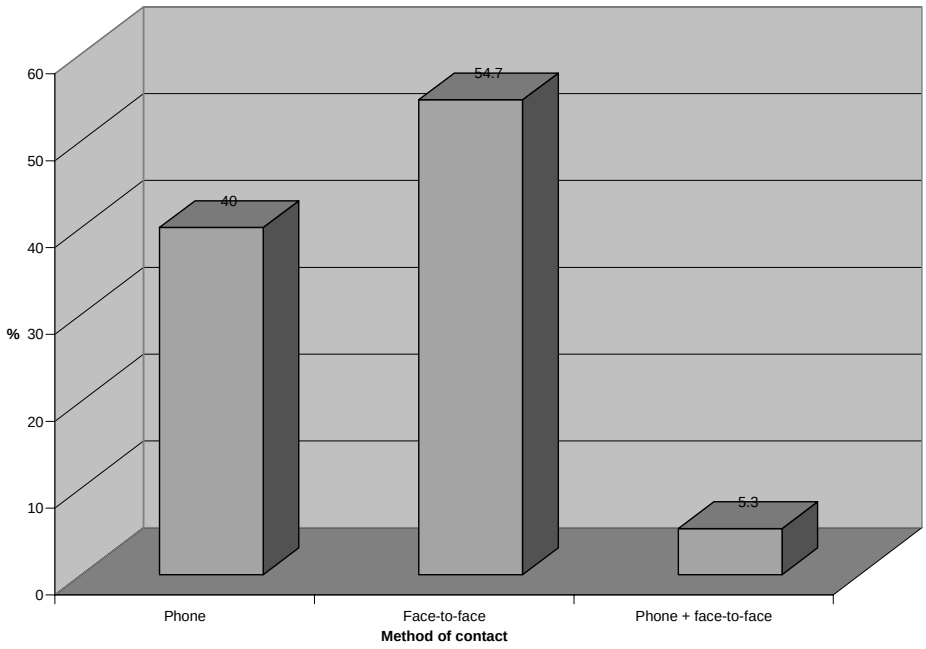
When asked if satisfied with the lawyer and/or client preparation, only 6 of the 74 mediators reported being dissatisfied (8.1%).

[36] Note that in one of the phone contact cases, the mediator also used e-mail during the pre-mediation session process.

Table 4.1 Reasons why a pre-mediation session was not held

Applicant residing interstate. Agreed all could be achieved at mediation.
Arranged but mistake as to time
Insurer one side only person attending. She was trained mediator. Discussed with other side's solicitor (accredited specialist in mediation) and decided no benefit.
Not practical
One party was ill and unable to attend. Parties' representatives wished process to proceed. I took the view matter should proceed.
Parties did not require additional information
Parties out of Sydney
Parties were ready for trial, had all information, all but plaintiff had mediation experience. I spoke to plaintiff to acquaint him with what to expect on the day.
Telephone conference - one party in country
The plaintiff resides at X and the defendant resides at Y. As a compromise, the mediation was held at A (in the country – closer to all parties)

Figure 4.1 How the mediation sessions were conducted



The mediators were asked to indicate the issues discussed at the pre-mediation session. Five discussion areas were provided on the survey form with the option of an 'other' category into which the mediator wrote the additional issue/s discussed. Seventy-four of the 75 mediators who indicated attendance at a pre-mediation session responded to this question.

Table 4.2 Number of mediators discussing the specified issues at the pre-mediation session

	n	%
Authority to settle	68	92
The mediation agreement	67	91
Empowerment	47	64
Role of mediator	68	92
Opening statements	53	72

Issues surrounding the authority of parties to settle, the mediation agreement and the role of the mediator during the mediation were very commonly discussed during the pre-mediation sessions. A high proportion of the sessions also included discussion about the parties' opening statements.

Fifty mediators reported that 'other' issues were discussed at the pre-mediation session. From the comments provided by the mediators, 18 further issues were identified. The commonly reported issues concerned material preparation and timetable issues. Issues about the exchange of documents and/or information; the nature/objective of mediation; the role of participants; issues of confidentiality; and mediation fees followed in frequency.

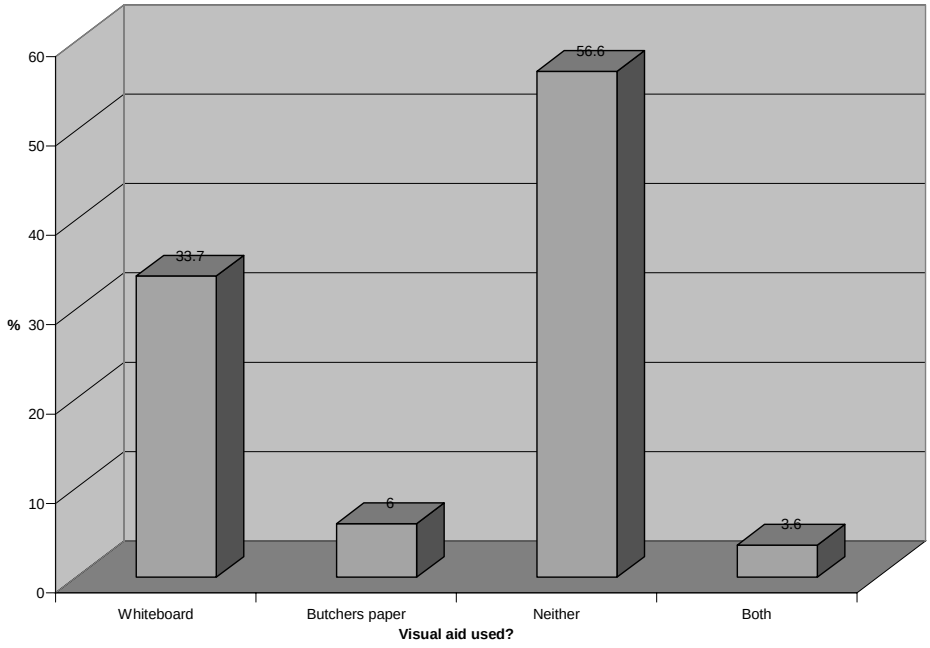
Table 4.3 Other issues discussed at the pre-mediation session

	n
Agenda for mediation	2
Exchange of documents/information	9
Material preparation/timetable issues	19
Nature/objectives of mediation	8
Role of parties/advisors	8
Venue/time/date issues	5
Issues paper	1
Confidentiality issues	8
Who was attending the mediation	4
Enforceable settlement/finality	3
Mediation fees	8
Settlement Week survey	3
Used to break ice between parties	1
Health issue of plaintiff	1
Disabled access	1
Claiming/litigation process	2
Matter settled at pre-mediation session	1
Court approval terms	1

The use of visual aids

Thirty-one (37.3%) of the 83 mediators who responded to this question reported using a whiteboard during the mediation process. Eight reported using butchers paper. Most mediators (47, 56.6%) reported that they did not use either method of visual presentation during the mediation process.[37] There was no difference in the resolution rates of mediations in which visual aids were or were not used.[38]

Figure 4.2
Visual aids used during the mediation



The use of private sessions

In 80 cases (93%) the mediator held private sessions. The stage at which these sessions were held is provided in Table 4.4.

Table 4.4
When were private sessions held?

	n
After opening statements	7
After some clarification	17
After issues explored	42
After an impasse reached	15

Most mediators reported that private sessions were held with the parties after the mediation had progressed to the stage at which the issues in dispute had been explored. Considerably fewer mediators held private sessions after

[37] Most mediation training stresses the importance of using a visual 'map' in mediation.
[38] Chi-squares: resolution by use of visual aid χ^2=.069, df=1, p=.793, n=80.

a fuller clarification of the issues in dispute or after an impasse had been reached between the parties. This approach follows the mediation training model of most mediation training providers. In a small number of cases a private session was held following the opening statements.

Why were private sessions held?

Seventy-eight mediators reported reasons for holding private sessions, which most frequently were held to explore options and to discuss issues. Other reasons included reality testing and exploring the best alternative/s to a negotiated agreement (BATNA).

Table 4.5 Why were private sessions held?

	n
To reality test	56
To explore BATNAs	52
To discuss issues	60
Open sessions were no longer productive	27
To explore options	62
To explore something said in the joint session	33
One party was very emotional	16

Mediators were also asked to provide additional comments regarding the private sessions. The issues raised by the mediators regarding the conduct of the private session/s are provided below and again, give some insight into the nature of the mediation process.

Table 4.6 Comments on the private sessions

Highly emotional matter between the two parties in dispute over property following a relationship breakdown and separation.
It helped the process of negotiation. Also the plaintiff's counsel seemed unsure of the process and was more comfortable with private session.
Very valuable
Private sessions were very productive and positive
To ascertain whether respondent understood everything
Very deep resentments on both sides
To explore settlement figures
The lawyer held their own private sessions
This was a Family Provisions Act matter and the parties were siblings
To develop 'doubt creation' reference future litigation (matter listed in near future)

Listing of agenda during the mediation

Sixty mediators reported that a listing of issues/topics/common ground or an agenda took place during the mediation. Less rights-based issues such as issues of fairness to both parties, the personal/financial position of the parties and the relationship between the parties, were listed as agenda items in some mediations. Some mediators used the agenda to enable some reality testing to take place, and farmed issues as questions such as 'What is the likely court outcome?' or 'What is the cost of taking the matter to court?'. Apart from the discussion of the legal rights and obligations of the parties, a discussion about interests took place which led to the development of a wider range of options in some cases.

What would you do differently next time?

When mediators were asked if they would do anything differently if mediating another dispute similar to the one in question, 17 mediators (21%) indicated that they would. Their comments were case-specific and can be found in Table 4.7.

Table 4.7 What would be done differently next time?

Not get 'offers' on this table at the outset.
Hold specific caucus with each representative.
Ideally, further information should be available at preliminary conference in complex cases – otherwise can be taken by surprise which prevents mediation going forward.
Confirm that all members of each team have been informed before mediation session of what has been agreed at preliminary conference.
Clarify in separate session the approach which counsel was going to adopt to allowing a party to speak.
Counsel's method of calculating result was different to the most obviously logical method. I should have 'converted' counsel earlier in negotiations.
Speak to the plaintiff separate from plaintiff's father
Be tough on limiting the material supplied for reading – may be useful as context on the industry but burdensome
Be sure in advance that the lawyers had read the common file
Meet parties separately for preliminary conference if the fee structure allowed
Summarise Defendant's position; summarise Plaintiff's position differently
Ensure counsel was present; ensure counsel was better prepared
It was difficult to obtain agreement as to venue
Greater pre-mediation preparation
Perhaps 'white board' the issue of damages
Would have had to bring parties back a week later

Party issues

Did the same parties attend the preliminary conference and the mediation?

Based on the responses of the mediators to the survey, the same parties attended both the preliminary conference and the mediation in 23 cases (31.5%). However, in response to the following question: 'Who did not attend the preliminary conference?' – 66 mediators reported party non-attendance. (On this basis, it would seem that in only 8 cases all parties attended both the preliminary conference and the mediation.)

Table 4.8 Who didn't attend the preliminary conference?

	n
Plaintiff/defendant	42
Counsel	45
Solicitor	14
Other: ▪ family/support person ▪ guardian/next friend	8 6 2

Who was at the mediation?

In almost half of the 86 mediations (40, 46.5%) another person was present in addition to the parties and the legal representatives. In 32 mediations, a support person was present (in 30 cases this person was a family member and in one case the support came via an on-line connection during the mediation). In four cases an observer was present, [39] and in one case the Protective Commissioner attended the mediation (with the consent of parties).

Party understanding of the mediation process

Mediators were asked if they considered the parties to have understood the mediation process before the session began. Seventy-nine mediators (94%) believed that the parties understood the process. Only five mediators (6%) reported the belief that the parties did not. Of these, three disputes were resolved at mediation, two were not. This conclusion is also reflected in party comments about understanding – see Table 3.16.

Party representation at mediation

Parties were represented during the mediation in all but seven cases (8.5%). Of these, both parties were unrepresented in one case, the defendant was unrepresented in three cases, and the plaintiff in one. In two cases it was not clear from the comment which side was unrepresented.

[39] In one case the observer was recorded as being a claims officer from the insurance company, and in another it was noted that the observer was for the defendant and became actively involved in the mediation.

Who made the opening statements?

Information regarding who made the opening statements was provided in 75 cases. In 24 cases, opening statements were reported as having been made by both the legal representatives and the parties (32%). In 14 cases (16.3%) it was reported that the opening statement was made by the parties alone. In 37 cases (49.3%) it was reported that the opening statement was made by the legal representatives.

The outcome of the mediation

Was the dispute finalised?

The mediators responding to the survey reported a resolution in just under two thirds of the cases that went to mediation (53, 61.6%). The dispute remained unresolved in 32 cases (37.2%) (some cases were resolved following the mediation and in other cases, issues were narrowed – see below). The most commonly reported reason for the dispute not resolving at mediation was that the outcomes the parties were hoping to achieve during the mediation were too disparate to enable a resolution to be reached.

Table 4.9 Why matters were not finalised

	n
One or more parties could not get instructions	2
One or more parties would not negotiate	2
One or more parties was unreasonable	8
The parties were too far apart	21
One or more parties were not well advised	4
Expert evidence was needed	4
One or other party did not act in good faith	5

The figures in table 4.9 are based on the mediators reporting one or more reasons for the dispute remaining unresolved; therefore, they are not additive.

Other issues noted by mediators as to why the dispute did not resolve at the mediation were that:

- One party needed more time to come to terms with a very emotional decision.
- One party was not legally represented.
- Plaintiff needed time to consider defendant's best offer, but was expected to settle/agree.

- Parties very close; defendant offer left open to allow the plaintiff a 'few days' to consider it, at the plaintiff's request.
- Ended up an argument of legal costs only by complainant who wanted to withdraw.

However, in 27 of the 32 matters that were not finalised (87.1%) the mediators reported that the issues in dispute were narrowed. The mediation was not considered to have narrowed the issues in four cases. One mediator chose not to respond to this question.

Was the outcome fair?

In 76% of the finalised cases, the mediator reported believing the outcome of the dispute was fair. In 24% of the matters, the mediator reported not having formed a view regarding the fairness of the outcome.

Costs savings

Mediators were asked their perception as to whether the mediation process saved the parties costs. Seventy-one mediators (86.8%) reported a belief that this was the case, eight (10%) reported negatively and one (1.3%) did not know. Mediators were also asked to estimate the amount they believed the parties to have saved. In respect to this question, it has been assumed that the mediators reported costs savings for both parties.

The median amount of cost savings reported by the mediators was $55,000. The range was from $5,000 to $350,000 (the 1994 Settlement Week estimated median was $30,092).

The mediators

Mediators were also requested to supply information about their training and experience. In cases where the mediator had been involved in multiple mediations, they were asked to provide their personal details only once. This ensured that their information was not included more than once in any analyses, and also accounts for the disparity between numbers of surveys received and mediators about which personal information is presented.

In 32 surveys mediators reported having the opportunity to debrief after the mediation (38.6%). Fifty-one (61.4%) reported not having the chance. Often the debriefing opportunity came as the result of the process being co-mediated.

Co-mediation took place in 22 of the mediations. All but one mediator reported being satisfied with the co-mediation process.

Mediation experience

Mediators were asked open-ended questions about their previous mediation experience and were also asked to report the year they first started mediating.

Number of mediations conducted, number of years mediating

Twenty-nine mediators provided information about the number of mediations they had conducted. In this figure mediators included conciliations in which they had been involved, and often the number was followed by a '+', providing a general rather than actual number (for example, 20+ mediations).

From Table 4.10 it is apparent that the NSW Settlement Scheme 2002 attracted a high proportion of very experienced mediators (who had previously mediated more than 100 disputes).

Table 4.10 Mediation experience

Mediations	n	%
1–10	1	3.4
11–20	4	13.8
21–30	2	6.9
31–40	3	10.3
41–50	2	6.9
101+	17	58.6
Total	**29**	**100.0**

Commensurate with the large range in the number of mediations conducted, the number of years of mediating experience varied considerably. The median number of years mediating was 11; the range was from 1–23 years.

Mediation training, suggestions for Settlement Week schemes

The survey asked mediators to report where they had gained their mediation training.

Table 4.11 What and with whom was your prior mediation training?

Mediation training with:	n
LEADR	20
ACDC	15
Law Society of New South Wales	18
Educational institution[40]	25
Government Department[41]	4
The Trillium Group	2
CDR Associates	6

[40] The institutions specified were: Harvard University, 9; Bond University, 7; University of Technology, 6; Australian National University, 1; University of Western Sydney, 1; TAFE, 1.

[41] The Departments specified were: Fair Trading, 1; Attorney General's, 1; Legal Aid Commission, 2.

Table 4.11 Continued

Unifam	2
Conflict Resolution Network	2
IAMA	3
World Intellectual Property Organisation	1
Accord Group	3
American Arbitration Association	1
Centre for Conflict Resolution	1

The survey asked mediators to comment on ways to improve the refresher training for the Scheme and also why the mediator had participated in the Scheme. The responses to these questions are provided in Appendix H.

When mediators were asked what would support the growth of mediation process use in Australia, 40 mediators responded. Most believed schemes such as the NSW Settlement Scheme 2002 supported the growth of mediation. This response was followed by the belief that referral to mediation should be mandatory.

Table 4.12 Supporting the growth of mediation in Australia

	n
Settlement Week schemes such as this	39
Mandatory mediation	31
One peak professional body	13
Standards for mediators	18
Greater Government support	20
Other[42]	11

Conclusions

The NSW Settlement Scheme 2002 attracted a high proportion of very experienced mediators, who received their mediation training from a variety of training providers. From the results of the survey it is evident that there was a high degree of consistency between them with regard to the way they conducted the mediation process.

The majority of mediators reported holding a pre-mediation conference, with most conducted face-to-face with the case participants. Issues surrounding

[42] The 11 'other' suggestions were: education and promotion; through use; more active encouragement through the courts not only in settlement weeks; use of on-line mediation/ADR; funding; greater awareness of what mediation actually is within the legal profession; promotion; funding and real legislation support; better pay loss CTC mediation and court-annexed mediation; ADR centre.

the authority to settle, the mediation agreement and the role of the mediator during the mediation process were most frequently discussed in the pre-mediation conference.

Private sessions were held in the majority of mediations (93%). They were most often held after the issues in dispute had been explored with all parties. The private sessions were used to explore options and discuss the issues with the parties on an individual basis. The listing of issues, common ground and/or an agenda was a commonly used procedure during the mediation process.

One area where there was considerable difference between mediators involved the use of visual aids. Just under half of the mediators reported using a visual aid during the mediation process. There was no difference in the rate of dispute resolution on the basis of the use of visual aids.

A resolution was reported in just under two thirds of the Settlement Week mediations. Most commonly the reason for non-resolution was that the parties were too far apart with regard to what they wanted to achieve from the mediation. It was however noted that in most cases where a resolution was not achieved, the issues in dispute were narrowed. The narrowing of the issues may have enabled a resolution to be reached between the parties at some stage subsequent to the mediation.

Chapter

5

Comparing mediation with NSW District Court processes – trial, arbitration, 'between parties agreement'

Introduction

As part of the Scheme evaluation, a survey was conducted of a control group of cases that did not go through mediation. District Court cases that were resolved by arbitration, trial and 'between parties agreement' were used as a comparative 'control group'. The aim of the survey was to collect case background, processing and outcome information about cases finalised in the following ways - a 'between parties agreement' (negotiation), arbitration, hearing (trial) or mediation.

The sample was based on cases selected during a two-week period in October 2002. Cases were selected according to the following criteria. The first 50 cases filing a 'Terms of Settlement' became the between parties agreement group; the first 50 matters listed for arbitration during this period became the arbitration group, and the first 50 matters listed for hearing during this period became the hearing group. Information was collected from these files during the last week of October 2002. The mediation group was selected using the Law Society records and included all cases in which there was a 'match' between the parties and the matter was listed for mediation. For the purpose of the following analyses, while not all cases in each group were finalised as listed, each group is referred to as a 'finalisation group'.[43]

[43] That is, disparate numbers in the following analyses with regard to method of finalisation result from not all of the arbitration, hearing and mediation matters being resolved as listed. In some cases, a between parties agreement was ultimately reached.

Referral of matters to arbitration and mediation

Matters are referred for arbitration in the District Court once they are deemed to be trial ready and will usually proceed to arbitration once listed by the Court.

Case and party profiles

Cause of action

To enable statistical comparisons to be undertaken, the cause of action has been divided into two categories: personal injury and 'other'.[44]

Table 5.1
Cause of action

	Personal injury		Other		Total	
	n	%	n	%	n	%
Between parties agreement (Negotiation)	45	90.0	5	10.0	50	100
Arbitration	45	93.8	3	6.3	48	100
Hearing	39	79.6	10	20.4	49	100
Mediation	27	69.2	12	30.8	39	100

There are significant differences between the finalisation groups with regard to the types of matters each includes.[45] The hearing and mediation groups had significantly higher proportions of 'other' matters, with the mediation group demonstrating the highest proportion of both. Of interest is that 8 of the 10 'other' hearing matters were commercial cases, whereas for the mediation matters the case-mix in the 'other' group varied considerably.

What might this be due to? It has been suggested that cases that proceed to a hearing or mediation are more complex than those that are resolved between parties or those that proceed to arbitration.[46] It may also be that mediation is particularly suited to cases in which there is an on-going relationship

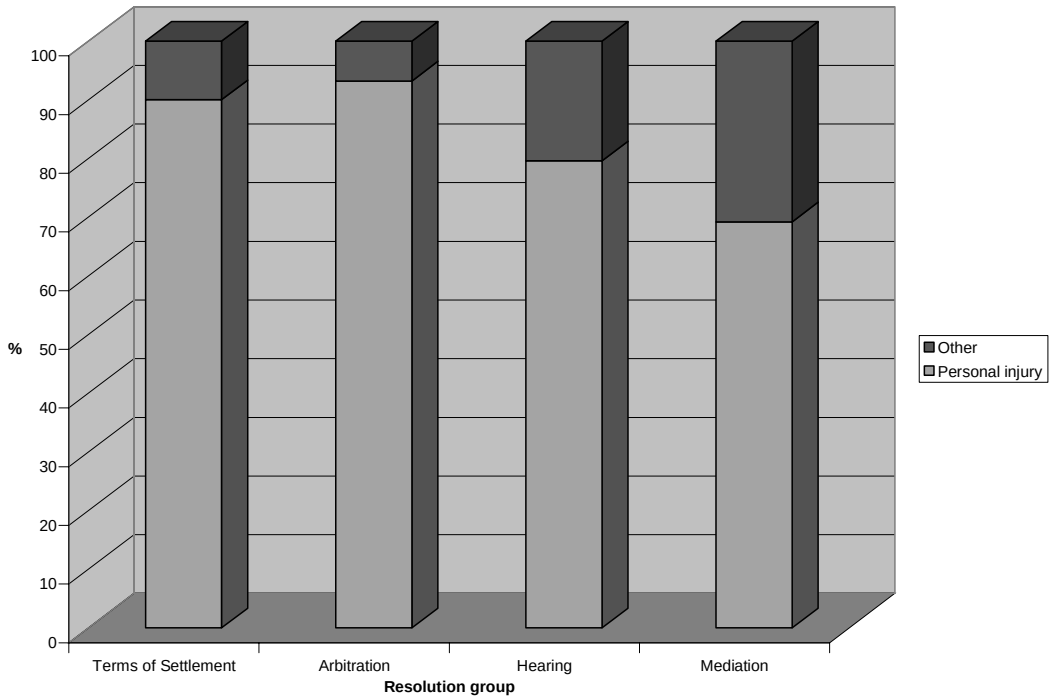
[44] The 'other' cases in the between parties agreement group were as follows: 1 professional negligence; 1 commercial; 1 workers compensation recovery; 2 construction. The 'other' cases in the arbitration group were: 1 professional negligence; 1 workers compensation recovery and 1 property damage. For the hearing group, the 'other' matters were: 8 commercial; 1 child abuse and 1 limitation periods. The 'other' mediation matters were: 2 professional negligence; 4 commercial; 1 construction; 2 property issues; 2 family provision issues; and 1 for defamation.

[45] Case type by resolution group: χ^2=10.84, df=3, p=.013, n=182.

[46] T Sourdin, *Alternative Dispute Resolution*, 2002, Law Book Company – see Chapter 6. Also see R Whiting, The Single Issue, Multiple Issue Debate and the Effect of Issue Number on Mediated Outcomes *Mediation Quarterly*, Volume 10, No 1, Fall 1992. An examination of 296 cases referred to mediation where outcomes for single issue and multiple issue disputes were determined.

between the disputing parties and that this has been considered by both the parties when agreeing to participate in the mediation process.[47]

Figure 5.1 Resolution group by cause of action



Age of case

The following information is based on the case duration (that is the time that elapsed between the year the matter was filed and October 2002).

There are significant differences between the groups with regard to the age of the disputes. Almost half of the between parties agreement group were resolved in less that one year after the dispute arose, as compared with only 8% of the arbitration group, 16% of the hearing group and 10% of the mediation group.

Table 5.2 Resolution group by case age at 2002

	0 years		1 year		2 years		3+ years	
	n	%	n	%	n	%	n	%
Between parties agreement	23	46.0	25	50.0	2	4.0		
Arbitration	4	8.0	44	88.0	2	4.0		
Hearing	8	16.0	31	62.0	11	22.0		
Mediation	4	10.0	27	69.2	5	12.8	3	7.7

[47] T Sourdin, *Alternative Dispute Resolution*, 2002, Law Book Company – see Chapter 6.

Case duration

The median duration of all of the matters surveyed was 12.1 months from the date the Statement of Claim was filed and the date the matter was finalised.[48] When examined by finalisation group, differences in case duration are apparent. This difference can be explained by court preferences to refer older, more intractable and complex cases to mediation (perhaps perceiving that the most significant savings can be made by the Courts and parties in these cases).

Table 5.3
Case duration by resolution group

	Months				
	mean	**median**	**min.**	**max.**	**n**
Between parties agreement	12.24	10.53	1	48	47
Arbitration	12.41	11.32	3	25	49
Hearing	17.32	16.58	2	47	45
Mediation	16.87	11.71	5	106	30

Whilst the 'between parties agreement' and arbitration groups are similar in duration, the hearing matters take longer to reach finalisation. This finding is statistically significant[49] and is consistent with previous research.

Number of cross-claims, and number and type[50] of plaintiffs and defendants

Cross-claims

Cross-claims were filed in 2 (4%) of the between parties agreement group, 6 (12%) were filed in the arbitration group, 4 (8%) in the hearing group and 7 (17.9%) in the mediation group.

Cross claims can be used as one indicator of claim complexity. Other indicators include the number of plaintiffs and defendants.

Number, and type of plaintiffs

From the data it is apparent that multiple plaintiffs were a feature most common to the mediation group. There was only one plaintiff in 48 of the 'between parties agreement' group (96%), in all (100%) of the arbitration group, and in 47 (94%) of the hearing group. However, there was one plaintiff only in 35 (87%) of the mediation group.

[48] 'Finalisation' refers to the date the Terms of Settlement were filed in the Court, or the date the matter was finalised at arbitration or hearing.

[49] Kruskal-Wallis: χ^2=20.357, df=3, p<.000, n=171.

[50] Where the cause of action was a motor vehicle accident the defendant is recorded as being an insurer. This is despite the other driver being listed as the defendant on the Statement of Claim, as the defending party is ultimately the Compulsory Third Party Insurer.

In the majority of the matters reviewed the plaintiff was an individual (n=178, 94.7%). This is not surprising as most disputes were the result of a personal injury. There was little difference across the finalisation method groups on this variable.

Number and type of defendants

While a difference is apparent between the finalisation method groups with regard to the proportion of cases in which there was more than one defendant, the difference was not found to be statistically significant.[51]

The proportion of cases in which there was more than one defendant is higher in the hearing and mediation groups than in the between parties and arbitration groups – this is particularly so for the hearing group matters.

Table 5.4 Resolution groups by number of defendants

	1 defendant		>1 defendant	
	n	%	n	%
Between parties	41	83.7	8	16.3
Arbitration	40	85.1	7	14.9
Hearing	31	64.6	17	35.4
Mediation	28	75.7	9	24.3
Total	**140**	**77.3**	**41**	**22.7**

Conclusions

The mediation and hearing groups in general consisted of more complex matters – as measured across a range of variables. This has important implications regarding the settlement rates in the mediation group as well as other variable information (including information relating to perceptions).

Plaintiff demographics

The following is based on demographic information collected about the plaintiffs only. In most cases the defendant was a business or company, and their demographics were irrelevant to the making of the claim. The following analysis excludes cases where the plaintiff was a business or company.

Gender

Overall, the ratio of males to females was 60/40. There are some differences in the gender proportions across the resolution method groups. The figures in Table 5.6 demonstrate a considerably higher proportion of males whose cases were in the arbitration (63.8%) and hearing groups (71.7%) than in the between parties (54.3%) and mediation groups (46.9%). In the mediation

[51] Resolution group by number of defendants: χ^2=7.257, df=3, p=.064, n=181.

group, the proportion of females was in fact higher than males (53.1%). While there are clear differences between the groups with regard to the gender proportions, the differences were not found to be statistically significant.[52] This may however be due to the relatively small number of District Court mediation cases in the sample group.

Table 5.6
Plaintiff gender

	Male		Female		Total	
	n	%	n	%	n	%
Between parties	25	54.3	21	45.7	46	100.0
Arbitration	30	63.8	17	36.2	47	100.0
Hearing	33	71.7	13	28.3	46	100.0
Mediation	15	46.9	17	53.1	32	100.0

These figures may suggest a higher take-up rate of mediation by women, or a difference in the type of cases that women/men are involved in. To determine whether this difference was related to case type rather than gender (on the basis that men and women may be involved in different case types) the relationship between gender and cause of action was explored. No relationship was found to exist between these two variables.[53] That is, the difference with regard to gender and resolution method group is independent of the cause of action. This feature suggests that women may be more likely to mediate than men.

Table 5.7
Gender by cause of action

	Male		Female	
	n	%	n	%
Personal injury	88	89.9	60	90.9
Other	10	10.1	6	9.1
Total	**98**	**100.0**	**66**	**100.0**

Age at filing

There was a small proportion of matters in which the plaintiff was aged less than 20 years or 66+ years at the time of filing; 6.3% and 6.9 % respectively. The highest proportion of plaintiffs fell into the 36–50 age group (38.9%).

[52] Chi-squared: Gender by resolution group - χ^2=5.845, df=3, p=.119, n=171.
[53] Chi-squared: Gender by cause of action - χ^2=.056, df=1, p=.814, n=164.

Are there age differences across resolution methods?

The small numbers in the youngest and oldest age groups precludes a statistical analysis. However, removing the categories and testing for significance, there is no difference between the groups.[54]

Despite this, differences are apparent with regard to age between the finalisation method groups. There were no matters in which the plaintiff was aged less than 20 years in the 'between parties agreement' group. There were two (4.3%) in the arbitration group and three (9.4%) in the hearing group. By contrast, the mediation group had four plaintiffs aged under 20, which represents 16%.

There is little difference between the proportions across the 20–35, 36–50 and the 51–65 age groups for the 'between parties agreement' and hearing groups. However, considerable differences are apparent across these categories for the arbitration and mediation groups – with over half the arbitration group and 40% of the mediation group falling into the 35–50 age category.

Table 5.8 Plaintiff age by resolution group

Age in years	Terms		Arbitration		Hearing		Mediation		Total	
	n	%	n	%	n	%	n	%	n	%
Under 20			2	4.3	3	9.4	4	16.0	9	6.3
20–35	12	29.3	9	19.6	11	34.3	6	24.0	38	26.4
36–50	13	31.7	24	52.2	9	28.1	10	40.0	56	38.9
51–65	11	26.8	8	17.4	8	25.0	4	16.0	31	21.5
66+	5	12.2	3	6.5	1	3.1	1	4.0	10	6.9
Total	**41**	**100**	**46**	**100**	**32**	**100**	**25**	**100**	**133**	**100**

Nature of the injury (personal injury matters only)

To enable a comparison to be made across the groups with regard to the nature of the injury, the injury categories have been collapsed into three categories: sprains and strains, fractures/dislocations and 'other'. Sprains and strains and fractures/dislocations were the two highest injury categories.

There is a clear relationship between the type of injury sustained and the group to which the matters belong.[55]

[54] Chi-squared: χ^2=6.538, df=6, p=.366, n=125.
[55] Chi-squared: injury by resolution group χ^2=21.380, df=6, p=.002, n=157.

Table 5.9 Finalisation group by type of injury

	Sprains & strains		Fracture/ dislocation		Other		Total	
	n	%	n	%	n	%	n	%
Between parties agreement	31	68.9	6	13.3	8	17.8	45	100
Arbitration	24	53.3	13	28.9	8	17.8	45	100
Hearing	11	28.2	11	28.2	17	43.6	39	100
Mediation	11	28.2	4	14.3	13	46.4	28	100
Total	**77**		**34**		**46**		**157**	

The 'between parties agreement' group is characterised by a very high proportion of sprain and strain injuries (68.9%), a low proportion fractures and dislocations (13.3%) and a low proportion of 'other' injury types (17.8%). Although just over half the arbitration group were sprain and strain injuries (53.3%) there were also a considerable proportion of fractures/dislocations (28.9%). There was however only a small proportion of 'other' injury types (17.8%).

The hearing and mediation groups were characterised by high proportions of 'other' injury types: 43.6% and 46.4% respectively.

Case processing

Number of pre-trial court attendances

Figure 5.2 Number of pre-hearing events by resolution group

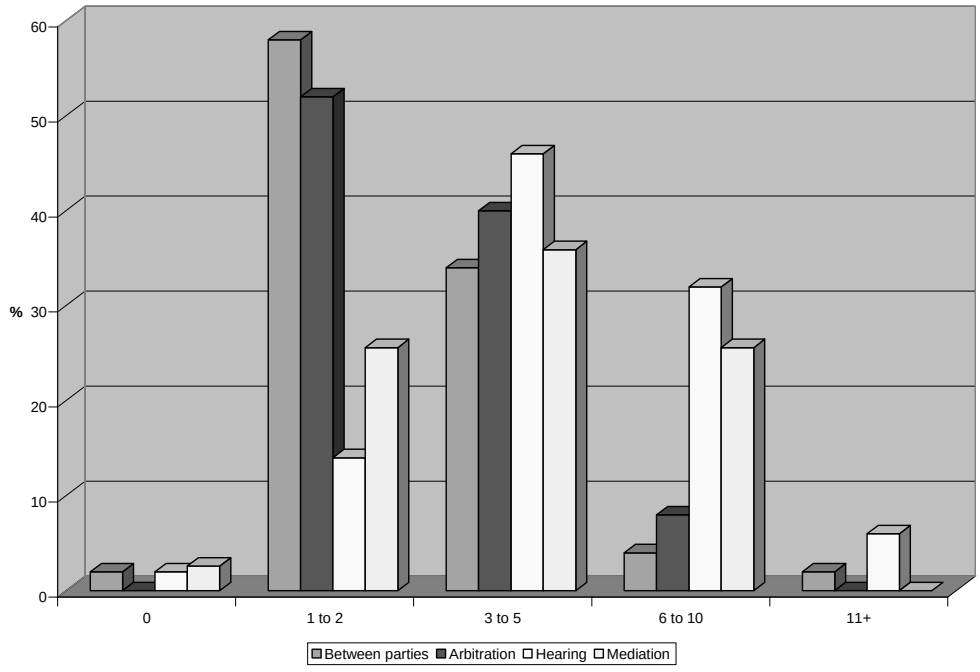


Table 5.10 Number of pre-hearing events by resolution group

	Between parties		Arbitration		Hearing		Mediation	
	n	%	n	%	n	%	n	%
0	1	2.0			1	2.0	1	2.6
1–2	29	58.0	26	52.0	7	14.0	10	25.6
3–5	17	34.0	20	40.0	23	46.0	14	35.9
6–10	2	4.0	4	8.0	16	32.0	10	25.6
11+	1	2.0			3	6.0	4	10.3
Total	**50**	**100.0**	**50**	**100.0**	**50**	**100.0**	**39**	**100.0**

Significant differences are evident between the groups with regard to the number of pre-trial events attended.[56] The number of pre-trial events attended is similar across the 'between parties agreement' and arbitration groups with 60% of the 'between parties agreement' group and 52% of arbitration group attending two or fewer pre-trial events. This is in stark contrast to the hearing and mediation groups (particularly the hearing group) with only 16% and 28.2% respectively attending two or fewer pre-trial events.

Almost half the hearing group attended 3–5 pre-trial events, and almost one third attended 6–10. Over one third of the mediation matters attended 3–5 pre-trial events and one quarter attended 6–10. This factor may again indicate that the matters in the mediation and hearing groups were more complex and as a result, required more frequent court intervention.

Process and stage of resolution by resolution group

By the nature of the sample selection process all matters in the 'between parties agreement' group were finalised. The stage of finalisation for matters in the other groups was as follows.

Arbitration

Of the 50 matters listed in the arbitration group during the selection period, 20 (40%) received an arbitrators award – 19 in favour of the plaintiff and one in favour of the defendant. The remaining 30 matters were finalised on the day of or during the arbitration (60%), resulting in the filing of terms of settlement.

Hearing

Of the matters listed for hearing in the selection period, 24 (48%) were finalised through a judicial determination. A negotiated settlement was achieved in 25 matters (50%) – three after listing and 23 on the day of or during hearing. One matter remained unfinalised at the time of data coding.

[56] Kruskal-Wallis: χ^2=40.910, df=3, p<.000, n=189.

The finding that 60% of arbitration matters and almost 50% of the hearing matters were resolved on the day of the procedure is not unexpected. It is important to consider though, for those matters that were ultimately resolved between parties, that the resolution is not necessarily independent of the arbitration or hearing process.

Mediated matters

While 39 matters in the District Court control group were listed for a mediation, 20 (51.3%) went on to be mediated.[57] Of these, 13 were personal injury matters; seven were 'other' matters. Of the 20 cases that went to mediation, 15 were resolved – nine were personal injury matters and six 'other' matters.

Of the 20 disputes that went to mediation in the District Court sample (the mediation sample was higher overall as it included Supreme Court cases), four were unresolved at the conclusion of the mediation (and remained unresolved at the time of District Court file data coding). In 13 mediations the plaintiff was 'successful' in that they received money; in one, the defendant was successful in that no money was paid to the plaintiff. In two matters, the dispute was resolved at mediation but the terms of the resolution were not on file. One of the unresolved disputes proceeded to arbitration and an arbitrator's award was made in favour of the plaintiff.

In 13 of the other 19 matters in the mediation group terms of settlement were filed; one matter went to arbitration; two were withdrawn/discontinued; and three remained unresolved at the time of data coding. Success may be somewhat difficult to measure in the mediated case group and agreements may provide for 'non tangible' arrangements such as transfer of family photographs in an estate matter – this arrangement may not 'reduce' to a monetary amount.

[57] It was not, in all cases, possible to determine from the court file whether the matter went to a mediation. The figure of 20 cases includes those cases in which it was possible to determine mediation attendance from the court file, coupled with matched data from the mediator survey.

Chapter

6

Comparing fairness and satisfaction across processes

Introduction

This chapter compares the process perceptions and process satisfaction of the four dispute resolution groups: 'between parties agreement', arbitration, hearing and mediation.

The information is based on the survey responses received from people who had a case filed in the District Court. All of the mediation matters reported on were part of the NSW Settlement Scheme 2002. No surveys were sent to parties involved in the 39 matters listed for mediation under the Scheme (these were distributed to the parties directly following their mediation, see Chapter 4).[58]

The total number of surveys received that could be matched with District Court file information was 55. These surveys represented 44 separate matters because in eight cases more than one survey was received per case, either one each from the plaintiff and defendant, or multiple responses received from plaintiffs or defendants.

Of the 55 matched surveys received, six were from the 'between parties agreement' group, 12 from the arbitration group, 16 from the hearing group and 21 from the mediation group. These numbers indicate that the response rate for the first three groups was particularly low. Included also in the total sample are an additional 11 surveys received from mediation participants (representing seven separate matters about which we do not have matched

[58] A copy of the survey was distributed to the case parties at the end of the mediation session by the mediator/s. The project parameters and budget did not extend to the designing and mailing out of survey forms to those people whose matter was listed for mediation but who did not attend a mediation session. Note that of the 39 District Court matters listed for mediation, survey forms relating to 20 of the matters were received. A further 13 district Court mediation surveys were received, however three of these were not on the Law Society file list and were not included in the data collection and a further 10 did not have any identification which would allow a match (if they could indeed be matched).

case file information), taking the number of mediation surveys to 32,[59] and the total number of participant surveys received to 66. Surveys were sent on three occasions to parties – however many were returned marked 'not at this address' which may indicate that Court records were not up to date and/or that following finalisation many parties changed address.

Notably, not all matters in each of these groups were finalised through the listed procedure. As noted in Chapter 5, not all listed matters went to arbitration, hearing or mediation. For example, some were resolved by agreement prior to or on the day of hearing or arbitration. In addition, some of the 'between parties agreement' group matters were resolved after having been listed for a determinative procedure. It became evident from a review of the surveys that people whose cases were resolved after being part-heard or part-arbitrated considered that it was the procedure that ultimately resolved their case.

The perceptions reported regarding procedural fairness and satisfaction are therefore based on the experience of the process used, not the negotiated settlement which may have ensued. On this basis these matters were analysed with those matters that were ultimately determined. Similarly, the matters that were listed but settled prior to the hearing/arbitration have been analysed with the 'between parties agreement' group matters.

Case numbers

Table 6.1 presents information based on the actual method of finalisation. As noted above, not all matters listed for arbitration, hearing and mediation were resolved via that procedure. A number were resolved via a 'between parties agreement'. This accounts for the disparate numbers evident between the reported response rates by group and the figures in the table relating to resolution method.

Table 6.1 Case numbers by resolution method

Mediations	Frequency	%
Between parties agreement	12	19.0
Arbitration	11	17.5
Mediation	24	38.1
Trial	11	17.5
Not yet finalised	8	7.9
Total	**66**	**100.0**

[59] Of these 7 additional matters 4 were not on the Law Society list received and therefore no file information was collected, and 3 could not be identified or matched.

The 'between parties agreement' group is comprised of 10 plaintiffs and 2 defendants; the arbitration group of 7 plaintiffs and 4 defendants; the hearing group of 5 plaintiffs and 6 defendants; and the mediation group of 13 plaintiffs and 11 defendants. Of the matters not finalised, 5 surveys were received from plaintiffs and 3 from defendants.

The 8 matters not finalised (7 mediated, 1 hearing) did not respond to the procedural fairness and satisfaction issues and are therefore excluded from the following analyses. Thus, the total number of cases in which the matter was resolved and the participant identified a specific procedure as the method of case resolution is 58. On this basis, the following information is based on the analysis of these 58 surveys only. It is important to note however that not all survey respondents answered all questions, which accounts for the varying number of responses apparent in the tables.

The number of matters where comparative data is available is very small. However, while the numbers do not allow for statistical testing or for definitive conclusions to be drawn, they highlight some important differences between the perceptions of people who are involved in difference dispute resolution processes.

Process perceptions and satisfaction

In Chapter 5 it was noted that case duration was related to resolution method – with cases going to hearing taking the longest time to be finalised. This finding is borne out by the data in Table 6.2, with it being reported that in almost all the hearing group matters the dispute took more time than expected to be finalised.

Table 6.2 Duration expectations by resolution procedure

Matter took:	More time than expected		Less time than expected		The same time as expected	
	n	%	n	%	n	%
Between parties settlement	4	40.0	4	40.0	2	20.0
Arbitration	6	54.5	2	18.2	3	27.3
Hearing	8	88.9			1	11.1
Mediation	7	29.2	2	8.3	15	62.5

There also appears to be a relationship between expectations of case duration and satisfaction with case duration. Given the results regarding expected duration, it is not surprising to find the greatest dissatisfaction with duration in the trial group. At the same time, the mediation group's perceptions were far better than any other group (despite case duration).

Table 6.3 Satisfaction with time taken

	Satisfied		Dissatisfied	
	n	%	n	%
Between parties settlement	6	60.0	4	40.0
Arbitration	6	60.0	4	40.0
Hearing	1	11.1	8	88.9
Mediation	21	91.7	2	8.3

Generally the greatest dissatisfaction with the amount of money received was evident for people in the hearing group.

Table 6.4 Satisfaction with the amount of money received

	Satisfied		Dissatisfied	
	n	%	n	%
Between parties settlement	3	30.0	4	40.0
Arbitration	3	50.0	3	50.0
Hearing	1	25.0	3	75.0
Mediation	5	55.6	4	44.4

As already noted in Chapter 3, a high proportion of survey respondents reported the belief that both sides won following the mediation.

Table 6.5 Who was successful?

	You		The other side		Both sides		No-one	
	n	%	n	%	n	%	n	%
Between parties settlement	6	60.0	1	10.0	3	30.0		
Arbitration	4	36.4	3	27.3	3	27.3	1	9.1
Hearing	1	11.1	5	55.6	2	22.2	1	11.1
Mediation	2	8.3	5	20.8	15	62.5	2	8.3

Differences in the perception of survey respondents regarding the formality of the processes are evident. Not surprisingly the majority of the arbitration and hearing groups viewed the dispute resolution process as being formal, and the majority of the between parties group and mediation group saw the resolution process as informal.

Table 6.6 Formality of process

	Formal		Informal	
	n	%	n	%
Between parties settlement	4	28.6	3	71.4
Arbitration	8	72.7	3	27.3
Hearing	7	87.5	1	12.5
Mediation	6	25.0	18	75.0

When survey respondents were asked to report their preference for formality, most from each group were content with the level of formality they experienced. However, this was more evident in the mediation group than the other three dispute resolution groups. This may be due to the mediation group participants having greater involvement in the dispute resolution process (more so than with the between parties group which is a process that is also perceived as informal). The responses of the survey participants to questions regarding process and satisfaction with the process provide some insight into this issue.

Table 6.7 Formality preference

	More formal		Less formal		Level was right	
	n	%	n	%	n	%
Between parties settlement			2	33.3	4	66.7
Arbitration	2	18.2	2	18.2	7	63.6
Hearing	3	33.3	1	11.1	5	55.6
Mediation	2	8.3	3	12.5	19	79.2

The question regarding formality preference can be partly answered by the responses to how well the dispute resolution process was understood by the survey respondents. Only one respondent from the mediation group did not understand the dispute resolution process. Given this, it follows that the perceived level of formality was perceived as 'right'.

Table 6.8 Understanding during process

	Very/quite well		Not well/not at all	
	n	%	n	%
Between parties settlement	5	71.4	2	28.6
Arbitration	6	54.6	5	45.4
Hearing	6	66.7	3	33.3
Mediation	23	95.8	1	4.2

The responses regarding the question of equality of treatment during the dispute resolution process are also informative. The majority of the mediation group perceived both sides to have been treated equally during the process. This perception decreases across the other three groups, with the 'between parties agreement' group most likely to perceive that unequal treatment occurred.

Table 6.9
Were both sides treated equally during the process?

	Yes		Other side favoured		My side favoured	
	n	%	n	%	n	%
Between parties settlement	1	33.3	2	66.7		
Arbitration	6	75.0	1	12.5	1	12.5
Hearing	5	71.4	2	28.6		
Mediation	21	87.5	3	12.5		

Procedural perceptions and satisfaction

Procedural perceptions

Table 6.10 indicates that the mediation process engenders a more favourable perception regarding involvement in the dispute resolution process.

While the case numbers are small, it is apparent that a greater proportion of mediation participants had favourable views regarding process participation; fairness; process control; outcome control; having time enough during the process and comfort with the process than did the other three resolution groups.

The group that perceived themselves as having the least control over the resolution process was the between parties group. The perceptions of those in the hearing group relating to procedural participation, fairness and comfort were the least favourable. The arbitration group reported the highest level of disagreement that they had control over the outcome of the dispute.

Furthermore, a considerably higher proportion of people in the 'between parties agreement', arbitration and hearing groups reported that they would have liked to participate more during the process than did the people from the mediation group. Interestingly, what is apparent is that while a proportion of people in each resolution process expressed the perception of being pressured to settle, this was considerably more so in the 'between parties agreement' group.

Table 6.10 Perceptions of the resolution procedure

During the process:	Negotiation				Arbitration				Hearing				Mediation			
	Agree		Disagree		Agree		Disagree		Agree		Disagree		Agree		Disagree	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Was able to participate	4	57.1	3	42.9	6	60.0	4	40.0	4	50.0	4	50.0	22	91.7	2	8.3
The process was fair	5	71.4	2	28.6	6	60.0	4	40.0	4	57.1	3	42.9	22	91.7	2	8.3
Had control	1	14.3	6	85.7	4	44.4	5	54.6	2	25.0	6	75.0	20	83.3	4	16.7
Like to participate more	4	57.1	3	42.9	5	50.0	5	50.0	4	57.1	3	42.9	4	16.7	20	83.3
Had control over outcome	4	57.1	3	42.9	1	11.1	8	88.9	2	28.6	5	71.4	21	87.5	3	12.5
Felt pressured to settle	5	71.4	2	28.6	2	22.2	7	77.8	2	28.6	5	71.4	6	25.0	18	75.0
Was enough time	5	71.4	2	28.6	6	60.0	4	40.0	5	62.5	3	37.5	21	87.5	3	12.5
I felt comfortable	3	42.9	4	57.1	5	50.0	5	50.0	7	12.5	1	12.5	21	87.5	3	12.5

Procedural satisfaction

The survey included questions regarding the level of satisfaction experienced by the disputants with regard to the handling and outcome of the dispute. The mediation group reported considerably higher levels of satisfaction with regard to all the satisfaction variables.

Table 6.11 Procedural satisfaction

Satisfied/ dissatisfied with:	Negotiation				Arbitration				Hearing				Mediation			
	Satisfied		Dis-satisfied		Satisfied		Dis-satisfied		Satisfied		Dis-satisfied		Satisfied		Dis-satisfied	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%
How process was handled	7	70.0	3	30.0	6	60.0	4	40.0	5	62.5	3	37.5	23	95.8	1	4.2
Way dispute was dealt with	7	70.0	3	30.0	5	50.0	5	50.0	5	62.5	3	37.5	21	87.5	3	12.5
Time taken to deal with the dispute	6	60.0	4	40.0	5	50.0	5	50.0	3	37.5	5	62.5	22	91.7	2	8.3
Outcome of the dispute	5	50.0	5	50.0	7	70.0	3	30.0	4	50.0	4	50.0	20	87.0	3	13.0
System operation	6	50.0	6	50.0	6	60.0	4	40.0	9	90.0	1	10.0	23	95.8	1	4.2

Conclusions

Despite the increased complexity of matters in the mediation group and despite the advanced 'age' of the mediation case sample, parties where mediation took place reported significantly higher levels of satisfaction than those involved in other resolution processes across a range of variables.

Chapter

7

Comparing outcomes and costs

Introduction

This chapter examines the outcomes and costs of the cases included in the four resolution groups. The case outcome information is taken from the file-based survey of the District Court. The case cost information is taken from the participant survey. This information is relevant as it is often said that mediation is a lower cost alternative to litigation and concerns are also expressed about outcomes relative to the type of process used.

Case outcome

Table 7.1 provides information about which party 'won' in each of the resolution groups. The information is taken from the District Court files and assumes that 'winning' relates to the payment of money. As noted previously, other variables may also be relevant – particularly in mediated matters where outcomes could include additional agreements (relating to such matters as continuing business contracts). The money amounts in each process are summarised and may also represent a complexity feature.

The majority of plaintiffs were 'successful'[60] in each of the resolution groups. This was however most evident in the arbitration group where 98% of the plaintiffs received an award. This rate of 'success' is also related to case type. In simple personal injury matters, plaintiffs are more likely than defendants to have an outcome in their favour.

[60] In terms of achieving an award or monetary or combined settlement in their favour.

Table 7.1 Which party won?

	Plaintiff		Defendant		Terms unknown/ unresolved	
	n	%	n	%	n	%
Between parties	44	88.0	6	12.0		
Arbitration	49	98.0	1	2.0		
Hearing	35	70.0	14	28.0	1	2.0
Mediation	29	74.4	3	7.7	7	17.0
Total	**157**	**83.1**	**24**	**12.7**	**8**	**4.2**

Outcome amounts

In only 19 matters, the amount claimed by the plaintiff is less than the full jurisdictional limit of the District Court ($750,000). In Table 7.2 the $0 dollar amounts (that is, where the plaintiff 'lost') were not included in the analysis.

Table 7.2 Case outcome by case type

	Personal injury $	Other $
Between parties		
▪ mean	151,484	215,000
▪ median	69,992	215,000
▪ minimum	9,500	100,000
▪ maximum	750,000	330,000
▪ n	42	2
Arbitration		
▪ mean	176,260	221,728
▪ median	163,533	13,863
▪ minimum	20,884	12,000
▪ maximum	425,000	639,322
▪ n	45	3
Hearing		
▪ mean	145,292	236,625
▪ median	120,000	137,274
▪ minimum	20,000	100
▪ maximum	426,738	750,000
▪ n	29	5
Mediation		
▪ mean	281,881	48,240
▪ median	185,000	40,000
▪ minimum	18,273	26,200
▪ maximum	2,500,000	80,000
▪ n	23	5

In the following analyses, the extreme values of $100 and $2,500,000 have been removed.

Out-of-court settlements

Table 7.3 compares the outcome of cases which were resolved prior to being listed for a finalisation procedure (the between parties group), with those that were finalised prior to attendance at a listed dispute finalisation event (arbitration, hearing, mediation).[61]

Table 7.3
Out of court settlements by resolution group

	Mean $	Median $	Minimum $	Maximum $	n
Between parties	140,209	62,672	16,000	750,000	16
Arbitration	207,117	212,500	28,000	425,000	30
Hearing	137,859	126,000	20,000	390,000	18
Mediation	209,542	161,000	50,000	615,000	12

It is clear that the median amount the plaintiff receives as a result of a between parties agreement is considerably different across the four process groups. The 'between parties agreement' group has the lowest median outcome amount and the arbitration group the highest. A statistical test demonstrated that these differences are statistically significant.[62] Given these two groups are similar with regard to case mix, this finding is significant.

The outcome of the analysis is consistent across the three dispute resolution processes (see Table 7.4 overleaf). Cases that are resolved between parties receive a larger award amount than do those in which the dispute is adjudicated or mediated.

The difference is most evident for the arbitration group where the median outcome of matters settled after being listed for arbitration was $212,500 compared with $60, 622 for cases receiving an arbitrator's award.[63] The difference for the mediation group was also considerable, with $161,000 as the median outcome of matters resolved without mediation compared with $45,000 for those resolved at mediation.[64] The difference between the between parties and adjudication groups for the hearing matters is negligible however.[65]

[61] Note that the Terms of Settlement group includes only those cases in which the awarded amount was on file, and in which the case had not been listed for arbitration or hearing prior to the Terms of Settlement being filed.
[62] Kruskal-Wallis: χ^2=9.887, df=3, p=.02, n=76
[63] Kruskal-Wallis: χ^2=7.118, df=1, p=.008, n=49
[64] Kruskal-Wallis: χ^2=4.832, df=1, p=.028, n=27
[65] Kruskal-Wallis: χ^2=.305, df=1, p=.581, n=34

Table 7. 4 Comparison of outcomes within resolution group: settled vs adjudicated/ mediated

Arbitration group	**Settled $**	**Arbitrators award $**
Mean	207,117	139,914
Median	212,500	60,622
Minimum	28,000	12,000
Maximum	425,000	639,322
n	30	19
Hearing group	**Settled $**	**Judicial determination $**
Mean	137,854	183,658
Median	126,000	112,780
Minimum	20,000	20,681
Maximum	390,000	750,000
n	18	16
Mediation group	**Settled without mediation $**	**Mediated $**
Mean	209,542	113,998
Median	161,000	45,000
Minimum	50,000	18,273
Maximum	615,000	425,000
n	12	15

Which case types were resolved by arbitration, hearing, mediation?

There are differences between the types of cases that were settled prior to the listed dispute process and those that proceeded to the process, with more 'other' case types going through to arbitration, hearing and mediation than personal injury matters. (This may indicate that such matters are more complex and less likely to be finalised by direct negotiation.)

While the numbers are small, a tendency can be identified in Table 7.5 for the cases in the 'other' category to be those that proceed to attend the listed dispute resolution event.

Table 7.5
Between parties resolution by case type

Arbitration group	Between parties		Arbitrators award	
	n	%	n	%
Personal injury	29	100.0	16	84.2
Other			3	15.8
Hearing group	**Terms of settlement**		**Judicial determination**	
	n	%	n	%
Personal injury	18	85.7	21	77.8
Other	3	14.3	6	22.2
Mediation group	**Settled without mediation**		**Mediated**	
	n	%	n	%
Personal injury	13	81.3	11	61.6
Other	3	18.8	7	38.9

Case costs

Total case costs

Similarities are evident between the 'between parties agreement', arbitration and mediation groups with regard to the median total cost. The median cost of the hearing group cases is notably higher. Basically, preventing matters proceeding to hearing is a cost-saving measure for the case participants – regardless of the method of finalisation. Notably, cases are referred to arbitration when they are said to be 'trial' ready. The parties must apply to the court to have the matter set down for trial before a judge. It would then follow that the arbitration and hearing matters are at the same stage when they attend those processes, yet the costs of attending a hearing are considerably higher.

Also, it is relevant that the cases referred to the Scheme were those that were 'older', dormant matters. Therefore it is explicable that the costs incurred are not dissimilar to the between parties and arbitration groups. On this basis, it follows that if cases were referred to mediation at an earlier stage, more significant cost-savings could be made.

Table 7.6
Total case costs

	Mean $	Median $	Minimum $	Maximum $	n
Between parties	29,227	23,575	5,659	82,000	8
Arbitration	34,155	27,664	1,600	67,000	6
Hearing	136,367	90,000	16,100	510,000	7
Mediation	28,583	24,500	11,000	62,000	12

Table 7.7
Costs by cost categories

	Professional fees $	Disbursements $	Other $
Between parties			
▪ mean	21,907	8,113	9,000
▪ median	16,126	4,000	9,000
▪ minimum	0	459	500
▪ maximum	65,000	20,000	17,500
▪ n	8	5	2
Arbitration			
▪ mean	29,405	2,567	10,400
▪ median	26,814	1,700	10,400
▪ minimum	800	1,000	800
▪ maximum	67,000	5,000	20,000
▪ n	6	3	2
Hearing			
▪ mean	40,220	146,000	56,490
▪ median	19,000	40,500	10,000
▪ minimum	7,100	3,000	6,000
▪ maximum	85,000	500,000	153,470
▪ n	5	4	3
Mediation			
▪ mean	24,083	4,111	17,000
▪ median	20,000	4,000	17,000
▪ minimum	10,000	1,000	17,000
▪ maximum	62,000	10,000	17,000
▪ n	12	9	1

Chapter

8

Referral to ADR

Introduction

Case selection for mediation

The Supreme and District Courts selected the cases for inclusion into the Scheme. The cases included in the selection process were those that had been lying dormant in the courts lists and which required intervention to be finalised. Mandatory mediation referral powers that were available to both courts were not used to refer matters to mediation. However, some judges who were interested in the Scheme may have 'suggested' the Scheme to parties.

Why mediation?

The take-up rate of the offer of mediation was very low for the Supreme Court cases. In only 5.6% of the cases to which mediation was offered did both parties agree to participate in the mediation program. The take-up rate, while still low, was higher for the District Court matters (10.4%).

The Supreme Court selected a total 1038 cases for possible inclusion in the NSW Settlement Scheme 2002. Of these, both parties declined to mediate in 892 cases (85.9%). There were 88 positive responses to participate in the program from at least one party (8.5%), which resulted in 58 'matched' cases (5.6%). A 'match' was made when a positive response to the mediation was received from both parties.

The District Court selected a total of 307 cases for possible inclusion in the NSW Settlement Scheme 2002. In 187 of these both parties declined the mediation offer (60.9%). There was a positive response by one party in 88 cases (28.7%), and a match achieved in 32 (10.4%).

The main reason mediation was declined by lawyers in both the Supreme and District Court matters was that the matter was considered 'unsuitable for mediation'. This is an issue that could be researched further as it is not clear whether perceptions regarding 'unsuitability' stemmed from a lack of lawyer

or party understanding about the mediation process. The other reasons given are listed in Table 8.1.

Table 8.1 Reason for declining mediation

Reason for declining mediation	Supreme Court		District Court	
	n	%	n	%
Arbitration/hearing date set	33	3.7	39	20.9
Attempting to settle/offer made	26	4.0	11	5.9
Case considered too complex	45	5.1	7	3.7
Case considered unsuitable	254	28.5	41	21.9
Case struck out	9	1.0		
No possibility of settlement	59	6.6	8	4.3
Court documents yet to be lodged	31	3.5		
Informal settlement conference organised	14	1.6	6	3.2
Liability in dispute	54	6.1	12	6.4
Matter settled	94	10.6	28	15.0
Outstanding medical/expert reports	59	6.6	21	11.2
Prefer court/other mediation scheme	67	7.5	4	2.1
Solicitor not interested in mediation	15	1.7		
Too early to go to mediation	97	10.9	7	3.7
Uncertain medical condition	23	2.6	3	1.6
Total	890	100.0	100	100.0

The Law Society used facilitators who contacted the parties in the selected cases. The facilitators explained the Scheme and the mediation process to be used. A proportion of matters settled following this contact by facilitators and a number of matters may have been mediated 'outside' the Scheme.

Chapter

9

Conclusions and future options

Introduction

The research indicates that mediation was perceived in a positive manner by the great majority of participants in the Scheme.

Mediation was effective in resolving disputes in a range of cases – from less complex to very complex 'older cases'. The research also shows that the percentage of lawyers and parties deciding to attend a mediation was relatively low. However, many parties who declined the offer of mediation, went on to:

- arrange formal or informal negotiations
- settle the dispute.

The Scheme therefore appears to have had a catalytic effect, as parties in many disputes went on to resolve their disputes without attending a mediation conference. The high success rate and the positive perceptions of those involved in the Scheme may suggest that the Scheme should be expanded and that a broad range of matters should be referred to mediation.

Implications for court related mediations

The research findings have important implications for court-referred mediation programs.

Firstly, the listing of a matter for mediation may be sufficient to prompt negotiations and settlement of a dispute in many instances. Secondly, the timing of a mediation process may be relevant. Some jurisdictions currently encourage mandatory pre-litigation mediation (see for example the NSW *Retail Leases Act 1994*), with high rates of resolution.

This research suggests that even in older more complex cases where significant legal costs have been expended, mediation may still be effective in resolving disputes. The research also suggests that matters that resolve 'by agreement' between the parties are more likely to settle within 12 months of filing (or close to that time). The optimum time (and most cost effective time) to refer matters to mediation may therefore be:

- between 6–12 months of filing in complex intractable disputes and in cases where there is a continuing relationship (not simple two-party personal injury cases)
- 12 months after filing in other cases.

Mandatory mediation

Research conducted in other jurisdictions has shown that there is no decline in settlement rates where parties are ordered to attend mediation (compared with self referral). This research suggests that some lawyers (and disputants) may be reluctant to choose mediation as an option. In complex cases that may be unlikely to resolve through direct party negotiation, the use of mandatory referral powers may be appropriate.

Implications for future research

The research findings suggest that further research could be undertaken in a range of areas. Firstly, research could be undertaken to explore reasons why lawyers do not consider that mediation is appropriate in some types of cases. The reasons for process preference could relate to issues of cost, lack of familiarity with process or other issues.

Further research could also be usefully undertaken in respect of mediator skills and follow up work in respect of compliance with outcomes and impact upon continuing relationships (some research suggests that mediated outcomes are more likely to be complied with than outcomes reached as a result of an advisory or determinative process).

More research could also be conducted in relation to public costs saved. Many of the matters mediated were older complex cases that may not have been expected to settle. In these matters, mediation may have been responsible for considerable savings in costs (both public and private). It would appear that a significant proportion of cases referred to the Scheme were unlikely to settle as a result of the complexity factors referred to previously.

Appendix

A

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Appendix

B

Participant survey instrument

Dispute Process Research

Section 1: Your dispute

1 What is the nature of your dispute?

- Motor vehicle accident ☐1
- Medical negligence ☐2
- Work related injury ☐3
- Occupier/public liability ☐4
- Commercial ☐5
- Family ☐6
- Equity ☐7
- Other (eg: professional negligence, defamation) ☐8

Specify:

_____

2 When did the event (or last event) that the dispute is about occur?

Write in date (dd-mm-yy) _____/_____/_____

3 Has your dispute been finalised?

- Yes ☐1
- No ☐2 ⇒ **go to 20**

4 How was it finalised (Tick all that apply)

- By negotiation ☐1
- At a conference ☐2
- At a mediation ☐3
- At a hearing ☐4

5 Overall, did the dispute take more or less time to be resolved than you expected?

- More time than expected ☐1
- Less time than expected ☐2
- About as much time as expected ☐3

6 Overall, how satisfied were you with the amount of time it took to resolve all aspects of your dispute?

- Very satisfied ☐1
- Satisfied ☐2
- Dissatisfied ☐3
- Very dissatisfied ☐4

7 Before you were involved in the process used to finalise your dispute, what did you think your chances of success were? Did you think you had:

- A small chance ☐1
- A fair chance ☐2
- A possible range of outcomes ☐3
- I did not know ☐4
- There was a near certainty that I would win ☐5

8 In the end, was the outcome of your dispute:

- Better than you expected ☐1
- Worse than you expected ☐2
- About the same as you expected ☐3

9 If you got any money, how satisfied were you with the amount of money you did get?

Very satisfied ☐1
Satisfied ☐2
Dissatisfied ☐3
Very dissatisfied ☐4

10 In the end, who do you believe was successful?

You ☐1
The other side ☐2
Both sides ☐3
No-one ☐4

11 If your case was finalised by arbitration, mediation or at trial, how long did the procedure take?

Hours: _____
Minutes: _____

12 Did you have to spend time waiting for your dispute to be dealt with? That is, did you wait for a judge, mediator or arbitrator to become available on the day(s) your matter was to be dealt with?

Yes ☐1
No ☐2 ⇒ **go to 14**

13 How long did you wait for your hearing, arbitration or mediation?

Hours: _____
Minutes: _____

Section 2: Your experience of the process that finalised your dispute

Note that the following questions relate to the process used to finalise your dispute.

14 Was the process used to finalise your dispute:

Very formal ☐1
Somewhat formal ☐2
Somewhat informal ☐3
Very informal ☐4

15 Would you have preferred if it was:

More formal ☐1
Less formal ☐2
The level of formality was right ☐3

16 How well do you feel you understood what was going on during the process?

Very well ☐1
Quite well ☐2
Not very well ☐3
Not at all ☐4

17 During the process, if an arbitrator/judge/mediator was involved, were both sides treated equally or was one side favoured?

Both sides were treated equally ☐1
My side was favoured ☐2
The other side was favoured ☐3

18 How strongly do you agree or disagree with the following statements:

SA = strongly agree
A = agree
D = disagree
SD = strongly disagree

	SA	A	D	SD
I was able to participate during the process	☐1	☐2	☐3	☐4
The process was fair	☐1	☐2	☐3	☐4
I felt I had control during the process	☐1	☐2	☐3	☐4
I would have liked to participate more during the process	☐1	☐2	☐3	☐4
I felt I had control over the outcome of my dispute	☐1	☐2	☐3	☐4
I felt pressured to settle my dispute	☐1	☐2	☐3	☐4
There was enough time to present/discuss all necessary information	☐1	☐2	☐3	☐4
I felt comfortable during the process	☐1	☐2	☐3	☐4

19 Overall, how satisfied were you with the following:

VS = very satisfied
S = satisfied
D = dissatisfied
VS = very dissatisfied

	VS	S	D	VD
How the process was handled	☐1	☐2	☐3	☐4
The way your dispute was dealt with	☐1	☐2	☐3	☐4
The time it took to deal your dispute	☐1	☐2	☐3	☐4
The outcome of your dispute	☐1	☐2	☐3	☐4

Section 3: Cases filed in a Court or Tribunal

ONLY ANSWER THIS SECTION IF YOUR CASE HAS BEEN FILED IN A COURT OR TRIBUNAL – If it has not please go to Section 4

20 In which Court or Tribunal has your case been filed?

_____

21 What is the court/tribunal file number

_____

22 Did a lawyer try to resolve the dispute <u>before</u> it was filed in a Court or Tribunal?

Yes ☐1
No ☐2

23 Why was the case filed in a Court or tribunal? (Tick all that apply)

My lawyer told me I would get more ☐1
The other side wouldn't give me what I wanted ☐2
The other side was not prepared to settle ☐3
The other side was taking too long ☐4
The other side filed the case ☐5
There was more than one party on the other side ☐6
Other (specify below) ☐7

_____

24 Tick all of the processes used to try to finalise your case:

Pre-trial conference ☐1
Arbitration ☐2
Mediation ☐3
Trial ☐4

25 Which of these processes finalised your case?

Pre-trial conference ☐1
Arbitration ☐2
Mediation ☐3
Trial ☐4
The case is not finalised yet ☐5

26 Was the procedure that ultimately resolved your case public or was it private?

The procedure was public ☐1
The procedure was private ☐2

27 Did you like it this way?

Liked it the way it was ☐1
Would prefer it to be public ☐2
Would prefer it to be private ☐3

28 If you prefer a <u>private procedure</u>, is it because a private procedure: (Tick all that apply)

Ensures the case is a personal affair ☐1
Saves embarrassment ☐2
Is less intimidating ☐3
Is fairer ☐4
Is cheaper ☐5
Produces a better outcome ☐6
Other (specify below) ☐7

29 If you prefer a public procedure, is this because a public procedure: (Tick all that apply)

- Keeps everybody honest ☐1
- Publicises what the other side has done ☐2
- Is fairer ☐3
- Produces a better outcome ☐4
- Other (specify below) ☐5

Section 4: Advice and costs

30 Did you see a lawyer to help you with your dispute?

- Yes ☐1
- No ☐2 ⇒ **go to 34**

If you are a lawyer please go to question 34

31 Did you try to negotiate with the other party before seeing a lawyer?

- Yes ☐1
- No ☐2

32 Why did you eventually see a lawyer? (Tick all that apply)

- I could not reach an agreement with the other side ☐1
- The other side would not negotiate ☐2
- The other side denied my claim outright ☐3
- The other side denied liability ☐4
- I could not get as much money as I needed/wanted ☐5
- The process was too difficult ☐6
- I wanted expert advice regarding my case ☐7
- Other reason/s(specify below) ☐8

_____

33 When did you first see a lawyer?

Write in date (dd-mm-yy) _____/_____/_____

34 How much of your own time have you spent preparing your case?

Days: _____ Hours: _____

35 If you settled your dispute how much do you think you saved in legal costs?

$ _____

36 Can you indicate how much has been spent on the following during the dispute:

Professional fees: $ _____

Disbursements: (For example Court filing fees, Court hearing fees, Mediation fees, Experts report/fees, Doctors reports/fees)

$_____

Other costs: (specify below) $_____

Section 5: General questions

37 Overall, how satisfied were you with the way the system operated for your dispute?

- Very satisfied ☐1
- Satisfied ☐2
- Dissatisfied ☐3
- Very dissatisfied ☐4

38 Do you have any further comments about the resolution of your dispute?

- No ☐1
- Yes ☐2 ⇒ **What are they?**

39 Have you ever been involved in a legal action?

No ☐1

Yes ☐2⇒**What was it about?**

40 Do you have any objection to the researchers having access to information that may be collected from the case file about your dispute?

No, I do not object ☐1

Yes, I have an objection ☐2

Section 6: About you

These questions are optional. However, we would appreciate your answers as they are valuable to the reporting process.

We confirm that all information collected in this research will be de- identified.

41 Are you:

Male ☐1

Female ☐2

A company or organisation ☐3⇒ **go to 46**

A solicitor with an organisation ☐4⇒ **go to 46**

42 What is your age?

Under 18 ☐1

18-30 ☐2

31-40 ☐3

41-50 ☐4

51-65 ☐5

Over 65 ☐6

43 Is English your first language?

Yes ☐1

No (write in what is) ☐2

_____

44 What is your highest grade of education?

School certificate (4th form/year 10) ☐1

Higher school certificate (6th form/year 12) ☐2

TAFE qualifications ☐3

College/University ☐4

Still at school/full time student ☐5

Other (specify) ☐6

_____

45 What was your occupation at the time the dispute arose?

Manager/administrator ☐1

Professional ☐2

Trades person ☐3

Clerk ☐4

Sales person/service worker ☐5

Machine/plant operator ☐6

Labourer or related ☐7

Home duties or retired ☐8

Other ☐9

46 In which of the following ranges was your personal gross, or before tax, income at the time the dispute arose?

nil-20,000 ☐1

$20,000 – 40,000 ☐2

$40,000 – 60000 ☐3

More than $60,000 ☐4

Company or organisation ☐5

Thank you for your time

Appendix

C

Mediator questionnaire

This survey is seeking information about what occurred in this mediation. All information will be analysed and de identified.

Thank you for taking the time to complete this survey.

Part A

Please answer this section about THIS particular mediation

1. Did you hold a pre mediation session?

Yes ☐1

No ☐2 ⇒ go to 7

If No, why not ?

2. **Was the pre mediation session conducted by phone or email or face to face (or a combination)?**

Tick any that apply

Phone ☐1

Email ☐2

Face to face ☐3

3. **What was discussed at the pre mediation session?**

Tick any that apply

Authority to settle ☐1

The agreement ☐2

Empowerment ☐3

Role of Mediator ☐4

Opening statements ☐5

Other (specify) ☐6

4. **To what extent were you satisfied with the lawyer and/or client preparation for the mediation?**

Very satisfied ☐1

Satisfied ☐2

Dissatisfied ☐3

Very dissatisfied ☐4

5. **Did the same parties attend at the pre mediation conference as at the mediation?**

Yes ☐1

No ☐2

6. **Who did not attend the pre mediation conference?** Tick all that apply

The parties ☐1

Counsel ☐2

Solicitors ☐3

Others (specify below) ☐4

7. **If you mediated another dispute like this one would you do anything differently?**

Yes ☐1

No ☐2 ⇒ **go to 9**

8. **What would you do differently?** Write in below

9. **Has this dispute been finalised?**

Yes ☐1⇒ **go to 11**

No ☐2

10. **If the dispute was not finalised why do you think this was the case?** Tick any that apply

One or more parties could not get instructions ☐1

One or more parties would not negotiate ☐2

One or more parties was unreasonable ☐3

The parties were too far apart ☐4

One or more parties were not well advised ☐5

Expert evidence was needed ☐6

One party wanted a precedent ☐7

One or other party did not act in good faith ☐8

Other reasons or comments:

11. **If the dispute has been finalised was the outcome fair?**

Yes ☐1

No ☐2

I have not formed a view ☐3

Comments:

12. **If the matter was not finalised were issues narrowed as a result of the mediation process?**

Yes ☐1

No ☐2

13. **Do you think the mediation process helped to save the parties cost?**

Yes ☐1

No ☐2

14. **If you think the process saved costs can you estimate the cost saving for all parties?**

Write in estimated amount $……

15. **Were all parties represented?**

Yes ☐1

No ☐2

If no, which party was not represented?

16. **Did the legal representatives or parties make the opening statements?**

The legal representatives ☐1

The parties ☐2

Both ☐3

17. **Was there anyone else at the mediation apart from legal representatives and parties?**

Experts ☐1

Family members ☐2

Witnesses ☐3

Other (specify below) ☐4

18. **Did you use a whiteboard or butchers paper to summarise issues or for some other purpose?**

Used a whiteboard ☐1

Used butchers paper ☐2

Did not use either ☐3

19. **Did you consider that the parties understood the mediation process before the session began?**

Yes ☐1

No ☐2

20. **Did you hold private sessions?**

Yes ☐1

No ☐2

21. **Can you identify a stage at which private sessions were held? If so, was it:**

After the opening statements ☐1

After some clarification had taken place ☐2

After issues had been explored ☐3

After an impasses had been reached ☐4

At some other time (specify below) ☐5

22. **If you held private sessions why did you do so?**
Tick all that apply

To reality test ☐1

To explore BATNA's ☐2

To discuss issues ☐3

Open sessions were no longer productive ☐4

To explore options ☐5

To explore something that had been said in the joint session ☐6

One party was very emotional ☐7

Comments:

23. **Did a listing of issues/topics/ common ground/ an agenda take place?**

Yes ☐1

No ☐2

24. **What issues were noted?**

25. **Will you have a chance to debrief following the mediation?**

Yes ☐1

No ☐2

If yes, who will you debrief with?

26. **If you co mediated were you satisfied with the process?**

Very satisfied ☐1

Satisfied ☐2

Dissatisfied ☐3

Very dissatisfied ☐4

Any comments?

Part B

If you have answered Part B in a previous survey please do not answer it again.

27. **What is your previous mediation experience?**
Indicate approximate number of mediations conducted and other relevant experience
eg: experience in conciliation

28. **When did you first start mediating?**

Write in year: _____

29. **What and with whom was your prior mediation training?**

30. **Do you have any comments about improving refresher training for settlement week?**

31. Why did you decide to participate in the settlement week program?

32. **What do you consider would support the growth of mediation process use in Australia?**

Tick any that apply

Settlement week schemes such as this ☐1

Mandatory mediation ☐2

One peak professional body ☐3

Standards for mediators ☐4

Greater government support ☐5

specify: .....

Other ☐6

specify: .....

Appendix

D

Court file data collection instrument

ID# _____ Checked: ☐ Entered: ☐

DISTRICT COURT SETTLEMENT WEEK PROGRAM

Data collection information

1	Coder	Initials	☐☐
2	Date coded	dd-mm-yy	☐☐☐☐☐☐

Claim details

3	File no.		☐☐☐☐☐☐☐ of 20 ☐☐
4	Date cause of action arose		☐☐☐☐☐☐
5	Statement of Claim	dd-mm-yy	☐☐☐☐☐☐
6	Defence filed	dd-mm-yy	☐☐☐☐☐☐
7	Cross-claim filed?	1=yes 2=no	☐
8	Date cross-claim filed	dd-mm-yy	☐☐☐☐☐☐
9	Claim type	use code	☐☐
10	If relevant, nature of the injury	use code	☐☐
11	Body part	use code	☐☐

Plaintiff details

12 Number of plaintiffs		☐☐
13 Number of cross-claimants		☐☐
14 Plaintiff/s type	circle all relevant	1 2 3 4 5
15 Gender	1=male 2=female	☐
16 Date of birth	dd-mm-yy	☐☐☐☐☐☐
17 Education	use code	☐☐
18 Occupation	use code	☐☐
19 Income at the time the cause of action arose		$ ☐☐☐☐☐☐

Defendant details

20 Number of defendants		☐☐
21 Defendant/s type	circle all relevant	1 2 3 4 5
Where relevant		
22 Gender	1=male 2=female	☐
23 Date of birth	dd-mm-yy	☐☐☐☐☐☐
24 Education	use code	☐☐
25 Occupation	use code	☐☐
26 Income at the time the cause of action arose		$ ☐☐☐☐☐☐

Quantum - heads of damage for plaintiff

		Include interest in each head of damage
27 Plaintiff	general damages	$
	past economic loss	$
	future economic loss	$
	costs	$
	other (specify)	$

Quantum - heads of damage for defendant

		Include interest in each head of damage
28 Defendant	general damages	$
	past economic loss	$
	future economic loss	$
	costs	$
	other (specify)	$

Case processing/management

29 Was the case included in the settlement week?

30 Did the parties agree to be included? 1=yes 2=no

31 Detail ALL pre trial/mediation events listed. Write in date, type and duration of each

1)	dd-mm-yy		5)	dd-mm-yy	
	type - use code			type - use code	
	duration (mins)			duration (mins)	
2)	dd-mm-yy		6)	dd-mm-yy	
	type - use code			type - use code	
	duration (mins)			duration (mins)	
3)	dd-mm-yy		7)	dd-mm-yy	
	type - use code			type - use code	
	duration (mins)			duration (mins)	
4)	dd-mm-yy		8)	dd-mm-yy	
	type - use code			type - use code	
	duration (mins)			duration (mins)	

Terms of settlement/award

32 Final settlement/award amount		Include interest in each head of damage
	general damages	$
	past economic loss	$
	future economic loss	$
	costs	$
	other (specify)	$
	total award	$ 1=cost incl 2=not incl

Suit information

33	Estimated length	days	
			medical / other / total
34	Number of expert witnesses	plaintiff	
		defendant	
			lay
35	Number of lay witnesses	plaintiff	
		defendant	
36	Settlement prospects	1=good 2=average 3=poor	

Case disposition: settlement/mediation/arbitration/hearing

37	Date resolved	dd-mm-yy	
38	Stage of resolution	use code	
39	Process of resolution	use code	
40	Date hearing/arbitration commenced		
41	Number of days court attended		
42	Actual hearing/arbitration length	hours	
		minutes	

Appendix

E

Law Society of New South Wales – mediators involved in the Scheme

Dr Tom Altobelli	Mr Robert Foggo	Mr Alan Limbury
Mr Michael Antrum	Mr Robbert Fox	Ms Elizabeth Maconachie
Mr Darryl Browne	Mr David Francis	Mr John McDermott
Mr Bruce Burgess	Mr Robert Gardini	Mr Ross MacDonald
Mr Phillip Bushby	Mr Richard Gulley	Mr John McGruther
Mr Peter Cappe	Ms Sandra Hale	Mr Alan Melrose
Mr David Castle	Mr John Hannaford	Mr Peter Murphy
Mr Tim Chadwick	Mr Harry Hanzen	Mr David Newton
Mr Geoff Charlton	Mr Robert Hemphill	Mr Rory O'Moore
Ms Ruth Charlton	Mr Bill Henningham	Dr Warren Pengilley
Mr Allan Cowley	Mr John Hertzberg	Mr John Pollard
Mr James Creer	Mr John Ireland	Mr Edwin Potts
Ms Jackie Curran	Mr Peter Irving	Ms Jennifer Scott
Ms Nihal Danis	Mr Peter Jessep	Ms Tina Spiegel
Ms Micheline Dewdney	Mr Stephen Klotz	Mr Robert Thompson
Ms Sue Duncombe	Mr Peter Larcombe	Mr Ross Whitelaw
Ms Geri Ettinger	Ms Robyn Lee	

Appendix

F

Law Society of New South Wales Guidelines

1. Revised Guidelines for Solicitors who act as Mediators

The responsibilities of practitioners when acting as mediators are set out in revised guidelines developed by The Law Society's Dispute Resolution Committee and approved by Council on 29 July 1993.

Development of the Society's guidelines for mediators was prompted by the receipt of numerous enquires from members of the profession seeking advice before expanding their practices into the area of alternative dispute resolution. The original guidelines were approved by Council on 19 May, 1988. These revised guidelines were redrafted by The Law Society's Dispute Resolution Committee to keep pace with the changing legal environment with regard to mediation. The Council of the Law Society reaffirmed its commitment to provide a professional mediation service by requiring solicitors to have satisfactorily completed an approved mediation skills training course and to have completed at least one co-mediation with an experienced mediator.

The Council has approved the revised guidelines and resolved that the activity of mediation by solicitors, subject to the revised guidelines, be declared to be appropriate to be undertaken as part of a solicitor's practice for the purpose of professional indemnity insurance.[2]

Therefore, a solicitor being the holder of a full practising certificate who, as part of his or her practice as a solicitor, acts as a mediator will be entitled to indemnity pursuant to and within the terms and conditions of the Certificate of Insurance, issued to that solicitor, or his or her firm, under the Master Policy of Professional Indemnity Insurance. Solicitor mediators on a restricted practising certificate are not so covered unless they are employees in a firm and are acting as mediators as part of that firm's practice.

The revised guidelines below do not purport to prescribe the legal requirements which should be observed by a person who undertakes to act as a mediator. Solicitors who intend to practise as mediators in the area of

alternative dispute resolution should inform themselves of the licensing provisions of any relevant legislative requirements.

The Guidelines

1. Introduction

1.1 These revised guidelines are intended to assist and guide solicitors acting as mediators.

1.2 These revised guidelines do not derogate from the usual obligations of solicitors.

2. Definition of Mediation

2.1 Mediation is a voluntary process in which a mediator independent of the disputants facilitates the negotiation by disputants of their own solution to their dispute by assisting them systematically to isolate the issues in dispute, to develop options for their resolution and to reach an agreement which accommodates the interests and needs of all the disputants.

2.2 The mediator does not impose a solution upon the disputants. It is not his/her function to attempt to coerce a party into agreement nor should he/she attempt to make any substantive decision for the parties. He/she may raise and help the parties explore options for settlement. It is not the mediator's function to give legal advice to the parties.

2.3 The solicitor mediator should not attempt to direct the decision of the parties based upon the mediator's interpretation of the law as applied to the facts of the dispute. It is a fundamental principle of mediation that competent and informed parties can reach an agreement which need not conform to legal precedents or to general community standards.

3. Qualification

3.1 No solicitor shall act as a sole mediator unless he/she has satisfactorily completed an approved course and has had appropriate mediation experience or such experience as may be approved by the Dispute Resolution Committee of the Law Society of New South Wales.

3.2 Italicised terms in 3.1 are defined in Schedule 1 to these revised guidelines.

3.3 It is the responsibility of solicitor mediators to engage in annual continuing mediation education as part of their CLE program to ensure that their mediation skills are current and effective.

4. Initial Duties of Mediators

The mediator should define and describe the process of mediation and its cost to the parties before they reach an agreement to mediate. He/she should give an overview of the process and assess the appropriateness of mediation for the participants. Among the topics covered, it is recommended that the mediator should address the following:

4.1 The mediator should define the process in context so that the parties understand the differences between mediation and other means of conflict resolution available to them. It is important that the mediator stress that the process is "without prejudice" and that in general unless both parties consent, communications during the course of the mediation process cannot be used as evidence in court proceedings.

4.2 The mediator should obtain sufficient information from the participants to enable them mutually to define the issues to be resolved in mediation.

4.3 The mediator in consultation with the parties, should establish the following procedures:

(a) the right of each party to talk without interruption;

(b) the order of presentation;

(c) any other rules for the conduct of the proceedings as may be appropriate.

4.4 It should be emphasised that the mediator may assist in generating options for the participants to consider, such as alternative ways of resolving problems but that all decisions are to be made voluntarily by the participants themselves.

4.5 The duties and responsibilities that the mediator and the parties accept in the mediation process should be agreed upon. The mediator should inform the parties that either of them or the mediator has the right to suspend or terminate the process at any time. It is recommended that the mediator include in any written agreement to mediate, a provision that he/she has a discretion to terminate or suspend the process at any time.

4.6 It is strongly recommended that a written agreement to mediate be entered into by the parties and the mediator prior to commencement of the process. The mediator may include a provision in the agreement excluding his/her liability.[3]

4.7 The mediator should explain the fees for mediation and reach an agreement with the parties regarding payment.

4.8 The mediator should explain to the parties that he/she might consult with each of them in separate sessions and that information divulged during such separate sessions will be kept confidential unless he/she has that party's specific agreement to disclose to the other party.

He/she should reach an understanding with the participants as to the circumstances in which he/she may meet alone with either of them or with any third party.

4.9 The mediator should inform the parties that they have the right at any time to obtain and may need to obtain independent legal or other professional advice during the mediation process.

4.10 The mediator should also raise the matters referred to in 6.5 and 6.6 below.

5. Impartiality and Neutrality

5.1 Impartiality

The mediator shall maintain impartiality towards all participants at all times during the mediation process. Impartiality means freedom from favouritism or bias in word or action.

The mediator shall not play an adversarial role and shall maintain a commitment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement.

5.2 Neutrality

If the mediator believes or any one of the participants states that the mediator's background or personal experiences or relationships would prejudice the mediator's performance or detract from his/her impartiality, the mediator shall withdraw from the mediation unless all parties agree to proceed after full disclosure of all relevant facts relating to the issue of neutrality.

5.3 Prior Relationship

If the mediator has at any time prior to the mediation provided legal, counselling or any other services or has had any social or professional relationship with any of the participants, he/she shall not proceed with the mediation. If after full disclosure, all parties to the mediation agree, the mediator may proceed.

5.4 Conflicts of Interest

The mediator shall disclose any circumstances to the participants which may cause or have any tendency to cause a conflict of interest. In particular a mediator who is a partner or an associate of any legal counsel retained by either of the parties should not act as mediator without the fully informed consent of all the parties.

6. Confidentiality

6.1 The mediator shall not voluntarily disclose information obtained during the mediation process without the prior consent of both parties.

6.2 The obligations of a solicitor relating to confidentiality as between solicitor and client shall apply as between the mediator and the participants.

6.3 If subpoenaed or otherwise notified or requested to testify, the mediator shall inform the remaining participants immediately.

6.5 The mediator shall, prior to entering into the mediation process, obtain all parties' agreement not to require the mediator to give evidence or to produce

documents in any subsequent legal proceedings concerning the issues to be mediated upon.

6.6 The mediator shall inform the parties that, in general, communications between them, and between them and the mediator, during the preliminary conference and the mediation, are agreed to be confidential. In general, they cannot be used as evidence in the event that the matter does not settle at the mediation and goes to a court hearing. The mediator shall also inform the parties that they should consult their legal representatives if they want a more detailed statement of the position or if they have any specific questions about it.

6.7 The mediator shall render anonymous all identifying information when materials are used for research or training purposes.

6.8 The mediator shall maintain confidentiality in the storage and disposal of records.

7. Disclosure

7.1 The mediator should if he/she considers it would facilitate settlement, recommend disclosure of relevant information.

7.2 The mediator may encourage participants to obtain independent expert information and advice.

8. Termination of Mediation

8.1 Where full agreement has been reached, the mediator should discuss with the participants the process for formalisation and implementation of the agreement.

8.2 Where the participants have reached a partial agreement the mediator should discuss with them procedures available to resolve the remaining issues.

8.3 Where the mediator believes the agreement being reached may be impossible to uphold or may be illegal, he/she should recommend to the parties that they obtain independent legal advice.

8.4 Without Agreement

(i) Each of the parties and the mediator has the right to withdraw from mediation at any time and for any reason.

(ii) If the participants reach a final impasse, the mediator should not prolong unproductive discussions which will result merely in a waste of costs to the participants.

(iii) If mediation has terminated without agreement, the mediator should suggest that the parties obtain additional professional services as may be appropriate.

9. Responsibilities to Other Mediators

9.1 A mediator may, if the parties desire, act where another mediator is already employed.

He/she may consult with the other mediator with the parties' consent.

10. Observers

10.1 In principle, the presence of observers is not desirable nor should be invited.

10.2 If parties request the attendance of observers, their attendance should occur only with the consent of all parties and the mediator.

Schedule 1

1. "An approved course" is one which satisfies the following criteria:

(a) No less than 50% of the course involves skills based training which should generally include at least two simulated mediations where each participant acts as mediator.

(b) An evaluation component to enable the trainers to assess each participant. (It is expected that at the very least the course will identify those solicitors who would benefit from further training and assessment before acting as sole mediators. Until then those solicitors will not meet the requirements of the revised guidelines to conduct sole mediations).

(c) A course length of not less than 4 days or 28 hours.

(d) For those solicitors who have already undertaken courses, approved courses include, as at the date hereof, those courses conducted by the following organisations:

(i) Australian Commercial Disputes Centre (ACDC)

(ii) BOND University (Qld)

(iii) CDR Associates (Colorado USA)

(iv) Community Justice Centres

(v) Family Mediation Centre (UNIFAM)

(vi) Lawyers Engaged in Alternative Dispute Resolution (LEADR)[4]

(vii) Marriage Guidance Council [5]

(viii) University of Technology, Sydney

(ix) other training courses approved by the Dispute Resolution Committee from time to time[6].[6]

2. "Satisfactory completion" means that the solicitor has been formally assessed during the training course as able to act as a sole mediator.

3. "Appropriate mediation experience" means that the solicitor has conducted at least one co-mediation with an experienced mediator or has undertaken simulated experience as a mediator after the initial training course.

4. Factors which the Dispute Resolution Committee would take into account when exercising its discretion to approve experience other than as in 3 above include any one or more of the following:

(i) experience in representing parties at a mediation;

(ii) regional factors, eg. isolation;

(iii) relevant legal experience;

(iv) public interest factors such as urgency.

2. Guidelines for Legal Representatives in a Mediation 7

The Law Society in several of its published guides or codes of good practice has encouraged solicitors to advise clients of the advantages of alternative dispute resolution (ADR).[8]

Preparing Clients for Mediation

The legal adviser's role in preparing clients for mediation includes:

Explaining the process, including the mediator's neutral role (See Law Society Mediation Model).

Assisting clients to identify their needs, interests and issues.

If necessary, assisting clients to prepare their opening statement.

Discussing the issues that would be considered by the court and the range of possible outcomes.

Discussing ways to achieve the client's desired outcomes, or priorities.

Discussing the likely reaction of the other party and ways to overcome any objections.

Explaining the nature of a "without prejudice" and confidential discussion.

Explaining that the mediator will not be deciding the matter and that the settlement decision must be their own.

Advising of the legal costs incurred to date and likely to be incurred if the matter does not settle.

It is recommended that the above check list be explored with clients prior to the mediation, whether or not a preliminary conference is held.

Role of Legal Advisers during Mediation

Essentially the role of the legal adviser is:

1. To assist clients during the course of the mediation.

2. To discuss with the mediator, with the other party's legal representative and with clients such legal and evidentiary, or practical and personal matters as the mediator may raise or the clients might wish. (It is likely that once the client has heard the other party's version, the legal adviser may need to take further instructions from his/her client and perhaps review the legal advice).

3. To participate in a non-adversarial manner. Legal advisers are not present at mediation as advocates, or for the purpose of participating in an adversarial court room style contest with each other, still less with the opposing party. A legal adviser who does not understand and observe this is a direct impediment to the mediation process.

4. To prepare the terms of settlement or heads of agreement in accordance with the settlement reached at the end of the mediation for signature by the parties before they leave.

Good Faith Participation

If the legal adviser forms the view either before or during the mediation that the other party is not willing to negotiate in good faith, the legal adviser should raise this issue with his/her client and/or the mediator.

Mediation Standards

A comprehensive description of the mediator's role is set out in the Charter on Mediation Practice and in the Revised Guidelines for Solicitors who act as Mediators. It is not the mediator's role to give advice or opinions, make suggestions which may disadvantage a party, propose or endorse possible outcomes or support either party's view. If the legal adviser is of the view that these standards, particularly those relating to neutrality, are not being met he/she should request a private meeting with the mediator immediately.

3. The Law Society of NSW Charter on Mediation Practice – A Guide to the Rights and Responsibilities of Participants

1. Underlying assumptions for the Charter

The majority of mediations conducted under the Law Society Mediation Program involve two-party disputes with a single mediator. It is acknowledged, however, that there are some disputes where more than one mediator, usually two, work together in co-operation.

Multi-party disputes may require a variation in the mediation process which is normally applied in the Law Society Mediation Program.

2. Objectives of the Charter

2.1 To set the highest standards of practice in accordance with the principles of mediation and to formulate guidelines consistent with the Law Council of Australia Ethical Standards for Mediators.

2.2 To inform parties of the principles and practice of mediation and of the role of mediators.

2.3 To provide guidelines to the parties for their role in mediation.

2.4 To provide opportunities for mediators and parties to give feedback on their experience as participants in mediation in order to foster and maintain the highest standards of mediation practice.

3. What parties can expect of the mediator

The mediator is experienced in assisting communication and negotiation

The role of the mediator is to guide the communication process so that a useful discussion can take place. The mediator will do this by asking you questions to assist in identifying and clarifying the issues in dispute, to help you sort out misunderstandings and to talk about what is important to you. The mediator aims to help you talk and negotiate with each other directly.

The mediator aims to be impartial

The mediator is not there to establish facts or to decide which of you is right or wrong, nor to take sides. The mediator will therefore not agree or disagree with statements you make nor put pressure on you to follow a particular idea or suggestion. The mediator aims to treat all parties equally.

The mediator is not an adviser

The mediator will not give legal advice, nor give professional or other advice.

The mediator respects confidentiality

What is discussed in mediation is confidential unless disclosure is required by law. This means that in nearly all cases, confidentiality will be maintained. Mediators cannot be called as witnesses in any court proceedings which may take place in the future. The mediator will not mention anything discussed by you during a private session to other parties during the mediation (unless you request the mediator to let the other parties know), or to anyone else following the mediation.

Options for settlement

The mediator will encourage you to consider a range of options for settlement and to evaluate them for the purpose of reaching a mutually satisfying outcome for all of you. The mediator will not express any opinion about the merits of the options but will encourage you to assess their implications.

The mediator is not a decision-maker

You need to decide what is best for you, as the mediator will not impose or suggest final outcomes for you. The mediator has nothing to gain in any way from the outcome of the mediation, whether agreement is reached or not.

The mediator controls the mediation process but not the content of the discussions or the outcome of the dispute:

The mediator will encourage you:

a. To take an active part in the mediation and to speak freely and with no interruptions from others present.

b. To discuss issues which are important to you not issues which the mediator considers to be relevant or significant.

c. To treat each other with courtesy.

What happens if you are accompanied by your lawyer at mediation

If your lawyer attends the mediation, the mediator will still encourage you to participate actively in the discussions and negotiations. You will, however, be given the opportunity, if you wish, to allow your lawyer to speak and negotiate on your behalf if you feel more comfortable with that arrangement. The mediator will also provide you with opportunities for breaks to allow you to consult with your lawyer in the course of the mediation or on the telephone if your lawyer is not present.

4. What parties can expect of the mediation process

The Law Society encourages mediators on its panel to follow a standard mediation process. However the parties can suggest variations provided the important principles of mediation are adhered to.

The Law Society mediation process normally consists of two sessions – a preliminary conference and a mediation session. Occasionally, the two sessions are merged into one.

4.1 What parties can expect at the Preliminary Conference

What mediation is and the mediator's role

The mediator will explain the features of mediation – its voluntary and confidential nature and the role of the mediator as a neutral third party facilitator, not an adviser or decision-maker. You will be told that as mediation is voluntary, it can be terminated at any stage by either party or the mediator without the need to give reasons.

The process of mediation

The mediator will outline the stages of the mediation process and you will be able to ask questions about it.

Preparing for the mediation session

The mediator will make sure that everyone is ready for the mediation session. An Agreement to Mediate will be signed by all participating in the mediation session.

A timetable will be set for all outstanding matters relevant to the mediation to be finalised prior to the mediation session including documents to be prepared and exchanged, and arrangements for the payment of fees.

The mediator will ensure that all parties to the mediation have authority to negotiate and settle.

4.2 What parties can expect at the Mediation Session

The mediator will ask you to make a brief opening statement outlining your individual concerns and the issues which have brought you to mediation whether you are accompanied by your lawyer or not. If your lawyer is with you, you may, if you wish, ask him or her to make the opening statement on your behalf.

The mediator will ensure that you get equal time to make your statement and that you do so uninterrupted.

The mediator will then summarise parties' opening statements and extract issues for discussion which emerge from the opening statements

You will be able to correct any errors you believe the mediator may have made when summarising back your opening statement. You will also be asked to check and agree on the list of issues for discussion.

The mediator will then facilitate direct communication between you and discussion of the issues.

You will be encouraged to communicate directly with the other party, asking each other questions to explore and clarify the issues extracted from your opening statements. The mediator will also facilitate your discussions so that you have the opportunity of becoming aware of each other's point of view.

The mediator may hold private and confidential sessions with each of you

During any private and confidential session you may have with the mediator you can raise any matter you consider relevant to the mediation.

The mediator will facilitate negotiations, settlement and agreement formulation. You will be able to discuss options and negotiate freely with the other party in order to reach a mutually satisfying resolution of your dispute. You will be given the opportunity to contribute actively to the substance and wording of the final agreement which is usually in writing.

You will also be given opportunities to give instructions to your lawyer, if present, on your wishes in relation to the agreement. If your lawyer is not present, you will be able to contact him or her to seek advice.

5. What the mediator can expect of the parties

Attendance at the mediation in good faith with the intention of seeking settlement

The mediator expects that parties are attending mediation in good faith with the intention of seeking settlement not in order to prepare themselves for a court case.

Attendance at both the preliminary and mediation sessions

The mediator will expect you to attend the Preliminary Conference as well as the Mediation Session to ensure that the same information is imparted to you all at the same time.

Preparing for the mediation session

It is very helpful to the mediator if you maintain realistic goals when entering negotiations. You can prepare yourself for the negotiations by doing calculations and background work beforehand and bringing relevant documents to the mediation session.

The mediator will expect you to have authority to negotiate and to settle.

Setting the scene for a constructive mediation session

You can make it easier for everyone if you observe the normal rules of courtesy and listen to each other in a fair and open-minded way. Even if you do not agree with what is being said, it will be helpful to you to appreciate each other's point of view.

Maintaining a positive attitude and being prepared to give and take

It would be very helpful if you adopt a positive, practical and forward looking approach when negotiating about the future.

A spirit of compromise is usually required to achieve agreement. An agreement which is satisfying to you all is only possible if you agree to give and take rather than insist on one particular set of demands.

6. The Policy Regarding Observers

In principle, the presence of observers is not desirable. If you require the attendance of observers, their attendance should occur only with the consent of the parties and the mediator(s).

7. The Opportunity for Feedback

As participants in a mediation conducted as part of the Law Society Mediation Program you will have the opportunity, if you wish, to comment on your mediation experience by responding to a short questionnaire or by forwarding your comments in writing to the Dispute Resolution Committee of the Law Society of NSW.

Your positive, constructive and informed feedback will help us to maintain the standard of mediation service provided by the Law Society Program at the highest possible level.

For a copy of the questionnaire or more information on any aspect of the Charter please contact Bridget Sordo, Manager, Dispute Resolution and Community Assistance Department, at the Law Society of NSW, 170 Phillip St, Sydney, 2000 or phone (02) 9926 0284, fax (02) 9233 7146, email bts@lawsocnsw.asn.au.

Appendix

G

Information provided to mediators

Extract from the letter sent to proposed mediators:

Re: Supreme Court File No: (number provided)

Mediation between: (names of parties provided)

Thank you for agreeing to be appointed as mediator in the abovementioned case.

The details of the parties and their legal representatives are listed on Annexure A attached to this letter.

We accordingly request that you arrange with those solicitors a preliminary conference. You are requested to conduct the preliminary conference **within one month** of receipt of this letter. If you are unable to do so please return this matter to the Law Society.

The purpose of the Preliminary Conference will be:

1. To acquaint you, the parties and their legal representatives with each other.
2. For you to explain to the parties and their legal representatives the procedures and rules to apply to the mediation process including the preliminary steps to be undertaken prior to the mediation conference. Enclosed is a copy of the Law Society's Charter on Mediation Practice which is a guide to the rights and responsibilities of participants. Please distribute these at the time of the preliminary conference along with the feedback forms and remind parties and their lawyers to forward the completed forms to me if they wish.
3. To execute the Agreement to Mediate, a copy of which is enclosed.
4. To set a timetable for the preliminary steps to be completed prior to the mediation conference.
5. To determine the venue for the mediation conference.
6. To determine the time and date for the mediation conference.

One of the matters we recommend be resolved at the preliminary conference is the issue of your fees in the event that the matter is not resolved within the 3 hours allowed for the mediation conference. Should the parties wish the mediation to continue either then or at a later date, some further arrangement as to fees needs to be made. You will recall, in that regard, that the parties will be solely responsible for your fees in respect of any additional time.

The Law Society's liability is limited to the payment to you of $800.00, plus a 10% GST component, bringing the total to $880.00. This is to cover all steps up to and including a mediation conference of up to 3 hours duration. The mediation fee of $440 (incl. GST) is refundable to each party if the matter is withdrawn prior to the preliminary conference. If, however the matter is withdrawn following a preliminary conference and before the mediation session, a refund of $220 (incl. GST) per party will be made upon the request of the party.

For clarity we note that the Society has received from the parties the $880.00 required to meet the Society's liability for your fees, plus the $110 administration fee. Once the mediation is complete, please forward your tax invoice for the full amount of $880.00 (inclusive of GST) to the Law Society of NSW.

As to venue, it would be of assistance if the mediation conference could be held at your office or, less ideally, at the office of the solicitors acting for one of the parties. It would be essential that two rooms be made available for the conference so that you would have the ability to hold separate conferences with each of the parties and their representatives. If necessary, rooms at the Law Society can be made available if you warn us within an adequate time.

In order that the Mediation Program be properly administered, so that matters are not lost to the Program due to unnecessary delay we request that you promptly notify the writer of the following:

1. Whether you will be able to provide a venue for the mediation conference.
2. The date arrangements for the preliminary conference.
3. The timetable agreed at the preliminary conference.
4. The outcome of the mediation.

Should you have any enquiry regarding the Mediation Program or its related procedures please do not hesitate to contact me on 9926 0397 or in my absence, Dorothy Allan on 9926 0214.

Appendix H

Comments on Settlement Scheme training and participation

Improvements to refresher training for Settlement Week	Why participated in the Settlement Week program
	To promote ADR
Very useful to reinforce the process	Enjoy mediating and think the process is worthwhile - helpful to parties To gain further experience as a mediator
	To support it
	Renewed Interest in mediation
No - training was good experience and ongoing training is required. Really need to make sure the panel is experienced and skilled	Active in mediation - Law Society
	Desirability of the Program
Different programs for the more experienced mediators AND NO FEES	I thought I would be referred a number of matters
	Love it!
	To support it (not for the money)
No, the refresher training was very good	Public benefit and personal satisfaction
	First I'd heard of it. Seems a very sensible idea

Improvements to refresher training for Settlement Week	Why participated in the Settlement Week program
Experienced mediators do not need refreshers in basics – segregate groups – do not pretend to charge $300 to support program as a 'refresher fee'	Participated in previous program
	To assist parties in what in some instances are lengthy and expensive disputes
	It was a very good program in 1992 and still is
More time was needed	Because I wanted to participate in a very valuable program
It should not be compulsory about a certain benchmark of experience – e.g. 50 mediations	It is an initiative in the public interest
More role plays	Need more practical experience
	I am interested in mediation
More of X (person)!	To put something back into mediation (not for the money)
	I like doing mediation work and being paid to do it
	Support mediation as method of finding resolution
Longer training sessions covering different areas of disputes. Other issues such as need for flexibility vs control of process.	It needs to be supported. Mediation needs continually to be promoted. Ideally the program should be more frequent. It's personally satisfying to be part of it.
	(1) To help (2) To improve skills (3) Employ Mediation
	An opportunity to broaden my experience
	To assist the Law Society
	Helps litigants resolve their disputes
More role plays	
More role plays, exemptions to confidentiality	Pro Bono
Reference to good reading material – not seminar	Keep name of Law Society Panel
Satisfactory	Enjoy conducting mediations

Improvements to refresher training for Settlement Week	Why participated in the Settlement Week program
	I enjoy mediation work
	To help out: it's an excellent initiative of the Law Society of NSW
	Habit
	Enjoy using my mediation skills
There should be more interactive discussion between experienced mediation; less experienced mediation can learn from the discussions	I had been part of the original scheme in the early 1990s
The sessions conducted were a waste of time. All information discussed was within an experienced mediator's existing knowledge. Anything new could have been written down. The Law Society should not involve itself in training – only information (not clear which session attended – a 'shorter' evening session was conducted for practitioners unable to attend the one day seminar).	Opportunity to improve mediation skills through practice; community involvement
	To extend my mediation experience
Great	I am interested in mediations